"The Queene is Defrauded of the Intent of the Law": Spenser's Advocation of Civil Law in *A View of the State of Ireland*

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Responses to Spenser's approach to legal reform in *A View of the State of Ireland* generally note his evasive but present critiques of the use of English Common Law in Ireland. As many critics, some to be noted here, point out, that critique had to be evasive because Common Law was understood to be a crucial part of the rights of the English in a nation growing in its place on the world stage. Any critique of Common Law could have been viewed by Spenser's contemporaries as a critique of England itself.

An interesting point in the criticism on legal reform in Spenser's *View* is that, while it notes his negative representation of Common Law and the legal loopholes it contained, no critic takes the extra step and asks the question: was Spenser then advocating the use of Civil Law? Certainly Spenser is advocating in this work a type of military control that stems from and increases the power of the monarch over even the minute details of rule. Common Law was a precedent-based, locally controlled form of law, and the English understood it to be an integral part of their heritage, a codified system upholding their customs. Because it operated without the possibility of any intervention from the monarch, there was no opportunity for the monarch to interfere with the judgments made by the jury in Common Law trials. This absence of opportunity for Crown interference in legal judgments was a large part of what made Common Law so satisfying to the English—they saw it as preventing the potential

tyranny of a monarch too closely involved in creating the policy of custom and court judgments. Civil Law, based on the Roman Justinian code, provided far more power to a monarch than the Common Law did. And while Elizabeth's successors, James I and Charles I, wholeheartedly embraced the Justinian code because it allowed them greater minute control over legal judgments, she did not. Perhaps she was more sensitive to the potential uproar over intervention in a legal system the people considered theirs by right of history and free from the possibility of monarchial tyranny. Or, however personally she may have been involved in the suppression of potentially dangerous material, she certainly had councilors who were sensitive, perhaps personally sensitive, to criticism of the status quo.

David J. Baker points out the extent of Spenser's service to his queen when he writes that Spenser "rendered some eighteen years of loyal service in Ireland to Elizabeth I and her administration." In *Between Nations,* Baker writes that Spenser "coveted and accepted the queen's rewards of land and position in the kingdom and was concerned to defend them. For much of his career, Spenser thought of himself as a royal servant, not just by employment, but as a self-appointed apologist and theorist" (74). But Baker also points out that Spenser took his service as an opportunity to "tutor his queen" and to "impress in her princely mind the confused misery which, because of her benevolence, corrupts her Irish colony (115). But that "tutoring" may have been more cunning that it appears. Recent scholarship has worked to reveal Spenser's own agendas lying within his seemingly state-serving poetry. Scholars generally accept his self-laid Virgilian trajectory as Britain's great poet. But far from being what Marx called the "arse-kissing poet," Spenser is instead being revealed as a writer with a strong sense of his own authorial persona and an author's responsibility as critic.

In "Spenser's Domestic Domain," Louis A. Montrose describes Spenser's creation of a "distinctive and culturally authoritative authorial persona" (83). Spenser, finding himself with limited

potential to enter into the gentry but hungry for advancement, fashioned for himself an identity that allowed him to participate more fully in the world to which he aspired. Montrose reports that "Spenser criticism has sometimes taken his indictment of courtly corruption and his praise of the monarch as non-contradictory," but he points out that, as sovereign, Elizabeth was symbolically inseparable from the court, and indictments of the court would then extend to the queen as well (100). But as Montrose earlier points out, Spenser declares in the first edition of *The Faerie Queene* in 1590 that "the generall end . . . of all the booke is to fashion a gentleman or noble person in vertuous and gentle discipline" (84).

Spenser, who owed his fifty pounds per annum as well as his office and estate in Ireland to the queen's favor, necessarily sought the continuation of her favor. While Montrose acknowledges the "tonal extremities and disjunctions" found in Spenser's text, he first states that Spenser was a writer "whose sycophancy serves his literary and material self-advancement" (101). Placing himself at her service, Spenser found her, as most did, a hard mistress, and whether his words take the tone of gentle chiding or outright bitterness, his "limited and precarious upward mobility" both forced his further dependence on the queen's favor and facilitated his self-fashioning as man of station and advice (107).

