

## Editorial | *The Law We Lost*

“All human societies face about the same problems,” claim David Friedman, Peter Leeson, and David Skarbek in their fascinating and peculiar book *Legal Systems Very Different from Ours*. “They deal with them in an interesting variety of different ways. All of them are grownups—there is little reason to believe that the people who created the legal systems of Imperial China, Periclean Athens, or saga-period Iceland were any less intelligent than the creators of the US legal system. All of the systems should be taken seriously, each as one way in which a human society dealt with its legal problems.”<sup>1</sup> So also, we could add, their economic problems. In particular, those interested in Christian social and economic thought today might have more to learn than they would expect from Christian Rome and Byzantium.

Christian Rome was not more or less intelligent than our systems today but it was “very different,” and it is fair to say that it was, in a few important senses, “more Christian.” The economies and polities of the ancient and medieval worlds—too agrarian, too aristocratic, too despotic—are not something we should pine for today. Yet integralists, distributists, and other traditionalists are right that something genuinely positive has indeed been lost in our modern, secular, democratic, and capitalist contexts. Affirming the former does not preclude conceding the latter.

While the importance of the Justinian *Code* is still acknowledged by legal historians today, there is another half of Roman law that too often remains overlooked, a half that though still present in some churches remains largely lost to our societies on the whole. One way that Christian Rome was more Christian is

the role played in its political economy by an alternative legal system to Roman civil law, through a polity-beyond-the-polity—the church’s body of canon law<sup>2</sup> and the bishops’ “judiciary right.”<sup>3</sup> Due to this, the West retained some political stability after the fall of Rome in the fifth century—its bishops still served a political function. In the Eastern Roman Empire, which persisted another millennium until the fall of “New Rome” (Constantinople) in 1453, church and state negotiated the coexistence of Roman civil law and ecclesiastical canon law through the principle of *symphonia*, which though historically complex and sometimes fraught cannot be reduced to the caricature of *caesaropapism* (imperial domination over the church).

Rather, the episcopal courts of canon law served and were legally recognized as alternatives to the magisterial courts of civil law. As Fr. John McGuckin notes, “In the later Byzantine era, even in the larger cities, episcopal courts came to be preferred by the people to the civil alternative of a hearing before the magistrate, not only because the penalties were less severe for the offenders, but also for their deeper sense of pastoral care.”<sup>4</sup> The Apostle Paul referred to a “law of the Spirit of life in Christ Jesus” that “has made [us] free from the law of sin and death” (Rom. 8:2) and “the law of Christ” that is “fulfill[ed]” when we “[b]ear one another’s burdens” (Gal. 6:2). The church, even before the conversion of Constantine, developed that evangelical law into a legal system in its own right, aimed at the effective administration in society not of justice—which is the role of the state and civil law—but of mercy. This administration extended to a network of social services, in part sponsored by the state, but almost entirely managed, according to established canons and historic precedent, by the church and its bishops.

Yet today, if I may generalize, even in many churches that retain their own bodies of canon law, canonical standards of discipline—and thus of mercy—are often disregarded, minimized, or only selectively applied, amounting to an institutionalization of what Dietrich Bonhoeffer called “cheap grace”<sup>5</sup> and the undermining of the rule of law within these ecclesiastical polities. As a result, we have in practice, if not also in theory, in many contexts lost not only a sense of the “cost of discipleship” with which Bonhoeffer was concerned. We have also and no less tragically lost a rationally organized system of mercy to complement our various justice systems throughout the world and to advance not only the common good but the kingdom of God.

Moreover, while many churches still have ministries of mercy—and in many cases, for better or worse, still receive state support if not outright sponsorship—these, if I may generalize again, tend to be viewed as secondary to state social services. In practice, they remain too far removed from the good government

of a polity of mercy that in the ancient church embodied what Pope Paul VI referred to as “full-bodied humanism” that aims for “the fulfillment of the whole man and every man.”<sup>6</sup> The church in Christian Rome developed just that sort of humanism, grounded in the inviolable principles of human dignity and the rule of law and in the theological dogma that the whole human person, created in the image of God, needs salvation, for “that which [Christ] has not assumed He has not healed; but that which is united to His Godhead is also saved.”<sup>7</sup>

In that catholic and holistic spirit, the ancient church saw ministries of mercy as essential to its own constitution; and its dioceses and parishes acted as hubs for almsgiving, medical care, alternative and restorative criminal justice, discipleship in Christian virtues, and more. We may rightly point out any number of ways that premodern economics, politics, and medical science fall short of the achievements of our modern, liberal democratic and commercial societies. But before we take a victory lap around the ruins of the past, we ought to acknowledge that despite all these genuine riches today, we are yet poorer for the law we lost.

—Dylan Pahman, Executive Editor

## Notes

1. David Friedman, Peter Leeson, and David Skarbek, *Legal Systems Very Different from Ours* (self-pub, 2019), 1.
2. For the various canon laws of the ancient church, see *NPNF*<sup>2</sup> 14.
3. Alexander Schmemmann, *The Historical Road of Eastern Orthodoxy* (London: Harville Press, 1963), 95.
4. John McGuckin, *The Ascent of Christian Law: Patristic and Byzantine Formulations of a New Civilization* (Yonkers: St Vladimir’s Seminary Press, 2012), 277.
5. See Dietrich Bonhoeffer, *The Cost of Discipleship* (New York: MacMillan, 1963).
6. Pope Paul VI, encyclical letter *Populorum Progressio*, March 26, 1967, § 42. See also Pope Benedict XVI, encyclical letter *Charitas in Veritate*, March 6, 2009, § 8.
7. Gregory Nazianzus, Epistle 101: “To Cledonius the Priest against Apollinarius,” in *NPNF*<sup>2</sup> 7:440.