The Law of Impeachment in Stuart England:
A Reply to Raoul Berger

by Clayton Roberts†

Raoul Berger's *Impeachment: The Constitutional Problems* is a learned, distinguished, and timely book. There can be no doubt that it will be widely read and relied upon. For that reason I should like to voice some reservations about the arguments concerning impeachments in Stuart England put forth in the first two chapters of the book. It is the thesis of those chapters that impeachments in England were not limited to previously existing treasons and criminal offenses, that the House of Commons might rightfully impeach a person for conduct that was not an indictable crime. Berger even implies in the course of his argument that impeachments need not be limited to violations of the known and established law. My own earlier research on Stuart impeachments,¹ however, leads me to a different conclusion: impeachments would lie only for a breach of the existing law.

Raoul Berger's first chapter concerns impeachment for treason, his second chapter impeachment for high crimes and misdemeanors. In both cases, he contends, impeachments need not be limited to previously existing criminal offenses. He claims that this is true as to impeachments for treason because Parliament possessed an inherent power to declare "retrospective" treasons, and might exercise that power in a trial upon an impeachment. With respect to impeachments for high crimes and misdemeanors it is true, he asserts, because Parliament created a new category of crimes, called "high crimes and misdemeanors," which were political, as distinct from private, crimes. I question the truth of both of these assertions.

I

In his discussion of impeachments for treason Berger makes two errors. One concerns his interpretation of the declaratory power itself, the other concerns his estimation of the willingness of Stuart parliaments to allow the declaratory power to be abused, or even

† Professor of History, Ohio State University.
used at all, in proceedings upon an impeachment. Let me examine each of these issues separately.

To begin with the declaratory power, I cannot agree with Berger's assumption—an assumption which informs the entire chapter—that there was an inherent power in Parliament to declare to be treason that which was not treason before. Throughout the first chapter Berger calls declaratory treasons "retrospective treasons." Indeed, he entitles his first chapter, "The Parliamentary Power to Declare Retrospective Treasons." But the phrase "retrospective treasons" is an anachronism. No Englishman in the 17th century, to my knowledge, ever used it. They spoke of "declaratory treasons," of "constructive treasons," of "common law treasons," but never of "retrospective treasons." The phrase "retrospective treasons" suggests the creation of new treasons and their application retrospectively (or "retroactively," as Berger says\(^2\)). But the idea that a court could create a new crime and apply it retrospectively or retroactively was alien to the English view of law. In the English view, courts interpreted and applied the existing law. Parliament (more particularly, the House of Lords) was a court, the highest court in the land, and as a court it interpreted and applied the existing law.

The law of treason which Parliament and other courts applied had its roots in both statutory and common law. The most important statute dated from 1350, when in the 25th year of the reign of Edward III, Parliament passed a statute defining seven categories of crimes that were henceforth to be regarded as treasons, including making war against the King, compassing (plotting) his death, "violating" his Queen (with or without her consent), slaying his justices, and counterfeiting his coin.\(^3\) To this statute Parliament added a clause, a salvo, saving to itself the power to declare offenses other than those enumerated in the statute to be treasons.\(^4\) Indeed, the effect of the salvo was to delay the ordinary justices in the exercise of these rights until Parliament had first declared its judgment. It seems clear to me that the authors of the salvo, when they spoke of Parliament declaring


\(^3\) 25 Edw. 3, c. 2 (1350).

\(^4\) The Salvo reads:
And because that many other like cases of treason may happen in time to come, which a man cannot think nor declare at this present time, it is accorded, that if any other case, supposed treason, which is not above specified, doth happen before any Justices, the Justices shall tarry without any going to judgment of the treason, till the cause be showed and declared before the King and his Parliament, whether it ought to be judged treason or other felony.
(As modernized in R. Berger, *supra* note 2 at 8.)
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treasons, envisaged its proceeding in the same manner as the justices did in the ordinary courts—applying the existing law, statutory and common, to determine whether an act was treason, or a felony, or perfectly legal and guiltless.\(^5\)

Berger maintains that the *salvo* did not create, but merely recognized the existence of, the declaratory power, a power that was inherent in Parliament. With this I agree. I also agree with Berger that the authors of the *salvo* intended the House of Lords alone, not the Lords and Commons, to exercise the declaratory power. I am even inclined to agree that 1 Hen. IV\(^6\) and 1 Mary\(^7\) did not repeal the declaratory power. But I cannot agree, as Berger asserts, that the declaratory power gave Parliament the right to create treasons and apply them retrospectively. What it gave Parliament was the right to declare that an offense was treason at common law or fell within the purview of the treason statute.

To support his theory of retrospective treason Berger cites the wide-ranging parliamentary accusations of treason in the late 14th century. It is true that in 1388 and 1397 political passions led both the Lords Appellants (baronial opponents of Richard II) and the supporters of Richard II (who abetted that king in his absolutist pretensions) to exercise the widest possible latitude in interpreting what constitutes treason. In particular, Parliament declared “accroaching the royal power,” that is, the usurpation of royal power by a subject, to be treason. But even in these cases, writes Samuel Rezneck, author of the definitive study of declaratory treasons in the 14th century, “there was no enactment of new treasons, but rather the revival and the declaration of old treason by a parliament exercising a supreme jurisdiction.”\(^8\) The offense of “accroaching the royal power” was the most common charge on which men were convicted in 1388 and 1397, and was a familiar offense in English law. In 1348 the Commons petitioned against the excessive use by the King of “accroaching the royal power” as an accusation of treason. Rezneck concludes: “[I]t should be remembered that even in the case of these trials [of 1388 and 1397]

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6. 1 Hen. 4, c. 10 (1399).
7. 1 Mary, c. 7, § 3 (1553).
the underlying idea was that of law-finding rather than of law-making, of judging rather than of legislating.”

