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"Perfect Conscience": *Hamlet*, Christopher St. German's *Doctor and Student*, and the English Common Law

Carolyn Sale

- 1 I here extend my earlier work on *Hamlet* and early modern English law to questions of conscience, and specifically the terms in which Hamlet berates himself for being one instance of the general phenomenon in which "conscience does make cowards [of us all]" (III.i.82).¹ The sense of incapacity that Hamlet expresses both in his most famous soliloquy and the earlier "O, what a rogue and peasant slave am I" (III.i.550) is one produced not only in relation to doubt in God, uncertainty about the possibility of an afterlife, or the predicament of having his father's ghost inform him that his uncle has murdered his father. The two soliloquies present us, rather, with a predicament shaped by matters of class and matters of law, and the debilitating role that Hamlet assigns to conscience in the second ties back to the specific form of legal debilitation that he refers to in the first. In that special theatrical scene of "hailing" which so greatly anticipates Althusser's "little theoretical theatre" of interpellation,² Hamlet turns on himself with a particular charge, "Am I a coward? / Who calls me villain?" (II.ii. 506-507), that reflects the very specific ways in which England's historical common law produced legal incapacity. Attention to this makes *Hamlet* important to contemporary imaginings of law, and not just for those cultures that take the English common law as inheritance.
- 2 The legal inflection is clear when we read Hamlet's self-beratement in "O what a rogue and peasant slave am I" and his declaration about conscience in "To be or not to be" in relation to one of the most popular books on law in early modern England, Christopher St. German's *Doctor and Student*. St. German's book, first written in 1528, helps us illuminate the connection between Hamlet's seeming incapacity to act and a fundamental problem of the English common law. When he demands of Horatio in Act 5

whether it would not be "perfect conscience" for him to "quit" Claudius with his "arm" (V.ii.67-68), Claudius having now not only stolen the crown but also having attempted to bring about Hamlet's death, Hamlet uses a phrase that features in the conversation between the two fictional characters of St. German's famous dialogue, a book of such popularity amongst students of law in early modern England that it was published in at least five editions across Shakespeare's lifetime, and remained in use at the Inns of Court through to the nineteenth century. Neither Hamlet's nor the Doctor and Student's exercises of "conscience" in their respective fictional domains are in fact "perfect." But in their very failures they point towards precisely what is required of any common law that would claim to act for or from "perfect conscience" or would enable exercises of "perfect conscience" by those for whom it obtains.³

- 3 St. German's *Doctor and Student* is a fictional dialogue between a Doctor of Divinity (or canon law) and a Student of the common law in which the characters commit to challenging, from the perspective of conscience, various kinds of litigation allowed by the common law. The characters discuss the various forms of action available at common law to litigants pursuing property interests to consider which forms of litigation can "stand with conscience" and where the law is, as a matter of conscience, "to be left."⁴ The book is an unusual one, as the legal historian J.H. Baker has noted, for "the relationship between the common law and conscience was not universally accepted."⁵ Conscience was the entity with which Chancery concerned itself as a court of resort for those seeking an equitable supplement to the common law and judgments at common law by which they believed they had been wronged. Common law jurisprudence concerned itself, on the other hand, with seeking the "common reason" by which cases could be decided in public, forensic arenas in relation to previous cases understood to be in one way or another like the one before the court.⁶ This is not to say that conscience was not operative in common law courts, but rather that it played its role indirectly; the courts could always decide that a judgment in a previous case that appeared to be like the one before them had been taken on poor grounds, or produced one or another kind of "inconvenience" (that is, produced an ethical concern that the current court could not ignore if it decided the historic case was in one way or another applicable), but conscience was not exercised as it was in the equity courts of Chancery, where the Lord Chancellor was free to make direct recourse to his singular conscience to decide a case.⁷ Common law reasoning, as Edward Coke famously asserted in his early seventeenth-century *Reports*, involved the specialized practice of "artificial reasoning" which excluded anyone except trained institutional practitioners from directly participating in the law's forms of reasoning, but while the common law's "reason" might be specialized, it was the product of serjeants-at-law and justices working in concert to argue and decide the rationale that ought to determine the outcome of a case.⁸ St. German's book was unusual in that it aimed to open up questions about the conscientiousness of the law to a general readership. In St. German's "radical common law ideology," the common law was to be construed not merely as a product of the courts but as an entity to be shaped by all those for whom it obtained.⁹
- 4 In *Doctor and Student*, St. German pursued this "radical" ideology through the exercise of conscience by which everyone purposefully put themselves into an active relation to law. Accordingly, St. German's Student asserts:

Many unlearned persons believe that is lawful for them to do with good conscience all things, which if they do them, they shall not be punished therefore by the law, though the law doth not warrant them to do what they do, but only, when it is

done, doth not for some reasonable consideration punish them that do it, but leaveth it only to his conscience. And therefore many persons do oft-times that they should not, and keep as their own that that in conscience they ought to restore.¹⁰

The disposition that the book encourages, one in which readers will not seek to keep something "as their own that [...] in conscience they ought to restore," works counter to the common law's general aims in regard to property, which (following Roman law) seek to "giue to euery one his owne."¹¹ Those that have lands by "recoveries" at law that cannot be justified in conscience "ought," the Doctor argues, "to be compelled to restitution."¹² Hamlet's conscience, we might argue, works well enough in this regard. Hamlet displays great contempt for those who are "spacious in the possession of dirt" (V.ii.87-88), and his disquisition on the first skull that he holds in his hands in Act 5, the skull that he imagines to be that of a lawyer, is one through which he expresses his sense of the energy that goes into the promotion and protection of property interests as a waste of intellection: "[Is this the fine of his fines, and the recovery of his recoveries] to have his fine pate full of fine dirt?" (V.i.106-107). There is, however, another form of intellection that is at stake for the common law, one that is not individual but collective. When Hamlet turns on himself as someone he imagines being called a "villein," he makes himself generally representative of a problem of the common law that affects not only the conscientious relationship of any individual in early modern England to the English common law, but the common law's status as conscientious entity. Both St. German's genealogy of law and his discussion of the feudal figure of the "villein" help us articulate the problem.

- 5 St. German strives to tie the common law of England irrevocably to questions of conscience by situating it within a genealogy in which it is a branch of the law of God. The genealogy, as set out in Part I of *Doctor and Student*, subordinates the law of property in England to the law of reason, with both of the branches of the "secondary law of reason," or the law of property, being, the characters aver, merely "suffered" by the law of God.¹³ It is the task of conscience, as the means of applying "knowledge to such things as are to be done," to ensure the right relation of the law of God and the manmade law of property, and disallow any contradiction between them. It therefore follows that "the most perfect and most true applying" of reason "to any particular act of man" will ensure "the most perfect, the most pure, and the most best conscience." Any "default in knowing of the truth of such a law, or in the applying of the same to particular acts," will, moreover, St. German continues, result in "an error or default in conscience," for "*Sinderesis* ministreth an universal principle that never erreth, that is to say, that an unlawful thing is not to be done."¹⁴ The achievement of "the most perfect [...] conscience" thus involves a two-fold challenge. One must have knowledge of law, and one must have the power to apply one's knowledge to "particular acts." Strictly speaking, however, very few people directly participate in the processes by which knowledge of law is applied to "such things as are to be done" in institutional legal arenas to produce the judgments of law. This is precisely the problem that *Doctor and Student* seeks to address. St. German talks about the "knowledge of the law" that one may acquire according to one's "capacity," but the challenge is for the law meaningfully to engage the capacities of all. Every individual conscience must have the opportunity to contribute to the collective conscientious matrix or "common reason" from which the law is made.