Andrew Hadfield, too, places Spenser's discrepancies with authority in the locus of the nature of service, pointing out that those administering power on behalf of the crown must negotiate the role of administrator and representative of power with the role of one to whom power has been delegated. Hadfield suggests in *Spenser's Irish Experience* that in a case like Spenser's, when the center of authority is elsewhere and the delegate finds himself in power that has "devolved to the margins," it would be "hardly surprising that a subversive 'view' sometimes comes into play" (71). Nicholas Canny also points out Spenser's determination to instruct as well as praise. Canny writes in "The Social

and Political Thought of Spenser" that "Spenser's unvarnished statement on the responsibility of the poet to serve as a social and political critic" lies in a 1586 sonnet to Gabriel Harvey, in which Spenser applauds Harvey for "sitting like a looker on / Of this world's stage" where he "dost note with critic pen / The sharp dislikes of each condition" (112). A duty to praise, apparently, did not preclude an obligation to instruct.

Bruce Avery suggests in "Mapping the Irish Other: Spenser's *A View of the Present State of Ireland*" that Spenser is pointing out, and advocating, the inevitable revamping of legal systems that would come from re-mapping the Irish population. Avery further argues that the *View* was initially denied publication because Spenser's embracing of a new imposition of law in Ireland was read as a critique of the widely lauded fundamentals of English Common Law. Ciarán Brady's essay, "The Road to the View: On the Decline of Reform Thought in Tudor Ireland," concentrates on legal reform and the inherent problems of anyone attempting, as Spenser did, to argue for a failure of any kind in the English legal system—even if the failure is that English Common Law cannot be successfully applied to another existing culture. Brady offers a lengthy history of English failed attempts to reform the Irish system and apply English Common Law in Ireland. Application of English law had always held the threat of force, but the idea was generally to adapt the Irish to the English ways (28). But, "Progress was slow, far slower than even the most cautious had anticipated, and frustration with the results of their efforts mounted palpably among administrators through the middle decades of the [Sixteenth] century" (29). Opposition was fierce, and poor financing, as much as what Spenser attacks as the conformity to barbarism of the Old English, contributed to the frustrating lack of success of the English agenda. And Brady catalogues other writers who demonstrated essentially the same frustrations Spenser does. But those others, Brady contends, nevertheless rest on the belief that English Common Law will win out in the end because of its inherent

superiority. The optimism that another culture could eventually give way to the superior form of law if that superior law were to be consistently and forcefully applied was always there. Spenser's *View,* on the other hand, credits this application of English law in an existing barbaric culture to the degeneration of the English position in Ireland, contending that the English form of law must be applied after, and only after, the existing system has been obliterated. Spenser's evidence for this is the story that the origin of this legal system comes from the Norman Conquest and the Conqueror's forcing it upon the native English after having destroyed their barbaric system. This idea was dangerous for two reasons: one, it goes against the general optimistic consensus that English Common Law has the power to overcome obstacles in and of itself, and, two, Spenser's evidence is contrary to the more popular idea that English Common Law has its origins in a more organic adaptation of Norman law with "native" English law. Brady argues that Spenser's *View* was held from publication after being entered in the Stationer's Register because of these very objections, "that the great law itself lay at the source of this failure," rather than from any particular objection to the violence of Spenser's recommended plan for the destruction of the Irish system (42).

David J. Baker agrees. In "'Some Quirk, Some Subtle Evasion': Legal Subversion in Spenser's *A View of the Present State of Ireland,*" he argues against the previous critical approach that the *View* was denied publication because it sought to expose English brutality and attempts instead to prove that Spenser's work was denied publication because Spenser, writing to both praise and instruct the queen, miscalculated in his critique of English policy in Ireland. Baker argues that officials read the work as a critique of English Common Law and as a revelation of the failures of the Common Law in Ireland. Baker bases his reading of the *View* in part on the feelings of Irenaeus, the speaker with first-hand knowledge of Ireland, who was frustrated that English Common Law was being mixed with Brehon law to the

advantage of the Irish and the detriment of the English settlers. Baker also shows Irenaeus's dislike not only of the manipulation of the law but with the law itself, a dislike stemming from the fact that Common Law requires individual interpretation rather than universally consistent application.

