

ADVANCED TOPIC PAPER 12

THE 'RULE OF LAW' IN EARLY MODERN BRITAIN: STATE POWER, CRIMINAL JUSTICE, AND CIVIL LIBERTIES, c.1500–c.1800



Thomas Rowlandson and Augustus Pugin, 'Old Bailey' (1808)
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Course description

This advanced topic (formerly specified) paper addresses a central dynamic in early modern British history. The years 1500–1800 were characterised by the growth of the state, yet this very process stimulated charges of ‘absolutism’ and ‘tyranny’. The pretensions of the state increased when monarchs advanced bold claims to control new spheres of public and private life, but also when they responded to a sequence of apparently interrelated threats – potential invasion by neighbouring superpowers, plotting by domestic religious extremists, and the teeming multitude of ‘the poor’. In comparison with modern totalitarian regimes, however, the early modern state had few technologies of coercion. Hence it continued to depend on its actions being seen as legitimate. A principal vector of state authority was the legal system. Law justified and transmitted, but hence also regulated, executive action. The legal systems of early modern Britain favoured the rich and well-connected; verdicts might be perfunctory, sentences harsh; the courts were run by those appointed by, and often beholden to, the current government. Yet they only worked because of the vast, routine participation of ordinary people, acting as jurors, witnesses, and in several other necessary capacities. A mass culture of respect for the values located within an idealised version of these systems thus developed. The ‘rule of law’ provided a dominant mode of interpreting political questions, extending from formal debate in the House of Commons to day-to-day conversation that was increasingly represented in the popular press. Contemporaries wondered whether the steps a regime took to counter threats risked destroying the very principles that the state – and increasingly the British state in particular – existed to uphold. In what circumstances, early modern Britons asked, should a regime derogate from due process; at what point did a protracted state of emergency become the new normal? In an age defined by ‘global terror’ and responses to it, such questions continue to resonate.

The specified paper addresses these questions through considering such matters as the independence of the jury, the provision of defence counsel, the admissibility of evidence, the use of intelligence and informants, the permissibility of torture, and the ‘theatre’ of execution. Famous trials – lawyers’ test-cases, popular *causes célèbres*, and literary representations – bring these issues fully to life. Databases such as the Old Bailey Online make broader surveys possible, showing how the policing of society integrated public power with popular agency. The paper thus adopts a wide definition of ‘political’ crimes, encompassing sedition, libel, poaching, and riot; and it incorporates the more routine homicides and felonies that could raise the same issues. The paper shows how political and religious developments – the Break with Rome, the rise of the confessional state, the Civil Wars, the Glorious Revolution, Jacobitism, the Anglo-Scottish Union, the conquest and colonisation of Ireland, and the creation of an empire – altered the terms within which state power was exercised and also critiqued. The paper therefore ranges broadly, from Henrician heresy trials to Georgian slavery cases, while relating each theme back to the overall subject. The paper draws on several bodies of scholarship: constitutional studies, social histories of crime, analyses of local governance, and intellectual histories. The paper tackles the Marxist-inspired debate about the oppressive character of the eighteenth-century legal system. It also reflects the emerging interest in the imperial dimension to the legal system. The paper adopts an avowedly historicist, rather than an essentialist, approach. Its intention is not to celebrate any particular set of values or to endorse one perspective on complex conundrums. Rather, it illuminates how one society negotiated the trade-offs between (what it understood to be) freedom and security: a thought-provoking subject for advanced study.

Modes of teaching

The paper will be taught through:

- Sixteen lectures, twice a week in Michaelmas term
- Six classes in Lent term, once a week, weeks 3–8
- Six supervisions, offered either in Michaelmas or in Lent term
- Two revision supervisions in Easter term

Maximum supervision capacity

There is no cap on student numbers. In order to distribute teaching, however, students' choice of supervision themes is somewhat limited. This limitation is explained in the next section.

Course structure

The paper is structured around the sixteen lecture themes:

1. 'By judgment of your peers': the jury and its alternatives
2. Legal 'fact': evidence and its interpretation
3. Trial by jury I: jurors
4. Trial by jury II: judges and magistrates
5. The rights of the accused I: the privilege against self-incrimination
6. The rights of the accused II: the rise of defence counsel
7. Treason trials: definitions and defences
8. Punishment, mercy, and mitigation
9. Habeas corpus: supervising the prerogative
10. 'Legislative tyranny': the sovereignty of parliament
11. 'An Englishman's home is his castle': personal and property rights
12. Enemies of the state I: religious nonconformity
13. Enemies of the state II: seditious libel and a free press
14. Imperial law I: Britain and Ireland
15. Imperial law II: beyond Britain and Ireland
16. Servitude and slavery in the British Empire

Students will select six themes for supervisions. In order to distribute teaching, the themes are halved into two lists (A and B) of eight and students asked to choose *at least two* themes from each list.

List A

1. 'By judgment of your peers': the jury and its alternatives
4. Trial by jury II: judges and magistrates
5. The rights of the accused I: the privilege against self-incrimination
8. Punishment, mercy, and mitigation
10. 'Legislative tyranny': the sovereignty of parliament
11. 'An Englishman's home is his castle': personal and property rights

- 12. Enemies of the state I: religious nonconformity
- 16. Servitude and slavery in the British Empire

List B

- 2. Legal 'fact': evidence and its interpretation
- 3. Trial by jury I: jurors
- 6. The rights of the accused II: the rise of defence counsel
- 7. Treason trials: definitions and defences
- 9. Habeas corpus: supervising the prerogative
- 13. Enemies of the state II: seditious libel and a free press
- 14. Imperial law I: Britain and Ireland
- 15. Imperial law II: beyond Britain and Ireland

The six one-hour classes will examine primary sources. The principal texts will be: 1. law reports, that is, lawyers' accounts written primarily for professional information; 2. other accounts of celebrated cases, as found in the *State Trials*; 3. the periodical publication of proceedings in London's central criminal court, as found in the *Old Bailey Sessions Papers*.

Two revision supervisions will be offered in Easter term.

Assessment

The paper is assessed through a three-hour exam in which students answer three essay questions. There will be a question on each of the sixteen themes. A sample exam paper is given below.

- 1. Why did summary procedure persist alongside trial by jury?
- 2. How did ideas about legal proof change over this period?
- 3. How did jurors decide whom to indict and whom to convict?
- 4. 'Judges were the determining factor in most criminal trials.' Discuss.
- 5. 'Contrary to myth, torture was part of every legal system.' Discuss.
- 6. What difference did defence counsel make to the outcome of criminal trials?
- 7. Why did so few treason trials result in acquittal?
- 8. 'Mercy was secularised over this period.' Discuss.
- 9. 'Executive detention remained largely outside judicial control.' Discuss.
- 10. 'The English/British parliament dispensed itself from the very legal principles that it claimed to uphold.' Discuss.
- 11. 'The state readily violated property rights.' Discuss.
- 12. How free was the press in this period?
- 13. 'Law concerned itself with religious practice rather than with religious belief.' Discuss.
- 14. How important were theories of conquest in shaping the legal systems of early modern Britain and Ireland?
- 15. How different was the legal process in the overseas territories from that in Britain?
- 16. Did habeas corpus lose much of its force outside Britain?

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