- 6 St. German's theory is clear enough. In their turning away from a system of law that permits proprietary holdings that cannot be reconciled with conscience, or with a disposition to property consistent with the values of the law of God, individuals will not simply assert the primacy of one law (the law of reason as derived from the law of God) over another (the law of man, especially the law of property). They will compel the formal jurisdictions of the law of property to shrink. They will take what the law "leaveth" to them, and leave the mechanisms that would permit them, of "colour," to take from others, and in so doing they will leave the law with considerably less business. Where the idea of the necessary conscientious engagement with law is sufficiently taken up—where many consciences work to enact a *general* refusal of the populace to avail themselves of the "recoveries" available to them under the secondary law of reason's particular branch of the "general custom" of property—the courts would find themselves languishing. The common law of property would still exist, but it would wither, and wither as a result of the aggregation of individual acts of conscience turning from it, which would effectively assert, in the face of the "general custom" of property, the capacity for individuals not directly involved in the administration of law to shape the legality under which they live. There is a great deal of potential power to this. The time, place, and activity of the conscientious engagement with law that *Doctor and Student* encourages—conscience as everyday, non-institutional jurisprudence—is everywhere, and cannot be contained; and where it can be harnessed to generate what the legal philosopher Gerald Postema regards as essential to the proper workings of the common law, a "convergence of judgment," it has the power to make the law truly common.¹⁵ The law will not be "common" merely, as Edward Coke later asserts, because it is "giuen to all."¹⁶ It will be common because every conscience has the opportunity to contribute to its "common reason."
- 7 St. German's Doctor and Student discuss this possibility in relation to the status of "custom," for in early modern England custom is seen as intrinsic to the common law: those "divers general customs of old time used through all the realm which have been accepted and approved by our sovereign lord the king, and his progenitors, and all his subjects" are, St. German writes, "the customs properly called the *common law*."¹⁷ The challenge is to keep alive the collective capacity to overturn "custom" when a later age determines that a given custom is "evil."¹⁸ Hamlet speaks of one face of this phenomenon when he declares that a custom may be "more honor'd in the breach than th'observance" (I.iii.16): any given custom may be obviated by its non-use. But the more powerful face of this phenomenon would show itself in relation to the active shaping of new custom. The play speaks to the potential of this greater force when the nameless messenger reports in Act 4 to Claudius of the attitude and conduct of the "rabble" joining Laertes in storming Elsinore:
- And as the world were now but to begin,
Antiquity forgot, custom not known,
The ratifiers and props of every word,
[They] cry, "Choose we, Laertes shall be king!"
Caps, hands, and tongues applaud it to the clouds,
"Laertes shall be king, Laertes king!"
IV.v.104-109
- 8 As an exercise in radical politics, this episode has its limits: the "rabble," even as they seem to act for the capacity to create a new world, would stick within the limits of the world that exists when they replace one sovereign figure with which they are unhappy

with another. We see a related problem in *Doctor and Student*. Indeed, in its second part, first published in 1530, the Doctor and Student engage in a decided failure of conscience that is all the more marked given the characters' earlier attempts to argue that any custom that is not consistent with the law of reason and the law of God may be overthrown. The thinking that drives this failure is precisely what makes it possible for Shakespeare's most famous protagonist to turn on himself several decades later as "villein." A consideration of Hamlet's association of himself with the "villein" in light of St. German's discussion throws Hamlet's seeming inability to act, and his idea of conscience as not enabling but disabling, into new light.

- 9 The most extended discussion of the "villein" in *Doctor and Student* focuses on what goods a "villein" may have, and how he may dispose of them, with the conversation ranging from the general situation of the villein to exceptional considerations: what happens, for example, to any goods that a villein may have if he "be made a priest."¹⁹ This includes consideration of whether he may "make executors" after he is "professed" (yes), and whether the lord then has any power over the goods of the former "villein" or the person (no, the lord "must suffer him to abide in his religion under the obedience of his superior, as other religious persons do that be not bondmen."²⁰) The priesthood, then, serves the "villein" as a means of exit from his status.²¹ It appears also to be a means for him to dispose of any goods he may own, even as he takes on the status of a person now dead in law, as he chooses.²² The discussion nevertheless emphasizes the "villein's" status as property even as, by choosing the priesthood, he would seem to escape it: the lord may have "an action of trespass against him that received [his villein] into religion without his license,"²³ and it is left to a jury of twelve men to adjudicate the amount of damages that the lord should receive for the loss of his property in the form of another person. These are problems in and of themselves. Indeed, the role assigned to the jury is a particular problem for the concerns that I am addressing here, for the jury has itself no opportunity to act conscientiously—that is, no opportunity to examine the legal predicament before it from the conscientious perspective of how the law of property, which would here make property of a person, can be reconciled with either the law of reason or the law of God.
- 10 In the first volume of his 1628 *Institutes*, Coke attempts to explain away the existence of the "villein" in a mythologizing account that claims that "villinage" arises against the law of nature as a matter of historical developments after Noah's Flood that witnessed a shift in humanity from a condition in which "all things were common to all, and free to all men alike" to one in which men engaged in battle to "mak[e] proper and private those things that were common." In the process of making the "private," men made property of other men on the battlefield, with the victor free to do with the man made "bond" to him "as with his beast, or any other chattel, to give, or to sell, or to kill."²⁴ Coke's account is blunt: the feudal system is a system of the victor's distribution arriving from historic acts of violence, and there is nothing in Coke's discussion to suggest that he challenges this. Knowledge of law, we might assert, is in such an instance conspicuously not reconciled with the law of reason, which "teacheth," amongst other things, as St. German's Doctor notes early on, that "wrong is not to be done to any man."²⁵ Yet when St. German's Doctor suggests that before he and the Student proceed to any question relating to villeins they must "first [...] see whether it may stand with conscience, that one man may claim another to be his villein" and the Student replies "That law hath been so long used in this realm, and in other also, and

hath been admitted so long in the laws of this realm, and in divers other laws also" that he "think[s] it is not good now to make doubt, ne to put it in argument, whether it stand with conscience," the characters that have earlier declared that no "custom" of the realm may stand if it cannot be reconciled with conscience leave unquestioned the most inhumane of the realm's customs, the "general custom" of property that allows one man to make property of another.²⁶