The possibility that Spenser was aware of the dangers of critiquing the law comes through when Irenaeus first begins to catalogue his issues with English government in Ireland. Eudoxus, the debater on the side of the English, replies that "in finding fault with the lawes, I doubt me, you shall much overshoote yourselfe, and make me the more dislike your other dislikes of that government" (Spenser 13). And while Ciarán Brady has suggested that Spenser was unaware of the implications of the legal critique, David J. Baker disagrees. In *Between Nations,* Baker refutes Brady, stating that he would rather

> urge to the contrary that Spenser was fully conscious of the "secret" implications of his own text, and that the questions that arose concerning the essential character of the Common Law were introduced by design into a treatise that was meant quite deliberately to disrupt the certainties of Elizabeth's policy makers. (72)

Baker also suggests that the *View* was denied publication, not because of its argument, but because of the ambiguities through which that argument was presented. Baker feels that the *View* would have been approved for publication without delay had Spenser articulated more clearly his fear of the inherent threat to royal power through the consistent application of Common Law. While that seems unlikely, in light of the evidence that critique of the Common Law was up against a strong English attachment to this native legal system, the ambiguity Baker points out is an important point worth investigation. It seems more likely, however, that a writer of Spenser's caliber was being deliberately vague and evasive of a clear argument on the law. The purpose behind deliberate ambiguity may point to a fear of the reception of what, exactly, is being argued.

And what was being argued was certainly a stronger royal presence in application of the law. Baker also suggests that Spenser is

arguing that "the law cannot establish order" without "a secure 'center' of authority" and that "even within an English court, its meanings are negotiated, altered, and disputed by techniques of evasion." Baker also suggests that Spenser saw the Common Law as "a code whose jurisdiction is indefinite and fluctuating in courts where testimony is suspect and judgment unsure" and that the *View*

> is also meant as a plea to the government to assert Elizabeth's rightful prerogative and prevent her law from devolving into the kind of indeterminacy that Spenser both condemns and exploits. The solution Spenser hopes for is the immediate and definitive establishment of English law on royal authority. (74)

But when Baker suggests that "this would require an incontrovertible demonstration from the throne of the absolute centrality of the prince's will throughout Britain and the utter dependence of every legal doctrine on its conformity to that will for its validity," he is suggesting, as Spenser is, a use of law that not only goes against the basic tenets of Common Law, but supports a system of legal application that puts the monarch, rather than the people, in charge (74-75). What Spenser is advocating, as Baker points out, is an application of law that enables "the eradication of those who deny the queen's supremacy" and that dovetails with the kind of directed royal involvement as the military control he is so openly advocating (74-75). And such an application of law is rendered difficult, if not impossible, by the structure and fundamentals of Common Law, but it is one of the central components of the Justinian Code, or the Civil Law.

The structure of the legal category of Irenaeus's argument builds slowly, beginning with the simple statement that law is one of the three main problems in Ireland at the time. He begins with a sacking of Irish Brehon law as ineffective and riddled with corruption. Sheila T. Cavanagh describes the general complaints against Brehon law as being that "it allowed monetary damages for the most heinous offences, dissolved marriages apparently upon demand, and was considered complicit with the other

Irish institutions which defied English efforts to understand and contain them" (119). But while Spenser touches on these difficulties with Irish law, he also describes Brehon Law in ways that are strikingly similar to the basic tenets of English Common Law, criticizing the very things in Brehon Law that the English prized in Common Law—basis of precedent, trial by a jury of men familiar with the case and the area, and loose treatment of evidence—as corroded with tampering by the accused and out of the control of the governmental authority. Cavanagh also points out that Brehon Law "allowed much more flexibility than the English could be comfortable with and they tended to view the process with extreme suspicion, particularly because its rules seemed largely indeterminate to those on the outside" and that, because its application varied from area to area, "the English were hard-pressed to keep track of its permutations throughout the country" (119-120). Irenaeus's critiques of Brehon law are of many of the very things the English considered great virtues in English Common Law, such as the fact that "it is a rule of right unwritten, but delivered by tradition from one to another, in which often times there appeareth great shew of equity, in determining the right betweene party and party" (Spenser 14). This freedom of application, without any central governmental control, is true of Common Law as well, and Spenser does not fail to indict it for this flaw. Irenaeus also states that

> The Common Law appointeth, that all tryalls, as well of crimes as titles and rights, shall bee made by verdict of a iury, chosen out of the honest and most subtantiall free-holders. Now, most of the freeholders of that realme are Irish, which when the cause shall fall betwixt an English-man and an Irish, or betweene the Queene and any free-holder of that countrey, they make no more scruple to passe against an Englishman and the Queene, though it bee to strayn their oathes, then to drinke milk unstrayned. (30)

In view of the problem of a lack of central control, the English Common Law does not offer any solutions to the Brehon Law—it is, in fact, structured so as to allow for precisely the same problem.