In the 17th century, the period with which Berger is most concerned, the proponents of the declaratory power certainly saw it as an instrument “of law-finding rather than law-making.” Parliament was to judge whether an offense was treason by statute or common law, not legislate new treasons. Oliver St. John, Solicitor General and spokesman for the Commons against the Earl of Strafford, declared: “The thing most considerable in this, is, whether the treasons at common law are taken away by the statute of 25 Edward III?” And he answered as follows: “My Lords, to say they are taken away by the statute of 25 Edward III is to speak against both the direct words and scope of that statute.” He further urged that the Commons “did not intend to make a new treason and to condemn my Lord of Strafford for it.”

Sir Francis Winnington offered the same interpretation when justifying the use of the declaratory power against the Earl of Danby, impeached in 1678 for helping Charles II to secure from Louis XIV the money needed to govern without Parliament. There is “a declaratory power in Parliament to declare treason, see 25 Edward III, [where it is] declared there are many other treasons not here set down, so what was treason before was afterward treason.” Winnington made his meaning yet clearer when urging in 1680 that Chief Justice Scroggs, who allegedly had defamed witnesses and discharged grand juries, should be impeached for treason: “And I am of opinion that any thing that tends to the destruction or alteration of the government, has always been, and ought to be declared in Parliament, treason, if brought there to be judged. The Parliament does not in this make new crimes, and then condemn them; but only declares that to be a crime which was so before, and wanted nothing but condemnation.” Others spoke the same language. Sir William Jones, one of the most brilliant lawyers of the age, declared in justification of Scroggs’s im-

9. Id. at 510. Bellamy has shown that “accoaching” was not in fact treason at common law, but was in a category of its own, between felony and treason. J. Bellamy, supra note 5, at 62-74.
11. Id. at 79.
12. Id. at 54. Strafford implicitly accepted the existence of common law treasons when he declared: “Nothing charged against him could be made good to be treason, neither by statute law nor common law.” 4 H.L. Jour. 215 (1641).
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impeachment that it "is treason at common law" for one in high place to obstruct justice. Sir Harbottle Grimstone, who had witnessed from his seat in the House of Commons the impeachment of three premier ministers of state—the Earl of Strafford in 1640, the Earl of Clarendon in 1667, and the Earl of Danby in 1678—declared in the debate on Danby's impeachment: "Tis agreed there are treasons not in the Statute [of 25 Edward III], and they [are] reserved to Parliament." And Sir John Somers, the greatest lawyer of them all, who wrote the first drafts of the Declaration of Rights and later became Lord Chancellor of England, stated in 1690 during a debate on a new treason statute: "The statute of 25 Edward III did forsee that men would be above the law, and, I believe, did not take away those that were treasons at common law." In short, Parliament might declare an endeavor to subvert the fundamental law to be treason at common law, as the Commons urged in their impeachment of the Earl of Strafford. Or Parliament might, as the Commons also urged in Strafford's case, construe transporting an Irish army to England as plotting the death of the King, and thus treason under the first clause of 25 Edward III. But whether it was declaring or construing or ruling, Parliament was interpreting an existing body of law.

True, the House of Commons did on occasions so abuse the declaratory power that one may rightly say that it was attempting to create new treasons and apply them retrospectively. But those accused, their counsel, and the House of Lords successfully resisted such efforts. And this brings us to the second of Berger's errors concerning impeachments for treason, his assessment of the inclination of Stuart parliaments to permit the declaratory power to be abused, or even used at all, in proceedings upon impeachments. It is a grave defect in Berger's first chapter that he gives the reader no idea how vigorously and how effectively Englishmen in the 17th century opposed the abuse of the declaratory power. His account of Strafford's attainder, his si-

15. 8 DEBATES OF THE HOUSE OF COMMONS 285 (A. Grey ed. 1763).
16. Parliamentary Notes, Dec. 21, 1678, British Museum Additional Manuscript No. 28,046, f.175.
17. 10 DEBATES OF THE HOUSE OF COMMONS 210 (A. Grey ed. 1763).
18. An impeachment is a judicial process in which the Commons accuse and the Lords try and, upon a finding of guilt, sentence the accused. An Act (or Bill) of Attainder is a legislative process in which the Commons, the Lords, and the King declare they are satisfied that a person is guilty of a crime and impose upon him whatever punishment they deem fit. An impeachment is governed by procedures similar to those found in a court of law. An attainder is governed by procedures similar to those used in passing an ordinary bill in Parliament.
lence about Laud’s, and his discussion of Clarendon’s impeachment offer three examples of this failure.

Berger declares that he is puzzled by the shift from impeachment to attainder in Strafford’s case, stating that he finds all attempts to explain the shift unsatisfactory. This is surprising, for contemporaries then and historians since have expressed no puzzlement about the shift. They have attributed it to fear on the part of the House of Commons that it could not prove its case before the House of Lords.