- 11 This is an aspect of the history of the English common law that we cannot ignore. The legal historian S.F.C. Milsom is matter-of-fact about it in his 2003 *Natural History of the Common Law*: the English common law, as the king's land law, does not apply to the "unfree." Its rules for tenurial holdings originated in "the criteria for the choice of successor on the death of a tenant by knight service," and the key historical development involved "the willingness of royal jurisdiction to override the decisions of lesser feudal courts" while leaving that system's disenfranchisements in place: the "royal remedies" of the common law, he reminds us, were not available "to tenants at the level of unfree tenure." "Not until much later did tenants at that level gain their own roundabout means of protection in royal courts."²⁷ In the meantime, under the provisions of this common law "legal monsters grew."²⁸ It is the banal face of one of these "monsters" to which *Hamlet* responds as its protagonist uses the vehicle of the soliloquy to present us, insistently, with one of the consequences for those for whom such a law obtains. St. German's Student asserts that "Conscience must be ordered by the law,"²⁹ but *Hamlet* presents us with the consequence of the law's ordering in a tragic protagonist whose exhibition of consciousness as displayed in his soliloquies has no obvious way to have a conscientious impact upon law. Isolated, alone, and associating his general sense of impotence or incapacity with the particular legal incapacity of the "villein," *Hamlet* is a figure for the problems of a common law that differentially equips the persons for whom it obtains to participate in its rationality, a problem that Shakespeare can signal most powerfully by associating *Hamlet* with the figure rendered property by such a system.
- 12 The bad quarto's variant on the opening line of the soliloquy in which *Hamlet* further expatiates on his sense of his incapacity, "Why what a dunghill idiote slaue am I?", articulates the problem more directly than the later variant in Q2 and the Folio.³⁰ As "dunghill idiote slaue," *Hamlet* is not merely "villein" but the "villein" in his specific medieval incarnation as the figure required to "carry and recarry the dung of his lord out of the city, or out of his lord's manor, unto the land of his lord, and spread [...] upon the land, and such like."³¹ In its reference to the figure as an "idiote," the bad quarto line also signifies the precise cultural predicament faced by the "villein." As a person who is property, the "villein" is structurally excluded from participation in the activities by which the law's rationality was shaped, and thus of no more legal capacity than an "idiote," a figure regularly defined as dead in law in legal texts of the period. But the "villein" is not alone in having diminished legal capacity under England's historic common law. As Coke notes, before the Conqueror's time even putatively "free" tenants were "bound by their tenure to plow & husband &c. [and] therefore they were not to be returned Burgesses to serve in Parliament, to the end they might intend the kings husbandrie the better."³² One premise of England's feudal common law—that the king had a right to preside over a property system of differential holdings in land in which even persons may be property—thus supported another, that the system's divisions of labour could be used fairly to exclude certain members of the realm from participation in the activities of law-making. Coke's tenant, like the "villein," is

separated from the means of legal production, and these historical facts have consequences for the system that results, and the rationality that it claims. Any law that aspires to enable and preside over any exercise of conscience that is "the most perfect, the most pure, and the most best" must ensure that all those for whom it obtains have the equal capacity to participate in its forms of reasoning. The problem for Hamlet and those he represents is not the "law's delay" but a law busy distributing legal capacity differentially in relation to an individual's place within a property-holding system.