Irenaeus points out the holes in Common Law that are ripe for corruption, such as the right to have as many as "fifty-six exceptions peremptory against the iurors, of which he shal shew no cause." And since, in Ireland, there is

> so small store of honest iury-men, he will either put off his tryall, or drive it to such men as (perhaps) are not of the soundest sort, by whose means, if he can acquite himselfe of the crime, as his is likely, then will he plague such as were brought first to bee of his iurie, and all such as made any party against him. (33)

But, again, is Spenser merely attacking vulnerabilities of Common Law in Ireland? Spenser points out this vulnerability in Common Law is a fault of the procedure (the "fifty-six" peremptory exceptions, which a note tells us is exaggerated) as much as it is of those who take advantage of it. Later, he says that the Irish can take advantage of the vulnerabilities in the law because "the Common-Law hath left them this benefite, whereof they make advantage, and wrest it to their bad purposes" (35). The language clearly indicates a fault in the law itself that leaves room for the outlaw to wriggle out of the law. The attack here is not so much on the Irish as it is on the system the English are attempting to use to control them.

Eudoxus also touches on an issue that would indicate a preference for the direct government involvement used in Civil Law when suggesting that a protection against evidence-tampering by the accused that ended in an inability to go to trial "might easily be provided for, by some Act of Parliament, that the receiver being convicted by good proofes might receive his tryall without the principall" (34). Eudoxus is suggesting a Parliamentary intervention into procedure, something that goes against the entire custom-based theory behind Common Law. Irenaeus also argues that

> The Common Law is (as I saide before) of itselfe most rightfull and very convenient (I suppose) for the kingdome, for which it was first devised: for this (I thinke) as it seemes reasonable, that out of your manners of your people, and abuses of your countrey, for which they were invented, they

take their first beginning, or else they should bee most uniust; for no lawes of man (according to the straight rule of right) are iust, but as in regard of the evills which they prevent, and the safety of the commonweale which they provide for. (29-30)

It is important to notice the additional note of "I suppose." Irenaeus is mitigating a statement about the efficiency of Common Law in England with that small aside. Irenaeus, ever pointing out how the queen is harmed by the freedom with which the Common Law neglects her interests, questions here the degree to which the law benefits her not only in Ireland, but in England as well. And Eudoxus agrees at least with Irenaeus's statement about the neglect of English, in general, and Crown interests, specifically, in Ireland:

In sooth, Iren. you have discovered a point worthy the consideration; for heereby not onely the English subject findeth no indifference in deciding of his cause, bee it never so iust; but the Queene, as well in all pleas of the crowne, as also in inquiries for escheates, lands attainted, wardshipps, concealments, and all such like, is abused and exceedingly damaged. (31)

It is that damage which prompts the *View* and drives its argument. And the direct military involvement Spenser certainly advocates is complemented by the direct legal involvement he comes so dangerously close to advocating in the debate between Irenaeus and Eudoxus.

An investigation of the use, and abuse, of Common Law in England would render Spenser's indictments of it more intelligible. The application of Common Law was rife with corruption, made possible by many of the very loopholes the English prized as allowing greater freedom. The issue was contentious, and ideas about appropriate royal involvement in law were confused by conflicting ideas about the origin of that law.

Debora Shuger's article, "Irishmen, Aristocrats, and Other White Barbarians," works to analyze the process of civilizing a nation as it was understood by Edmund Spenser and Sir John Davies and as it is revealed in their respective works, *A View of the Present State of Ireland* (1596) and *A Discovery of the True Causes*

Why Ireland Was Never Entirely Subdued (1612). By focusing on the sources of the works, both recent to them and ancient, Shuger recovers Tudor/Stuart definitions of "barbarism" and "civility" and shifts the usual focus of investigating the works from horror at implications of genocide towards a probing of period notions of progressive socio-political reform. She points out that Spenser argues both that barbarian Ireland is similar to medieval England and that the reason England was able to reach its level of civilization is that William the Conqueror imposed Norman Common Law on the uncivilized Saxons he conquered. Shuger states that, "For Spenser, [. . .] civilizing the barbarian requires forcible imposition of an alien order" (par. 28).