The Commons in March 1641 had accused the Earl of Strafford, Charles I’s ablest and most ruthless minister, of two counts of treason—that he had attempted to subvert the fundamental laws of England, and had advised Charles to use an Irish, papist army against England. But as the trial proceeded, the Commons grew fearful that they could not make good their charges. There were two reasons for this uneasiness: the Lords might refuse to accept the contention of the House of Commons that an attempt to subvert the fundamental laws could be declared a treason; and the Lords might demand, as the law required, two witnesses to the charge that Strafford advised the King to bring over the Irish army, to which charge the Commons had but one witness. The course of Strafford’s trial made it abundantly clear that the Commons moved to an attainder for these reasons, as was expressly confirmed by St. John in his speech justifying the attainder.

Perhaps Berger is puzzled by the shift from impeachment to attainder because he does not want to admit what the Commons evidently believed—that the Lords would not accept declaratory treasons in a trial upon an impeachment. Berger’s total and unaccountable silence concerning the impeachment of Laud confirms this. William Laud, Archbishop of Canterbury and scourge of the puritans, served Charles as loyally in the Church as Strafford did in the State. In 1640 the Commons impeached him for endeavoring to subvert the

19. R. Berger, supra note 2, at 35.
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laws of England by licensing popish books, suppressing puritan preachers, and forcing an Anglican liturgy on Scotland. Once again the Commons relied upon the declaratory power. Once again the accused vigorously denied the validity of declaratory treasons. Once again it seemed that the Lords would find the accused innocent of any treason. The Commons therefore substituted an attainder for their impeachment. In the end, Laud's head fell upon the scaffold as Strafford's had. But the deaths of Strafford and Laud offer no proof that men could be impeached, convicted, and executed for declaratory treasons. Quite the reverse, the fact that the Commons in both cases deserted their impeachments for attainders suggests that impeachments based on declaratory treasons could not be successfully prosecuted.

Clarendon's impeachment in 1667 illustrates the disrepute into which declaratory treasons fell after the Restoration—though Berger concludes just the opposite. Berger writes of the vote to impeach Clarendon for treason: "Proponents of the declaratory power carried the day. . . ." But a careful examination of the debates and votes in the House of Commons shows this not to be true. The Earl of Clarendon was Lord Chancellor of England, a staunch friend of the law and the King's chief minister. On the sixth of November 1667 the personal and political enemies of Clarendon introduced into the House articles of impeachment against him. Seventeen charges were made, the most important of which was that he had attempted to subvert the laws of the realm by advising the King in June 1667 to dissolve Parliament and to govern by a standing army. On the ninth of November the opponents of Clarendon sought to persuade the House that such advice was treasonous. Since no treason in 25 Edward III covered such an act, the opponents of Clarendon fell back upon the declaratory power, contending that Parliament could declare an endeavor to subvert the law to be treason. But the country gentlemen and cavaliers who crowded into St. Stephen's chapel that autumn day refused to countenance this use of the declaratory power; by a vote

23. Bulstrode Whitlocke observed that the Commons proceeded by attainder against Laud "because they perceived the Lords not forward to give judgment for treason against him." B. WHITLOCKE, MEMORIALS OF ENGLISH AFFAIRS 110 (1732). For the Lords' scruples, see 7 H.L. JOUR. 111 (1664). In 1641 the Commons also invoked the declaratory power to impeach Justice Berkeley for treason for endeavoring to subvert the fundamental laws of the realm. However, the lawyers in the Commons asked to be excused from managing the trial, because they were "altogether unsatisfied of any treason in his case...." Letter from Sir John Coke the Younger to Sir John Coke, May 14, 1642, in HISTORICAL MANUSCRIPTS COMMISSION, TWELFTH REPORT app., pt. II, at 314, 315 (1888) (2 Manuscripts of the Earl Cowper, K.G.) In the end the Commons prosecuted him only for misdemeanors.
24. R. BERGER, supra note 2, at 43.
of 172 to 103, they concluded that Clarendon should not be accused of treason on such a charge. The next effort to invoke the declaratory power came on the 11th of November, when Clarendon's enemies argued that he had committed treason by advising the sale of Dunkirk to France. But the Commons refused to accuse him of a declaratory treason upon this charge, or upon any other nonstatutory charge that day. They were willing to accuse him of misdemeanors on these charges, but not treason. In desperation Clarendon's opponents amended Article 16 (a charge that Clarendon had corresponded with the enemy) by adding the words "and discovered and betrayed his [the King's] secret counsels to his enemies." Lord Vaughan, one of Clarendon's leading opponents in the Commons, charged that Clarendon had divulged to the French Court the King's resolution to send a considerable English army to help the Spanish defend Flanders against a threatened attack by France. To betray the King's confidences to the enemy was clearly a statutory treason, so the House voted to impeach Clarendon for treason upon the 16th Article. But this was no victory for the declaratory power. It was in fact a victory for deceit, for Lord Vaughan had no evidence to prove his charge. For that reason the Commons never sent to the Lords particular charges against Clarendon. Instead they stubbornly insisted that the Lords imprison Clarendon upon a general charge. The Lords refused.