- 13 When Hamlet castigates himself for his inability to act in relation to a voice that hails him as "villein," the violence that he imagines himself experiencing ("Who calls me villain, breaks my pate across?", V.ii.572) phantasmatically repeats the originary scene of violence at which the "villein," as the person that may be owned and killed, is made. The recourse to language in the soliloquies is thus ironic, for what Hamlet performs for us is his exclusion from the possibilities of making or adjudicating in a law in which the symbolic depropertying that the character experiences as a result of Claudius's theft of the crown makes Hamlet generally representative of all those deprived to one degree or another of the capacity by which individual exercises of conscience might be discursively reflected as law. Hamlet is a figure for the prospect of everyone being figuratively made the "villein" who bears the lord's dung to the fields rather his or her own intellectual capacities to any authoritative place of law, but the imaginary address of the play is not from but to a legal system that differentially distributes the capacity to participate in formal law-making and adjudication of law, and that address presents, through the representation of Hamlet's tortured self-expression and his fear of an incapacity produced by conscience that renders him as legally ineffectual as the "villein," the consequences of the law that makes the "villein" not only for individual but general consciousness.
- 14 The ramifications of the historic existence of the "villein" for the common law are profound. The existence of a category of legal person that is himself property vitiates the theory of the common law as a practice of reasoning-in-common. If even one person is exempted from the genuine capacity to participate in practices of reasoning about law, the law that prevails is common to all only in a negative sense, in its *application* to all. And its consequences are not contained within the historical moment or *durée* in which the "villein" obtains as social fact. In theory, by the beginning of the seventeenth century the figures of the "villein" and his female counterpart the "naïf" had dropped away. The National Archives of the United Kingdom does, however, hold manumission records for both into the late sixteenth century.³³ But the inability of St. German's Doctor and Student to broach the topic of the existence of the "villein" as a matter of conscience as late as 1528 shows how difficult it is for a culture to extract itself from historic social forms and the forms of the thought to which they are tied. There is, moreover, no easy accounting for either the individual or general social consequences. What might the English common law have been and what forms of life might it have supported if it had never granted the premise that the making of property out of persons was something the law of God was willing to "suffer"?
- 15 Hamlet himself is placed in vexed relation to these difficulties. Amongst other things, Hamlet does not presume what Jacques Rancière has argued is critical to any just culture, the presumption of the equality of intelligence.³⁴ The "groundlings," for example, can be dismissed as being "for the most part capable of nothing but

inexplicable dumb shows and noise" (III.ii.11-12), and when Hamlet declares to Horatio in Act 5 that Rosencrantz and Guildenstern, sent to their death in England, are not "near" his conscience (V.ii.58), he reflects not only a willingness to value others differentially, but attributes to conscience a spatial dimension that articulates larger dilemmas for law: no one person's conscience should be the means to consign others to death; and the law must act not to exclude any from its shaping consciousness or "reason," or shunt them to any structural margin or outside. The law should work, instead, to ensure a comprehensive inclusion of all in its rationality. Hamlet's complaint, moreover, of the toe of the peasant coming near the heel of the courtier is part and parcel of these dilemmas: the peasant's toe is the metonymic lever that might undo his hierarchically-structured world. "Villein" may be the dire name that Hamlet gives to his sense of his own incapacity, but incapacity itself is (it seems) something that he would happily leave to others. The character himself suffers for those instances in which conscience fails him, and he does not presume the necessity of equal participation in the law's rationality. Reasoning mostly alone, Hamlet is unmoored from those with whom he might shape a law consistent with the law of reason, and is thus a figure for all those prospectively rendered "coward" because they neither seek for themselves nor seek to create the opportunity to yoke their capacity to reason to the capacities of others imagined as capacities equal to their own.

- 16 The experience of the play in performance furnishes, however, a vital extra-legal means for cultivating the very thing at stake, the common law as a form of reasoning-in-common requiring not simply the public *co-ordination* of conscience, but the radical inclusion of the all in the law's reason. No one is going to law in the theatre, no one actively arguing or judging a case. But the arena, public and open, affords every member of the audience the opportunity to exercise his or her capacity to contribute to the "convergence of judgment" upon which the common law depends. Play-going's capacity to achieve this purpose will be intensified where the *content* of the play engages any kind of legal question or legal consideration—or, perhaps, more importantly engages the kind of concern that the common law courts (in their everyday fulfillment, in practice, of the "law of man") *leave*; but the events of theatrical performance and play-going are always formal opportunities for participation in public intellection that may be as important, if not more important, to the common law as a practice of reasoning-in-common precisely because there are no constraints in the theatrical arena on one's participation. In "play," both institutional practitioners and the polity's members may take up in a fiction, in something like a dream, matters that may otherwise escape the law's attention—or matters that it may "leave" to conscience.
- 17 More specifically, in relation to Hamlet's isolation from others and tortured consciousness, playgoers have the opportunity to experience, in congregation with others, the capacity of conscience, even as it is negatively inflected, so that they might feel the potential of its collective force; and the social experience is prospectively one in which the theory of the corporate public person of the body politic associated with another idea of sovereignty, that of the fiscal king, may be felt as potential arising from the shared capacity for reasoning, especially as exercised in focused collective attention to the object of the play.³⁵ This is to say that the play may indeed be the "thing" by which to catch the conscience of the king—but not the king as individual leaping from his seat in the shock of taking in a representation of something like his murder of his brother, but the king as the entity arising from and expressed by the members of the polity in their cohesion (in performance represented metonymically by