Irenaeus discusses the English confusion over whether Common Law was a native cultural inheritance or if it was brought to them by the Normans. Either way, Irenaeus points out, it was a direct enforcement by a monarch to civilize a people incapable of carrying out their own judicial order. Eudoxus points out a discrepancy in Irenaeus's argument—Irenaeus had, cautiously and diplomatically, avoided a direct statement that the Civil Law he is advocating for Ireland should also replace the use of Common Law in England. Again, he evades a direct answer:

> This law was not made by the Norman Conqueror, but by a Saxon King, at what time England was very like to Ireland, as now it stands: for it was (as I tolde you) annoyed greatly with robbers and out-lawes, which troubled the whole state of the realme, every corner having a Robin Hood in it, that kept the woods, that spoyled all passengers and inhabitants, as Ireland now hath; so as, me thinkes, this ordinance would fit very well, and bring them all into awe. (Spenser 138)

Sidestepping the issue of origin, Spenser is nevertheless advocating a stringent royal control here. He suggests that England benefited from direct royal intervention, be it from native or foreign sources, and that this very intervention prevented England from remaining the same kind of barbaric place that Ireland had.

J. G. A. Pocock reports that by the early modern period, "the story that among the Conqueror's first acts had been to codify and confirm the Confessor's law had found its way into most of the chroniclers" (43). This is highlighted in Spenser's strange confusion about the source of English law, but it presents a win-win situation for those wanting English law in Ireland—either the law system the English value so much was brought in with the Norman invasion and its subsequent success proves that such imposition of law is successful and needed in Ireland, or the law system is an inherently English thing confirmed by the Norman Conqueror and has, then, not only survived and been confirmed by time, but was supported by a force invading England as being the superior legal system.

According to Pocock, critiquing that law may have had even greater implications because of this origin theory. The English understood their legal system to be more than just a system of laws to which they were long accustomed. Common Law was unwritten and represented the custom of the people. The law was the long-upheld customs of the land, dating back to antiquity, pre-Norman invasion. Because Common Law was a codified, consistently upheld understanding of what the English understood to be their way of life, their values as a people, it was more than a legal system. Everything that was "as it had always been" was part of the Common Law. To challenge the system, then, was to challenge the legally-upheld customs of the English people, their values, and their ways of doing things. And it went farther than that—because that "way of doing things" included the ideas of who had power and how much, challenging the Common Law was more than a mild threat to the status quo; it could be seen by ultra-conservatives as a total threat to the understanding of how power was divided. Since parliament derived its power from the same understanding of custom, since the aristocracy derived its status from custom, a threat to Common Law was more than a threat to the legal system; it was a threat to their power and status because it challenged the basis for the

way things were. While it is extremely unlikely that Spenser had such magnanimous challenges in mind, much less that he would have advocated them, he could have, unwittingly, opened the door to such fears by supporting a legal system that could have displaced the codified customs.

But what Pocock suggests is that many of the codes and customs that the English understood as Common Law had originated as dictates from an authority. Pocock points out the English view of Civil Law as "an importation" and suggests that "civilian principles were embedded in the Common Law and had been used to build it up in its early stages" (59). This was not the common understanding of the English legal system, however, and any who pointed it out had to battle with the perception central to the pronounced English attachment to Common Law, that it was an organically developed, time tested and approved, fundamental demonstration of the virtues of Englishness. Common Law, then, was not merely a generally approved system; it was considered to be The English System, the way that judgments were formed in England, based on the fundamental and central values of the English way of life. G. R. Elton puts it that Common Law was called "common" "because it applied to all parts of the king's dominions" (148). Its existence tied those dominions together and gave them a cohesive self-understanding, but while such a statement gives the suggestion that the system was imposed on those dominions, the English saw it rather as something they had always had in "common" and that expressed who they were. Elton's included document, "The purpose of the Court of Chancery" by Thomas Smith, written in the seventeenth century, contains the statement that in the Chancery, "the usual and *proper form of pleading of England is not used,* but the form of pleading by writing which is used in other countries according to the Civil Law; and the trial is not by twelve men, but by the examination of witnesses as in other courts of the Civil Law" (158; my emphasis). Smith does not refer just to the "usual form" as not used or suggest that a

form is being used which is a lesser choice; he states that the "proper form of pleading of England," the true and correct form, is passed over in favor of a form that is alien to England and that is incorrect. This "proper form" is one that operates without royal dictate or governmental interference, but rather takes its judgments from a jury and their understanding of basic values. O. L. Hatcher writes that the courts of Common Law resolved "litigations by recourse to parliamentary statutes and legal precedents (hence 'case law'); verdicts were reached by a jury of twelve persons socially equal to the defendant, presided over by a judge." The procedure was more than procedure to the English; it represented the people's culture.