The scruples which the Commons displayed against the declaratory power in 1667 melted away before the passions unleashed by the Popish Plot, an alleged conspiracy by papists in 1678 to assassinate Charles II and place his Catholic brother on the throne. In 1678 the Earl of Danby, Lord Treasurer of England and Charles II's chief minister, who had allegedly failed to conduct a thorough investigation of the plot, was impeached by the Commons for the treason of arrogating to himself regal power and endeavoring to subvert the Kingdom's ancient and well-established form of government. And in 1680 the Commons used the declaratory power to impeach Chief Justice Scroggs of treason for the old common law offense of obstructing justice. But neither man ever came to trial. And herein lies another weakness in Berger's thesis. His whole argument for retrospective treasons rests upon the law as the prosecutor would define it. But prosecutors do not define the law, judges do. This is as true for the law of impeachment as for any other branch of the law. It thus belonged to the

25. 1 Debates in the House of Commons 29-37 (A. Grey ed. 1763).
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House of Lords to declare what was treason. As Paul Foley, a stalwart opponent of the King, said in 1681: "[W]e only impeach, they [the Lords] are to be judges, whether the matter be treason or no." This being the case, it is a matter of no little significance that not one person in Stuart England was ever found guilty upon an impeachment for a declaratory treason—not Strafford, not Laud, not Clarendon, not Danby, not Scroggs, none. The Lords twice (under great pressure from the populace) accepted declaratory treasons in bills of attainder, but it is of the very nature of attainders that they are not governed by ordinary judicial forms and precedents. Since the House of Lords in Stuart England did not hand down a single judgment on the validity of declaratory treasons in impeachments, the historian simply cannot pronounce on their validity. Least of all can he deduce, as Berger does, that impeachments in the 17th century were not limited to indictable crimes.

II

The phrase "high crimes and misdemeanors" plays the same pivotal role in Berger's second chapter that "retrospective treasons" plays in the first. He writes: "'High crimes and misdemeanors' were a category of political crimes against the state, whereas 'misdemeanors' described criminal sanctions for private wrongs." This crucial sentence raises two issues, which should be examined separately: did persons in Stuart England distinguish between political crimes and private wrongs? And did they distinguish between "misdemeanors" as used in the phrase "high crimes and misdemeanors" and "misdemeanors" as used in the ordinary courts?

In the 17th century the English did speak of "private wrongs," but never (to my knowledge) of "political crimes against the state," a phrase redolent of an indictment in a people's democracy. The use of the phrase "political crimes" is therefore incorrect. On the other hand, persons in Stuart England did distinguish between a "public offence" and a "private wrong." John Selden wrote in 1626, "Yet complaints have ever been received in parliaments, as well of private wrongs as public offences." By a public offense Selden meant an

27. An Exact Collection of the Debates of the House of Commons [1680-1681], at 228 (1689).
28. R. Berger, supra note 2, at 61 (emphasis in original).
29. See pp. 1432-38 infra for a discussion of the incorrect implication that "political crimes" could be political actions which were not breaches of some existing law.
abuse of public trust, such as corruption on the part of a judge or extortion by an official. Berger suggests that such offenses, which were indeed charged in impeachment cases, were not statutory or ordinary common law crimes, but were crimes by "the course of Parliament," the "lex Parliamentaria."31 The problem here is the absence of references to the "lex Parliamentaria" in the many impeachments for misdemeanors in Stuart England. I cannot remember seeing it in articles of impeachment drafted during these years. The explanation for this absence is not hard to find. The phrase "the course of Parliament" in the 17th century referred to those laws authorizing and governing the proceedings of the two Houses in the exercise of their judicial and legislative powers. The right of the Commons to initiate money bills, the right of the Lords to hear appeals from the King's Bench—these were aspects of "the course of Parliament"; the definition of corruption and extortion was not.

Yet Berger is right, though his terminology is inexact, to say that public offenses were not necessarily statutory or ordinary common law crimes (that is, crimes for which one could be indicted in the King's Bench, Common Pleas, or the Exchequer). And historians must be indebted to him for raising a question which has been ignored too long: by what law was it criminal to extort higher fees, intimidate witnesses, or exceed one's warrant? The answer is obscure, but one approach lies in the recognition that Parliament and the common law courts had no monopoly over the making of law. Rather, English law was fed from many sources. It was embodied in statutes passed by Parliament and it was laid down by judges in the King's Bench, Common Pleas, and the Exchequer. But royal commissions and prerogative courts also created large bodies of judge-made law.

Special royal commissions issued by the King were of particular importance in medieval times. As early as 1289 Edward I established a Special Commission of Complaints in order to punish the "trespasses done by the King's ministers." In the next four years it punished judges for bribery, intimidation, and violence.32 Royal commissions were also used by the Stuarts three centuries later. James I, for instance, issued a commission in 1613 to inquire into frauds and deceits in the navy, but this merely empowered the commissioners to search

31. R. Berger, supra note 2, at 67.
32. State Trials of the Reign of Edward the First 1289-1293, at xxvi, xi-xli (T. Tout & H. Johnstone eds., Royal Historical Soc'y Publs., Camden 3d ser., vol. 9, 1906). I should like to thank Frank Pegues for calling my attention to this special commission.
out offenders. Once found they were to be referred "to the course of justice as appertaineth."\(^3\)