those in the audience taking in the "thing" of the play). The experience of the play is the experience of being oriented to something other than that which is one's own, and it reinvigorates an idea of what the common law might be if it were not already "stolen," that is, not a system of property distribution organized in relation to the feudal king that distributes legal capacity differentially between persons.

- 18 As it is collective rationality that is at stake, as the play moves towards its conclusion it stages for us, at one of the lowliest, scenes of work, two men engaging in a conversation about law in which they voice critical perspective upon it. The scene involves a tutorial dynamic in which the first gravedigger gives his mate a lesson in how to speak in ways that place their lowly labour in the larger scheme of valuation furnished by belief in the very thing Hamlet seems to doubt in his most famous soliloquy, the Christian scheme of redemption. Toying, in his consideration of suicide, with what the "law of God" would prohibit, Hamlet toys with a break with a host of fictions, including the fiction that the law of God suffers a law that makes property out of men. The grave-digging clowns get, however, to the concern that Hamlet leaves alone, the ways in which the system produces differences in persons according to their class. Assuming their right to consider the jurisprudence in two cases, one of them fictional, one of them real, the gravediggers talk law in order to deliver class critique, most directly in their judgment of the holding in Ophelia's case: "Will you ha' the truth an't? If this had not been a gentlewoman she should have been buried out a' Christian burial" (V.i. 23-25). From this perspective, feudal class structures affect not just the common law, but the canon law. But what matters is not so much the content of the clowns' talk but the theatrical fact of it. The represented conversation invites from the audience critical perspective on the fact of their labour as organized by a legal system that would keep them in a menial place, one far removed from the places in which the law is made and adjudicated. Hamlet will later complain that the first gravedigger, when left alone, sings while he works, but from the perspective of theatrical representation in 1603 or 1604 the conversation about law that he shares with his mate is the greater provocation for the audience.
- 19 The "Blackadder" joke in which Hugh Laurie's Shakespeare cuts a deal with Rowan Atkinson's theatrical impresario to cut lines from "To be or not to be" as long as he may have the gravediggers back in—"both of them!"—is relevant here.³⁶ The exchange between the gravediggers is vital, for what is needed is not a monologue about the law, or a soliloquy expressing incapacity in relation to it, but the representation of the kind of conversation from which a truly conscientious common law would be shaped, the conversation of even the lowliest workers treated as if it were just as important to the shaping and adjudication of law as the conversations of the law's specialized practitioners. Artificial reason must always be in dialectical exchange with the reason of all members of the realm. The fictional dramatic dialogue in Act 5 of *Hamlet* extends, in short, the dialogic work of St. German's *Doctor and Student* in a way that promotes the very thing that St. German's characters shy away from defending, the inclusion of even the lowliest workers in the rationality of the law as discursive agents rather than mere objects. My central contention is this: both Hamlet's articulation of his sense of legal incapacity and the conversation between the gravediggers permit the theatre to function as a space within which those present may feel the "form and pressure" (III.ii. 24) of their own conscientious capacity to make law by situating themselves in active relation to it: who, after all, wants to be either "coward" or "villein," and who, to be unjust? This capacity will be just to the degree that it orients itself to an ideal of

"perfect conscience" that comprehensively engages the rational capacities of all. To the extent that we articulate the ways in which Shakespeare's dramatic canon confronts the problems of the English common law in early modernity the better equipped we are to let Shakespeare open out onto and assist with our imagining of contemporary legalities, not just for those cultures for which the common law is inheritance, but for all legal regimes. Historicist work thus has the opportunity to support the kind of democracy that *Hamlet* could at best only anticipate and which we have not yet achieved—a democracy that is something other than, as Jacques Rancière has argued, a state of "oligarchic law."³⁷