Raymond Waddington describes this difference between Common Law and Civil Law in early modern England as being more than a difference in approach:

> The vast majority of lawyers were trained in the Common Law at the Inns of Court and Chancery; they were complemented, and increasingly opposed, by a far smaller cohort of Civil Lawyers, who had earned a doctorate at university and were trained in the Civil Law of Rome, the Justinian Code. England had, and still has, a profound attachment to Common Law, a legal system based on custom, precedent, and interpretation. (298)

Pocock quotes Sir John Davies' contemporary praise of the Common Law:

> This Law therefore doth demonstrate the strength of wit and reason and self-sufficiency which hath always been in the People of this Land, which have made their own Laws out of their wisedome and experience, [. . .] not begging or borrowing a form of a Common weal, either from *Rome* or from *Greece,* as all other Nations of *Europe* have done; but having a sufficient provision of law & justice within the Land, have no need *Justinian & judicium ab alienigenis emendicare,* as King John wrote most nobly to Pope *Innocent* the Third. (34)

A large part of what Irenaeus wrestles with, in the ambiguously argued statements about the imposition of law before or after the Norman invasion, deals with the sixteenth-century understanding that the law stood as it always had, that it was not

only a custom handed down from time immemorial, but that it functioned as it had in time immemorial. Pocock describes the English as seeing the Common Law as having "eyes [that] were turned inward, upon the past of its own nation which it saw as making its own laws, untouched by foreign influences, in a process without a beginning" (41). Pocock quotes Sir John Davies as writing that

> a *Custome* doth never become a Law to bind the people, untill it hath been tried and approved time out of mind, during all which time there did thereby arise no inconvenience: for if it had been found inconvenient at any time, it had been used no longer, but had been interrupted, and consequently it had lost the virtue and force of a Law. (33)

Pocock also reports that

> Common Lawyers, holding that law was custom, came to believe that the Common Law, and with it the constitution, had always been exactly what they were now, that they were immemorial: not merely that they were old, or that they were the work of remote and mythical legislators, but that they were immemorial in the precise legal sense of dating from time beyond memory—beyond, in this case, the earliest historical record that could be found. (36)

But this emphasis on the Common Law as a time-honored heritage served the English a far more important purpose than merely a system they could see as validated by centuries of use.

The understanding of the Law as being handed down from history took its application completely out of royal hands and potential Crown interference. A king who had no direct contribution to a statute, who had, in fact, inherited it just as everyone else had, had then no right to tinker with it or abolish it. Common Law was outside the purview of the Crown and allowed judgments to be made in which the monarch had no say. Raymond Waddington reports that James I, "not inaccurately, saw Common Law rendering him subservient to his judges. In his view, the law was only the expression of the monarch's will, a position with which the Justinian Code was understood to be sympathetic" (299). Pocock also writes that

> the attraction which the concept of the ancient constitution possessed for lawyers and parliamentarians probably resided less in whatever ultimate principle provided its base, than in its value as a purely negative argument. For a truly immemorial constitution could not be subject to a sovereign: since a king could not be known to have founded it originally, the king now reigning could not claim to revoke rights rooted in some ancestor's will. In an age when people's minds were becoming deeply, if dimly, imbued with the fear of some sort of sovereignty or absolutism, it must have satisfied many men's minds to be able to argue that the laws of the land were so ancient as to be the product of no one's will, and to appeal to the almost universally respected doctrine that law should be above will. (51)

It could hardly be surprising, then, that a work advocating absolutism in Ireland, and even hinting minutely that what works abroad may work at home, could not pass muster with the government censors.

Pocock reports that "Between 1550 and 1600 there occurred a great hardening and consolidation of common-law thought," but is uncertain

> whether this arose as the Common Law sought to defend itself against aggressive conciliar rivals, or whether the effect of Tudor centralization was to deliver it from more rivals than it created and actually make it easier for it to regard itself as the sole and supreme system of law in England. (31-32)

But whatever the reason, consolidation was happening despite jealousies between English courts—jealousies that added to the corruption Spenser suspects.

Elton discusses the important differences, and rivalries, among the three types of courts in the sixteenth century. The Court of the King's Bench decided cases "in which the king was concerned" and "criminal cases of all kinds" (149) and made appeal decisions in cases in which it was argued that a technical mistake had rendered a previous verdict to be in error. The King's Bench had been the "most distinguished and superior" (149) of the courts, but was losing business and began appropriating cases in civil matters between private citizens from the Court of the Common Pleas. The Common Pleas was the oldest of the three Common Law courts, and the most used, as it was designed to

decide any cases between two non-government parties, but the King's Bench used any number of clever devices to appropriate cases from the Common Pleas in order to gain some of its tremendous income. Common Pleas also lost customers to the Exchequer of Pleas, which dealt with all revenue cases, because a generally lighter case load allowed the Exchequer of Pleas to deal with cases more quickly and to extend itself beyond its original purpose of deciding revenue cases involving the Crown. These rivalries, however, did not prevent judges from moving easily between courts.