The commission did not say what this course of justice was, but it might be one of the prerogative courts—either a departmental court or the Court of Star Chamber. A quarrel in 1613 over the jurisdiction of the Earl Marshall's office demonstrates the respect of lawyers for departmental courts. A pursuivant at arms had kept fees paid for funerals, creations, and titles for his own use. His case was brought before Chancery, but the defendant pleaded that the case ought to be tried before the Commissioners for the Office of Earl Marshall. Sir James Whitelocke, a redoubtable champion of the common law, challenged the authority of the Earl Marshall's office to try the case, but only because the King had not empowered the office to act as a court. He allowed that the King possessed the power to authorize the commissioners to act as a court, but argued that the King had not done so. He pleaded that the case should go to Chancery,\(^3\) but herein he confused equity in civil cases, which was exercised by Chancery, with criminal equity, exercised by the most famous of the prerogative courts, the Court of Star Chamber. Under the Tudors and early Stuarts this was the highest court for punishing public offenses (Parliament aside). For example, under the "so called Star Chamber Act of 1487,"\(^3\) a committee drawn from that court was given the power to punish men in the King's own Household for maintenance (supporting unjust claims in a court by violence or threats) and livery (keeping uniformed retainers).\(^3\) Other aspects of the court and its jurisdiction developed case by case. In Henry VIII's reign, for instance, a bill of complaint was brought in Star Chamber against certain Admiralty officials for extortion.\(^3\) In James I's reign it found the Attorney General guilty of a "Breach of Trust and Misdemeanor" for drawing up a Charter for the City of London without a warrant to do so.\(^3\) The law defining public offenses was, therefore, wider than statutory and ordinary common law; it comprehended also the judge-made law of royal commissions and prerogative courts.

There is a certain ambiguity in Berger's thesis. He puts his position

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24. Id. at 34-37.
25. 13 Hen. 7, c. 1 (1486).
27. 2 Select Cases Before the King's Council in the Star Chamber Commonly Called the Court of Star Chamber IV (J. Leatham ed., Selden Soc'y Pubs., vol. 25, 1911).
28. 3 H.L. Jour. 125 (1621).
this way: "I would maintain that history furnishes a plain answer to at least one question that has long cluttered analysis: the test of an impeachable offense in England was not an indictable, common law crime." If by a "common law crime" he means a crime for which a man might be indicted before the King's Bench, Common Pleas, or Exchequer, he may well be right. But if the phrase "common law" is given a wider interpretation, if it is allowed to comprehend the lex terrae or known law, including the judge-made law of the Star Chamber, of the other prerogative courts, of royal commissions, even of the House of Lords itself, then English history gives no such plain answer to the question. Blackstone and Wooddeson clearly believed that the violation of this known law was the test of an impeachable offense. It is unclear whether Berger also believes that it is. His discussion of the meaning of "high crimes and misdemeanors" in Chapter Two suggests that he does not, but that discussion is based upon a fundamental error.

Early in Chapter Two Berger chides Edward Christian for believing that the phrase "high crimes and misdemeanors" merely gives greater solemnity to an ordinary charge of misdemeanor. "In this," Berger writes, "he went astray. The phrase 'high crimes and misdemeanors' is first met not in an ordinary criminal proceeding but in an impeachment, that of the Earl of Suffolk in 1386." Berger later continues: "At the time when the phrase 'high crimes and misdemeanors' is first met in the proceedings against the Earl of Suffolk in 1386, there was in fact no such crime as a 'misdemeanor.' " He then goes on to show that in 1386 crimes that would 150 years later be called "misdemeanors" were called "trespasses." Thus a gap of 150 years separates "misdemeanors" from "high crimes and misdemeanors."

It is an ingenious argument, but it is based upon a misreading of the evidence. The phrase "high crimes and misdemeanors" was not used in the Earl of Suffolk's impeachment in 1386, nor in that of the Duke of Suffolk in 1450, as Berger states. The Earl was accused of "faults and misprisions," the Duke of "certain high treasons and offences and misprisions." The phrase "high crimes and misdemeanors" appears nowhere in either impeachment. Berger seems to have been misled by T.B. Howell, an early 19th century editor of State

39. R. Berger, supra note 2, at 297.
40. See R. Berger, supra note 2, at 55, 56.
41. Id. at 59.
42. Id. at 61.
43. Id. at 67.
Trials, and by John Hatsell, a late 18th century editor of Precedents of Proceedings in the House of Commons. Howell added the phrase “high crimes and misdemeanors” to his introduction to the Earl’s impeachment,44 which is cited by Berger on this point;45 Hatsell added the phrase to his account of the Duke’s impeachment,46 which is also cited by Berger.47 Had Berger consulted the Rotuli Parliamentorum he would have discovered that no such phrase was used in the actual impeachments.48 He further compounds his error when he asserts that Attorney General Yelverton and Lord Treasurer Middlesex were impeached for “high crimes and misdemeanors.”49 They were not. This is more of T.B. Howell’s invention.50 My own research has led me to the conclusion that the first use of “high crimes and misdemeanors” occurred on 12 February 1642, in the impeachment of Sir Edward Herbert. Before that date it was not used; thereafter it was regularly used.51

The 150 year gap between “high crimes and misdemeanors” and ordinary “misdemeanors” thus does not exist, but this does not in itself contradict Berger’s contention that there is a functional division between the two. It is therefore worth asking exactly how the English used the word “misdemeanor” in impeachments. The answer is that they used it carelessly, confusedly, prolifically, rhetorically, but nearly always in its ordinary sense of a crime less serious than a felony. Thus the House of Commons accused Middlesex of “bribery, extortions, oppressions, and other grievous misdemeanors.”52 It impeached Buckingham for “misdemeanors, misprisions, offences and crimes,”53 and Sir Robert Berkeley of “high treason and other great misdemeanors.”54 In 1626 John Selden wrote a treatise on impeachments, in which he argued that in all cases of felony and treason the accused is denied counsel, but in cases of misdemeanor he may plead through counsel.55 (This rule, which seems strange under modern concepts,

