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A Reply to Dean Jeffrey C. Tuomala

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REPLY

THE UTILITARIAN SWITCH

Herbert W. Titus[†]

Dean Tuomala rightfully points out that those—Christian or otherwise—who adhere to the “natural law” theory end up in the same place as the legal positivist, employing law as a “utilitarian instrument for creating a social order in which people are compelled to do that which promotes the common good.”¹ Not only is this a methodological “switch” inconsistent with the premise upon which natural law is based, as Dean Tuomala observes,² it is a fatal misstep that will inexorably undermine the moral foundation upon which the natural law is based.

According to Christian natural law theory, the moral norms upon which law is based are unchanging, uniform, and universal. If, however, civil enforcement of those norms is to be based upon an assessment of “societal costs and benefits,” as Dean Tuomala suggests,³ then civil legal rules will necessarily depend upon pragmatic considerations based upon human estimations of the most effective way to reach a result tempered by the desirability of that result.

Take, for example, a civil government financed and administered welfare system for the poor. If the result to be achieved is the elimination of poverty, or even its substantial reduction,—surely goals consonant with Christian morality—how do we know whether a tax subsidized program is the best way to reach either of those goals? Furthermore, how do we know whether either goal is attainable at all? For example, beginning in the 1960’s America’s welfare systems for dependent children and for the unemployed grew steadily under President Lyndon Johnson’s Great Society. Yet, by the 1980s we discovered that these programs had failed miserably, hurting the very people that they were designed to help.⁴

Despite the overwhelming evidence of failure, America’s leaders have utterly failed to ask whether it is the business of civil government to take care of the weak and the poor. Instead, “compassionate conservative” critics of government welfare have called for “taxpayer funds [to be made] available to a diversity of antipoverty groups, so that recipients can choose from a variety of

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1. Jeffrey Tuomala, *The Bible and American Law: A Response to Dean Herbert W. Titus*, 2 LIBERTY L. REV. 329, 332-33 (2008).

2. *Id.* at 332.

3. *Id.* at 332-33.

4. See generally CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980 (1984).

religious and nonreligious traditions.”⁵ But out-sourcing government welfare programs to tax-subsidized, faith-based organizations has not so much improved welfare services as it has “corrupted” the recipient organizations by politicizing them.⁶

Had Biblical law been consulted, instead of the natural moral law of love, tax-supported welfare programs would never have been undertaken in the first place. Both the Old and New Testaments teach that poverty cannot be eliminated from any society. Indeed, even in “holy” Israel, God revealed that “the poor will never cease out of the land,”⁷ and Jesus taught that “ye shall always have the poor with thee.”⁸

To be sure, these are not statements calling for callous disregard of the poor and downtrodden. To the contrary, the Old Testament commanded the people to reach out to the poor;⁹ and the New commended those who did likewise.¹⁰ Nowhere in the Scriptures, however, is there any evidence that it is within the jurisdiction of the civil authorities to care for the poor. Even in Old Testament Israel, God’s command to take care of the poor and needy is not supported by any civilly-enforced sanction, taxation or otherwise. To the contrary, giving to the poor and needy was a “heart” matter, not a civic duty. Thus, God admonished the people not to “harden thy heart, nor shut thine hand from thy poor brother, but thou shalt open thine hand wide unto him,”¹¹ not under the threat of a civil sanction, but pursuant to a promise that if one’s “heart [was] not grieved when thou givest unto him, God shall bless [him] in all [his] works”¹² In like manner, the New Testament attests that God “loveth the cheerful giver,” the one who “purposeth in his heart” to give “bountifully,” not “grudgingly or of necessity.”¹³

As Dean Tuomala reminds us, in America’s early years, her law teachers and judges acknowledged God’s law as the foundation of the nation, and would apply Godly principles with particularity in accordance with the Western Legal Tradition.¹⁴ No better example of this truth can be found than in the adoption

5. MARVIN OLASKY, *COMPASSIONATE CONSERVATISM: WHAT IT IS AND WHAT IT DOES, HOW IT CAN TRANSFORM AMERICA* 182 (2000).

6. Robert A. Sirico, *Faith-Based Funding Politicizes Religion*, ACTON INSTITUTE COMMENTARY, May 5, 2006, <http://v1.acton.org/ppolicy/comment/article.php?id=321>.

7. *Deuteronomy* 15:11 (KJV).

8. *Matthew* 26:11 (KJV).

9. *See Deuteronomy* 15:11.

10. *See 2 Corinthians* 9:9.

11. *Deuteronomy* 15:7-8.

12. *Deuteronomy* 15:10 (KJV).

13. *2 Corinthians* 9:6-7 (KJV).

14. Tuomala, *supra* note 1, at 329-30.

of the “free exercise of religion” guarantee in Article I, Section sixteen of the original 1776 Virginia Constitution. After stating the principle that “religion,”—that is, those duties owed to the Creator which are enforceable only by “reason and conviction,” not by “force or violence,”—was subject only to the “dictates of conscience,” the guarantee concluded that it is “the *mutual* duty of all to practise Christian forbearance, love, and charity towards each other.”¹⁵

In sum, welfare for the poor was a “mutual duty” not because it was unnecessary for the civil government to use its taxing and administrative powers to provide for a “safety net” for those who met its eligibility criteria because the nation was largely rural, agrarian, and religiously homogeneous. Rather, caring for the poor was a “mutual duty”—because by its nature, it could be discharged only voluntarily and unconditionally, governed solely by the dictates of the consciences of the giver and the receiver, according to God’s legal order that is fixed as to time, uniform as to person, and universal as to place.

15. VA. CONST. art. I, § 6 (1776) (emphasis added).