NOTES

1. All quotations of *Hamlet* are to the *Riverside Shakespeare*, Boston, Houghton Mifflin, second edition, 1997, unless otherwise noted. My earlier published work on *Hamlet* and the law includes "The 'Amending Hand': *Hales v. Petit*, *Wimbish v. Tailbois*, *Eyston v. Studd* and Equitable Action in *Hamlet*" in *The Law in Shakespeare*, eds. Karen Cunningham and Constance Jordan, Houndsmills, UK and New York, Palgrave Macmillan, 2007, and "'The King is a Thing': the King's Prerogative and the Treasure of the Realm in Plowden's Report of the Case of Mines and Shakespeare's *Hamlet*," *Shakespeare and the Law*, eds. Paul Raffield and Gary Watt, Oxford and Portland, Oregon, Hart Publishing, 2008.
2. See Louis Althusser, *On the Reproduction of Capitalism: Ideology and Ideological State Apparatuses*, trans. G.M. Golgasharian, London, Verso, 2014, p. 264 (*Sur la reproduction*, PUF, 1995), and Judith Butler's adumbration of the consequences of Althusser's interpellation in "Conscience doth make subjects of us all," *Yale French Studies* 88 (1995), 6-26. Butler does not discuss *Hamlet*.
3. In her 1979 article "The Case of Hamlet's Conscience," *Studies in Philology* 76-2 (1979), 127-148, Catherine Belsey took up the consideration of Hamlet's relationship to conscience in relation to William Perkins' *The Whole Treatise of the Cases of Conscience* (1606) and various morality plays. More recently, Abraham Stoll has explored the topic, again in relation to William Perkins' work, in an article focusing on scholastic theology and "conscience as an inward process of self-reflection." Stoll discusses St. German's *Doctor and Student* to elaborate his conception of *synderesis*, the "force" in the "rational soul" that leads one to incline towards "good" and "abhor evil." Stoll does not, however, discuss *synderesis* in relation to St. German's principal topic in *Doctor and Student*, the relation of conscience to ideas of and actions at law. See Stoll, "Thus Conscience: Synderesis and the Destructuring of Conscience in Reformation England," *Exemplaria* 24/1-2 (2012), 62-77, p. 62 and p. 66-67. "Dramatizing conscience is," as Stoll notes, "arguably the goal of the entirety of *Hamlet*" (p. 75).
4. Christopher St. German, *Doctor and Student*, Birmingham, Alabama, The Legal Classics Library, 1988, p. 155 and p. 56.
5. See J.H. Baker, *Oxford History of the Laws of England, Volume VI, 1483-1558*, Oxford, Oxford University Press, 2003, p. 43.
6. See Gerald Postema, "Philosophy of the Common Law," *The Oxford Handbook of Jurisprudence and Philosophy of Law*, eds. Jules L. Coleman, Kenneth Einar Himma and Scott J. Shapiro, Oxford University Press, 2004, esp. p. 592-595, and "Classical Common Law Jurisprudence (Part II)," *Oxford University Commonwealth Law Journal* 3 (Summer 2003), esp. p. 8-9.