44. 1 A COMPLETE COLLECTION OF STATE TRIALS 90-91 (T.B. Howell ed. 1809).
45. R. BERGER, supra note 2, at 59, n.21.
46. 4 PRECEDENTS OF PROCEEDINGS IN THE HOUSE OF COMMONS 60 & n.* (J. Hatsell ed. 1796).
47. R. BERGER, supra note 2, at 67 n.63.
48. 3 ROTULI PARLIAMENTORUM [Rolls of Parliament] 220 (1386); 5 id. at 177 (1450)
(The Earl’s impeachment reads, in the original French: “pur les defautes & mesprisons ....” The Duke’s accusation reads in Latin “de quibusdam altis proditionibus, necnon offensis & mesprisonibus ....”
49. R. BERGER, supra note 2, at 67.
50. 2 A COMPLETE COLLECTION OF STATE TRIALS 1135, 1183 (T.B. Howell ed. 1809).
51. 4 H.L. JOUR. 582-83 (1642).
52. 3 H.L. JOUR. 383 (1626).
53. id. at 619.
54. 4 H.L. JOUR. 161 (1641).
55. J. SEDEN, supra note 30, at 1625-27.
may have been an attempt to emphasize the heinous nature of the first two offenses.) The Earl of Strafford attested to this same threefold classification when he told the Lords that "if a thousand Misdemeanors will not make one Felony, 28 Misdemeanors could not be heightened into Treason. . . ."56 The evidence suggests that "misdemeanor" meant in the high court of Parliament what it meant in the ordinary courts—a category of crimes less serious than felonies.

The important distinction in Stuart England was not between "misdemeanors" and "high crimes and misdemeanors," or between "political crimes" and "private wrongs." The important distinction was between lawful and unlawful conduct as judged by the known law. The Commons could rightly impeach a man for an illegal act, but not for a legal one, however politically unwise, unpopular, inexpedient, or unsuccessful. This is a distinction which Berger obscures. As with his interpretation of treason, he develops a theory of political, noncriminal impeachments based upon the actions of the Commons without considering how unsuccessfully these charges were prosecuted.

The fact that a valid impeachment had to be for an illegal act was strongly emphasized in the first 17th century impeachment in 1621. James I told the Commons in that year that he would not have men accused "for mere error of judgment unless it were accompanied with corruption."57 The Commons heeded his command. They did not impeach the King's councillors who had erroneously declared patents of monopoly to be legal and convenient. True, they did impeach one member of this group, Sir Francis Bacon, but they impeached him for taking bribes, not for his erroneous judgments.58 They impeached Sir Henry Yelverton, the King's Attorney General, but for illegally signing warrants dormants, not for his judicial opinions.59 In the 1624 impeachment of the Earl of Middlesex, James I's Lord Treasurer, the Commons did overstep the boundary between lawful and unlawful acts by accusing him not only of bribery and extortion but also of advising the King to levy impositions on wines and sugar. But the Lords refused to entertain the latter charge, and found Middlesex guilty only of the briberies and extortions.60

56. 2 IMPARTIAL COLLECTION 54 (J. Nalson ed. 1683).
57. 5 COMMONS DEBATES 1621, at 94 (W. Notestein, F. Relf & H. Simpson eds. 1935).
58. 3 H.L. JOUR. 106 (1621).
59. Id. at 77. From the context of Yelverton's impeachment, it appears that warrants dormants gave authority to patentees and monopolists to arrest those who resisted their authority.
60. Id. at 307-11, 379-81 (1624). Tite gives an excellent discussion of the Lords' caution in accepting the accusations of the Commons. C. TITE, IMPEACHMENT AND PARLIAMENTARY JUDICATURE IN EARLY STUART ENGLAND 166-67 (1974).
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But the impatience of the Commons in 1624 proved a harbinger of the future. In 1626 they impeached the Duke of Buckingham, Lord High Admiral of England and the King's great favorite, for sending an ill-prepared expedition to Cadiz, for neglecting to guard the Narrow Sea, for holding many offices, for accepting exorbitant gifts from the King, and for prescribing a physic for James I. These were acts of folly, but they were not crimes. Buckingham promptly drew up a vigorous, full, and clear reply to the accusations against him. The Tuscan envoy estimated he had the support of two-thirds of the Lords. Charles I showed his favor to the Duke by naming him Chancellor of Cambridge University. All of this drove the Commons to add to their legal prosecution a political confrontation. They threatened to vote a remonstrance demanding the Duke's removal, and to refuse to grant further funds for the government until the King acted on the remonstrance. When Charles heard that they were determined to vote the remonstrance before the Bill of Subsidy, he dissolved Parliament.61

Buckingham's impeachment proved to be a pattern for the next century: the Commons would impeach men for their faults after labeling those faults crimes, and then neglect to prosecute the impeachments before the Lords. This explains why, of 57 ministers, judges, public officials, and clergymen impeached for "high crimes and misdemeanors" (or a like charge) between 1626 and 1715, only five were brought to trial and judgment.62 Berger declares otherwise when he writes: "Between 1621 and 1725 there were fifty cases of impeachments brought to trial."63 The words quoted by Berger are those of Sir William Holdsworth (though Holdsworth wrote "1715," not "1725"),64 but the great Holdsworth himself erred egregiously. To support his assertion that 50 impeachments were brought to trial, Holdsworth cites Sir James Stephen's *The History of Criminal Law*, I, 159. But what Stephen actually wrote on that page was this: "From

61. See Dispatches from the Tuscan envoy to the Grand Duke of Tuscany, June 5, 12, 19, 26, 1626, in *HISTORICAL MANUSCRIPTS COMMISSION, ELEVENTH REPORT* app., pl. I, at 68, 70-75 (1887) (Manuscripts of Henry Duncan Skrine, Esq.)