The judges considered themselves as a group to be the legal advisors of the kingdom "whose advice was frequently sought by the Tudors" and were accustomed to working together on some issues, using "the Exchequer Chamber as a meeting place for formal consultation and the discussion of problems arising in the regular courts." Such camaraderie, however, did not preclude jealousy among the courts. As procedures were set for them to examine each other's errors, and as they attempted to evade such supervision by and of each other, such as "the Exchequer's refusal to submit to the King's Bench," correction of errors, and a continued development of the law as a progressively applicable thing, could be stalled and diverted as the courts battled for jurisdiction and power (Elton 150). The Common Law courts had become, by the sixteenth century, a smoky back room full of infighting.

The Court of the Chancery was created to provide some kind of oversight and, by the sixteenth century, it covered matters that did not fall under Common Law: a few extraordinary property matters such as copyhold and efeoffment. The Chancery used a procedure more like Civil Law that allowed for a very comprehensive examination of the case, including extensive examination of witnesses. It also used devices such as subpoenas to eliminate some of the standard Common Law delays and evasions, especially nonappearance of a crucial party. But the Court

of Common Pleas was "jealous" of its power and was eventually successful in disabling it (153-54).

Brian P. Levack examines political conflicts generated by influences of Civil Law the widespread resistance to it in England in "Law and Ideology." He defines the absolutist Civil Law as it was used in England as having the "rational, philosophical character of Roman law, together with its systematic arrangement." According to Levack, the Civil Law was understood to espouse the legal traditions of "the canon law of the Roman Catholic church," the "commercial and maritime law of medieval Europe," and international law as it was applied to relations between different states (222). He posits that the emergence of the study of Civil Law in the late Elizabethan period brought to the surface serious questions with which the constitution was investigated. Levack concludes that these tensions between Civil and Common Law set forth a debate that helped shape England's ideas of sovereignty in the period and set the stage for the civil war to come.

Spenser's argument against Common Law draws on more than a crisis of law. It was a crisis of identity in that it juxtaposed conflicting ideas of precedent—native English precedent versus Roman imperialist precedent. The Tudors frequently used ancient Rome as England's literal and figurative precedent. Irenaeus's use of precedent that leans on the Romans could also carry for Spenser the connotation of Roman, or Civil Law, since Civil Lawyers were trained in the Roman Justinian code. And the precedent used here is of a system of direct royal control, of the kind the Justinian code adheres to:

> And so did Romulus (as you may read) divide the Romanes into tribes, and the tribes into centuries or hundreths. By this ordinance, this King brought this realme of England (which before was most troublesome,) unto that quiet state, that no one bad person could stirre but he was straight taken holde of by those of his owne tything, and their Borholder, who being his neighbor or next kinsman were privie to all his wayes, and looked narrowly into his life. This which institution (if it were observed in Ireland) would worke that

effect which it did in England, and keep all men within the compasse of dutie and obedience. (Spenser 137)

Roman law, defined by Waddington, "was a written code, a body of doctrine, the interpretation of which Justinian explicitly attempted to limit and control." Common Law, however, was based on "reportage, year books, notebooks, reports—records of particular cases and decisions, the study and interpretation of which, in rather Platonic fashion, give insight to the unwritten code" (299). Another important difference between Common Law and Civil Law was the actual procedures involved in resolving a case. Elton writes that under Common Law, argumentation of a case had to be "reduced to one specific point in dispute . . . so that the full complex of troubles was never considered or settled. If plaintiff's counsel chose the wrong issue, he could do his client much harm" (151).

According to Elton, Civil Law "served only two purposes in England: after 1535, when the study of canon law was forbidden at the universities, it was (more or less) the law practiced in the declining courts of the Church, and it was necessarily the law of the one court which dealt with matters involving foreigners and foreign goods, the Court of the Admiralty." He continues that, when Spenser was writing, the Court of the Admiralty had jurisdiction over "a wide variety of mercantile causes" and so was very powerful. Therefore, "practice in it, and especially judicial appointment to it, were the chief ambitions of men trained in the Civil Law who in 1511 formed themselves into a society (Association of Doctors of Law) modeled on the Inns of Court and formally incorporated in Doctors' Common in 1565" (155). The jurisdiction battles did not exclude the Civil Law, however, and this one certain domain for Civil Lawyers was eventually overtaken. The Civil Law's procedures included a higher demand for a witness's evidence, which led to fewer convictions, and what Elton calls an "assertion that the Civil Law was too careful of the accused's interests" led to these cases being transferred to where they could be tried under Common Law (155).