7. Baker, *op. cit.*, p. 39-48. On p. 42 Baker notes, "The chancellor came not to destroy the law, but to fulfill it by ordering what conscience demanded. In doing so, he did not thwart the common law, because the law did not forbid the conscientious result."
8. Coke's famous statement on the "artificiall reason" of the common law is in the twelfth volume of his *Reports*, London, 1656, fol. 65: "causes which concerne the life, or inheritance, or goods, or fortunes of [the king's] Subjects; they are not to be decided by naturall reason, but by the artificiall reason and judgment of Law." See also Postema, *op. cit.*
9. Richard Rex, "New Additions on Christopher St. German: Law, Politics and Propaganda in the 1530s," *Journal of Ecclesiastical History*, 59/2 (2008), 281-300, p. 296.
10. St. German, *op. cit.*, 54.
11. Edward Coke, *Le Tierce Part des Reportes del Edward Coke*, London, 1602, sig. Diii^v. See also David Seipp, "The Concept of Property in the Early Common Law," *Law and History Review*, 12/1 (1994), 29-91, p. 32.
12. St. German, *op. cit.*, p. 82.
13. *Ibid.*, p. 110.
14. *Ibid.*
15. Postema, *op. cit.*, "Philosophy," p. 595.
16. Coke, *La Neufme Part des reports de Sr. Edvv. Coke Cheualier*, London, 1613, sig. bv^r.
17. St. German, *op. cit.*, p. 18, St. German's emphases.
18. *Ibid.*, p. 82.
19. *Ibid.*, p. 241.
20. *Ibid.*, p. 242.
21. For a contemporary theorizing of "exit" from an ideological system, see Paolo Virno's *Grammar of the Multitude*, Los Angeles, Semiotext(e), 2004, p. 66-71.
22. On the civil death of religious persons, see Baker, *op. cit.*, p. 607-608.
23. St. German, *op. cit.*, p. 242.
24. Coke, *The First Part of the Institutes of the Lawes of England*, London, 1628, fol. 117, sig. Ff4^v.
25. St. German, *op. cit.*, p. 6.
26. *Ibid.*, p. 155.
27. S.F.C. Milsom, *A Natural History of the Common Law*, New York, Columbia University Press, 2003, p. 57-58.
28. *Ibid.*, p. 66.
29. *Ibid.*, p. 53.
30. *The Three-Text Hamlet*, eds. Bernice W. Kliman and Paul Bertram, New York, AMS Press Inc., 2003, p. 104, line 1590.
31. Coke, *Institutes*, *op. cit.*
32. Edward Coke, *La Neufme Part des Reports de Sr. Edvv. Coke Chiualier*, London, 1613, sig. ciii^r.
33. See, for example, SP46/33/fo226 for the manumission record for the naïf Lucrece Brooke (1584).
34. See especially chapter 3 of Rancière's *The Ignorant Schoolmaster: Five Lessons in Intellectual Emancipation*, trans. Kristin Ross, Stanford, Stanford University Press, 1991 (*Le Maître ignorant : Cinq leçons sur l'émancipation intellectuelle*, Paris, Fayard, 1987).
35. For the most well-known scholarship on fiscal sovereignty, especially as it applies to English conceptions, see Ernst Kantorowicz, *The King's Two Bodies*, Princeton, Princeton University Press, 1957, esp. p. 164-173.
36. See the "Blackadder" video, at https://www.youtube.com/watch?v=mvaUwagX_uU (last accessed 11 April 2015). The "Shakespeare Sketch" was performed at Sadlers Wells Theatre on 18 September 1989.
37. Jacques Rancière, *Hatred of Democracy*, trans. Steve Corcoran, London, Verso Books, 2006, p. 73 (*La Haine de la démocratie*, Paris, La Fabrique, 2005).

ABSTRACTS

The essay proposes that Christopher St. German's legal text, *Doctor and Student*, first published in 1528, and published subsequently in several editions across the sixteenth century, illuminates the particular legal problem that Hamlet invokes in the soliloquies in which he declares that conscience "does make cowards [of us all]" and turns on himself as "villain" or "villein," the lowest figure in the feudal hierarchy. Hamlet's invocations of conscience and his reference to himself as "villein" speak to a fundamental problem of the historic common law of England, which differentially distributes legal capacity to persons in relation to their place in a property-holding system. *Doctor and Student* asserts the importance of conscience to the common law even as the characters of the dialogue engage in a failure of conscience that illuminates Hamlet's engagement with the conjunction of conscience and law. The experience of the play in performance in 1603/4 is one that compensates for the failure of conscience epitomized in the handling of the "villein" in *Doctor and Student* and Shakespeare's representation of Hamlet by cultivating the capacity for the thing upon which a truly "common" law would depend, the comprehensive inclusion of all in the law's rationality.

Cet article se propose d'analyser à la lumière de *Doctor and Student*, texte de droit écrit par le juriste Christopher St-German et publié en 1528 (nombreuses rééditions tout au long du XVI^e siècle), le problème juridique qui apparaît dans le soliloque d'Hamlet sur la conscience et la couardise (III.i) et lorsqu'il se présente (II.ii) à la fois comme un homme « vil » et un « villain », situé au plus bas de la hiérarchie féodale (« villain »/« villein » en anglais). L'appel à la conscience et la mention du statut de « vilain » font écho à un problème essentiel du « droit commun » (*common law*) anglais, qui attribue des degrés de responsabilité légale différents en fonction de la place de chacun au sein du système foncier. *Doctor and Student*, dialogue dont les personnages aboutissent à un échec de la conscience, maintient néanmoins que la conscience est un élément important de la *common law*, thème que l'on retrouve dans les réflexions d'Hamlet. Si le traitement du « vilain » dans le dialogue de St-German et le personnage d'Hamlet dans la pièce de Shakespeare évoquent un échec de la conscience, l'expérience de la représentation scénique d'*Hamlet* en 1603/1604 invite au contraire à cultiver la qualité sur laquelle repose tout droit véritablement « commun », l'inclusion de tous dans la rationalité du droit.

INDEX

Keywords: Coke Edward, common law, conscience, Hamlet, law of God, reason, St. German Christopher, villein

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