62. The five who were impeached, tried, and judged were Roger Manwaring, Sir Robert Berkeley, Baron Trevor, Sir Richard Gurney, and Henry Sacheverell. The Lords fined Manwaring £1,000, suspended him from the ministry for three years, and imprisoned him during the pleasure of the House. See 5 H.L. Jour. 855 (1628). The Lords fined Berkeley £20,000. See 6 H.L. Jour. 211 (1643). Trevor was fined £6,000 and allowed to continue as a Baron of the Exchequer. See 6 H.L. Jour. 263 (1643). The Lords deprived Sir Richard Gurney of his office of Lord Mayor and imprisoned him at the pleasure of the House. See 5 H.L. Jour. 284-85 (1642). Sacheverell was suspended from preaching for three years. See 19 H.L. Jour. 1216 (1710).

63. R. BERGER, supra note 2, at 7 n.l.

64. 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 382 (6d ed. 1922).
that date [1621] to the present day there have been fifty-four impeachments, so far as I have ascertained from the calendar to the Lords' Journals." Stephen did not say that these impeachments were brought to trial; Holdsworth added this piece of misinformation and misled Berger. Impeachments could be sent to the Lords without ever being prosecuted, just as they could be voted without later being sent to the House of Lords at all. It is time to set the record straight: the great majority of impeachments voted by the Commons were never brought to trial before the Lords.

The reasons were many why the Commons did not prosecute their impeachments: the dissolution of Parliament, the outbreak of civil war, the flight of the accused. But the chief reason was their unwillingness, once the political advantage of voting an impeachment had been gained, to put the charges to a test before the Lords. In 1641, for example, the Commons voted impeachments against the six judges who ruled in favor of Ship Money (a tax imposed by royal prerogative on all the counties of England); they then voted two weeks later that the impeached judges should not be in the Commission of Oyer and Terminer for the next Assize. On 20 July 1641 they impeached Bishop Wren, and the next day voted that he was unfit for office and asked the King to remove him. In August 1641 they impeached 13 bishops for passing canons without submitting them to Parliament, then in October asked that they be removed from the House of Lords. The Commons were not anxious to prosecute any of these impeachments. Sir Symonds D'Ewes, a member of the House of Commons, confessed that their slowness in proceeding against the judges "was a delay that we would judge a scandal in any other court." Despite repeated urging by the Lords, the Commons prosecuted only two of the six Ship Money judges. Nor did the bishops come to trial. On 11 August the Lords informed the Commons that the charge against the 13 Bishops was too general. The Commons thereupon sent up the same charge again, but accompanied by a copy of the canons that allegedly contained statements contrary to the fundamental laws of the realm. To the second charge 12 of the 13 Bishops entered a demurrer on 19 November 1641. The Commons never replied to the demurrer, even

65. J. Stephen, A History of the Criminal Law of England 158-59 (1883). Stephen was in error when he said there were 54 impeachments voted between 1621 and the time at which he wrote. There were 225 by my count in the Journals of the House of Commons and the House of Lords (1621-1805).
66. W. Holdsworth, supra note 64, at 382.
67. British Museum Harleian Manuscript No. 163, f.368v, July 1, 1641.
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though the Lords in March 1641 urged the lower house to proceed with all their impeachments.68

The same pattern emerged after the Restoration. The Commons impeached Sir William Penn in 1668, but only in order to dissuade Charles from sending him to sea again. They did not prosecute the impeachment.69 In November 1680 the Commons impeached Sir Francis North, but made no move for two months to send up articles against him to the Lords.70 In December they impeached Edward Seymour and pressed hard for his commitment, "the chief design of the impeachment being [in his brother's words] to have a pretence to move him from the King's ear. . . ."71 The strategy of voting impeachments for purely political reasons did not always work. In 1675 the enemies of the Earl of Danby introduced an impeachment against him in the House of Commons, only to be met with John Maynard's objection: "Illegal and inconvenient are things very different, and are different questions."72 The House refused to vote the impeachment.

Among the most instructive examples of impeachment for high crimes and misdemeanors are those voted in 1701 against Somers, Halifax and Orford. They are instructive because they contain charges which Berger cites73 to establish his category of "political crimes." Among the charges are putting a seal to an ignominious treaty, supporting pernicious and dishonorable measures and receiving exorbitant grants. Now these actions, though inexpedient, were not unlawful. Yet the Commons did include them in their impeachments; as well they might, for they had little intention of prosecuting those impeachments. On the very morning after the impeachments were voted the Commons voted addresses to William III asking him to remove the three lords from his council and presence forever. Then they let their impeachments lie. The Lords, however, did not; they prodded, urged, and pressed the Commons to action. Finally the Lords set a day for the trials. Sir Christopher Wren prepared Westminster Hall for the scene. The Lords summoned the Commons to appear. But the

68. 4 H.L. Jour. 359, 363, 496 (1641); 2 H.C. Jour. 251, 493 (1641).
69. Samuel Pepys wrote that Penn's answer was sent to the Commons, "but they have not yet read it, nor taken notice of it, so as, I believe, they will by design defer it till they rise, that so he, by lying under an impeachment, may be prevented in his going to sea. . . ." S. PEPS, DIARY 497 (E. Rhys ed. 1927) (entry for Apr. 29, 1668).
70. R. NORTH, EXAMEN 553-54 (1740).
73. R. BERGER, supra note 2, at 69-71.
Commons did not appear, probably because they did not believe that they could prove these acts unlawful. As the Dutch envoy wrote,