But the English adherence to Common Law had greater implications than the arguing of court cases and even of court jurisdiction—all major institutions of authority were wrapped up in it as well. If the Common Law were more than just a legal system, if it were, in fact, a codified inheritance of ancient custom, tested and supported by centuries of use, then all systems that grew out of custom were also validated by this immemorial right. Pocock contends that

> When it was claimed that a remote precedent existed for such a right, it might very well be claimed in addition that the right was of immemorial antiquity. When Elizabeth I's parliaments began to claim rights that were in fact new, they indeed produced precedents, but they did much more. They made their claim in the form that what they desired was their by already existing law—the content of English law being undefined and unwritten—and it could always be claimed [. . .] that anything which was in the existing law was immemorial. The Common Lawyers began to rewrite English history on parliamentary lines in the Elizabethan House of Commons [. . .] and by the time of the Apology of 1604 the Commons were already insisting that the whole body of their privileges should be recognized as theirs by right of time immemorial. (48)

An attack on the usefulness and practicality of the application of precedent-based Common Law would, in an indirect but nevertheless present way, attack the right of any English institution to interpret its purpose and rights, even its right to exist, based solely on the right of precedent. Pocock points out the relationship between Parliament and the Common Law in 1628:

> The antiquity of Common Law rendered it "fundamental" in the sense that any other laws obtaining as part of the royal authority did so by its sanction, and did not provide the crown with alternative modes of jurisdiction through which "the prerogative" might choose to proceed. Parliament—as was often claimed in the House of Commons and elsewhere—was as ancient as the Common Law itself (this could be affirmed by the same strategies of appeal to precedent as established the antiquity of the law), and because it was the assembly in which were made the statutes by which the law was altered (as was denied by none) it was peculiarly charged with maintaining Common Law as well as altering it. (302)

Spenser's primary dispute with Brehon Law, that it was too easily influenced for the worse by the associations of the jury of peers, would not have seen any improvement at all under the procedures of Common Law. Elton points out that, in Common Law courts, "the jury composed supposedly a body of expert witnesses—the men of the locality who knew the truth about the matter in dispute, though in fact sixteenth-century juries were in principle no different from modern ones." Since the procedure of *nisi prius* allowed for the jury to be brought to Westminster only if the case had not "previously been settled at the assizes (which it always was)," the case would be decided in the local area, where local politics and conflicts would be factors in the decision. In cases being decided locally, "during the troubles of the fifteenth century the jury, easily bribed, packed, or intimidated, became suspect as a means of proof" (151). The resulting long-ranging reputation of corruption made application of the law far less satisfying. In civil matters, the procedure was riddled with procedural technicalities and the Common Law in general protected the rights of the accused, although, as Elton points out, such protection was probably more accident than intent of the law, and "common-law procedure in civil cases tended to deprive plaintiff of a remedy; in criminal cases it handicapped the Crown" (152).

It is just such a handicap that Irenaeus and, eventually, Eudoxus discuss in the *View*. Repeatedly, Irenaeus expounds on how the queen is slighted in Ireland, how her policies are perverted, and how a more direct royal involvement could reclaim governance for her benefit, how, as Irenaeus puts it, "all these will easily be cut off with the superiour power of her Majesties prerogative" (Spenser 38). Irenaeus spends several pages detailing specific defects in the Common Law and the loopholes in it that can be abused before stating that "the Queene is defrauded of the intent of the law" and that "the Common Law hath left [the Irish] this benefite, whereof they make advantage, and wrest it to their bad purposes" (34-35). But, as investigation shows, it

is not necessarily a flaw in the Irish that cause this "defrauding"; it is the defects of the law itself. The "intent of the law," as far as the *View* is concerned, is to benefit the Crown. When the intent of the law is corrupted by the application of the law, the law is inherently defective. Law that is left to the judgments of juries and monitored by judges jealous of their own power, which is based on precedent rather than individual circumstances and contemporary needs, and that is inherently separate from royal interference can be used, was used, to "bad purposes." But law that is far more micro-managed by authorities, in which cases are decided by royally chosen judges who have Crown interests in mind, and that is not subject to local interpretation and corruption, will uphold "her Majesties prerogative."

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