The committee which is charged with the task of drawing up articles of impeachment finds itself very embarrassed, not discovering in the two Partition Treaties any matter for their articles, so it is said they desire to have recourse to other subjects, which they will intermix with the former, and thereby embroil matters further; for they see clearly that the [three] lords, being innocent, will have no difficulty absolving themselves. They have resolved therefore not to push for a judgment.74

A similar episode occurred on 1 July 1717, as the dénouement of the impeachments voted in 1715 against four Tory lords, Oxford, Bolingbroke, Ormond, and Strafford. A Whig House of Commons threw a mixed-bag of alleged treasons and misdemeanors against them. Bolingbroke and Ormond, who had corresponded with the Pretender, fled; Strafford and Oxford, who had not, remained. For two years the Commons postponed their trials. Once again the Lords demanded that the Commons prosecute their impeachments. Aware that they could not prove Strafford guilty of any misdemeanors, the Commons dropped his impeachment. Oxford had been impeached both for treason and for high crimes and misdemeanors. The Lords asked the Commons to proceed with the charge of treason before that of high crimes and misdemeanors. The Commons, however, possessed no evidence to prove this allegation, so when summoned to the trial on 1 July 1717 they declined to appear. A Tory then proposed that Oxford be discharged of the treason charged against him, but the leader of the Whigs moved that he be discharged of all charges, misdemeanors as well as treasons. The Lords readily consented and the Commons acquiesced.75

The conclusion to be drawn from this series of events is manifest: the House of Commons did seek to create a category of political offenses which were not violations of the known law. Berger is quite right to draw our attention to this fact. But the House of Lords resolutely opposed this theory of impeachment. The Lords opposed it because they found it intolerable that anyone should be punished for

74. British Museum Additional Manuscript No. 17,677 WW, ff.234v-35, Apr. 7, 1701. The French ambassador and the envoy of the Great Elector agreed that the Commons had no intention of prosecuting their impeachments. Public Record Office, French Transcripts, June 9, 20, 1701; British Museum Additional Manuscript No. 30,000E, ff.233-34, June 3, 1701.

75. W. Harlwick, The History of the Third Session of the Present Parliament 76-79, 81-83 (1717).
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lawful acts, however unpopular, unwise, or unsuccessful. Berger devotes many pages to the charges drawn up by the prosecution, but none to the pleas of the beleaguered defendants. Had he examined the arguments of the accused he would have found no category of political offenses. Buckingham said in his own defense: "Whilst I defend my innocency I will not maintain that I have not erred." Strafford declared, "My Lords, it is hard to be questioned upon a law which cannot be shewn . . . . Do not put, my Lords, such difficulties upon ministers of state, that men of wisdom, of honour, and of fortune, may not, with cheerfulness and safety, be employed for the public." In his defense Justice Berkeley cited a statute of 18 Edward III declaring it to be punishable for a judge to give an erroneous judgment, if done willfully, maliciously, or for bribes and corruptions; and submitted respectfully that he had done none of these. Laud reminded the Lords that not a single witness had yet charged him with overthrowing the laws, and declared that he had done nothing that his predecessors had not done in the reigns of King James and Queen Elizabeth. Lord Somers admitted he placed the Great Seal to a treaty with blanks therein, "which he conceives, and is advised, he might lawfully do . . . ." He also acknowledged that he received grants of land from his Majesty, "and he humbly conceives, it was lawful for him so to accept the same." But no one expressed more eloquently than the Earl of Oxford the injustice of impeaching people for mere faults:

If there was a fault [in negotiating the Treaty of Utrecht], it is only an error in judgment, of a thing lawful. A man must not be criminal, because another person judges better or otherwise than he when there is no fraud, no corruption objected . . . . Infinite are the errors and evils which are not punished by law, especially in public counsels and acts of government, but these are tolerated evils arising from the necessity of things, and the defects of human nature, and to punish them without law will be a remedy worse than the evil, will deprive princes of ministry and council, and will leave the body politic without arms to act, nor feet to move, without eyes or ears to inform the understanding.

78. 5 H.L. Jour. 82 (1642).
79. 1 The History of the Troubles and Tryal of William Laud 271 (H. Wharton ed. 1695).
80. 5 Parliamentary History of England 1282 (W. Cobbett ed. 1809).
81. Id. at 1284.
82. British Museum Loan (Portland Papers) 29/10, No. 8, Sept. 7, 1715.
The Lords discharged Oxford from all the treasons and misdemeanors charged against him, and the Commons never again sought to transform “high crimes and misdemeanors” into a category of political crimes. Berger rightly perceives the political character of many of the high crimes and misdemeanors voted by the House of Commons, but he errs in not pointing out that the House of Lords successfully resisted this development. Berger writes: “Not all of the cited impeachments eventuated in verdicts of guilty by the House of Lords. Some did result in convictions . . . .”83 His language is unacceptably vague. The fact is that the House of Lords between 1621 and 1715 found 29 men, in public and private life, guilty of high crimes and misdemeanors (or an equivalent charge). But of these 29 men, five were accused of bribery or various forms of extortion (Mompesson,84 Bacon,85 Mitchell,86 Yelverton,87 and Middlesex88), eight of trading with the enemy in time of war (John Goudet and seven others in 169889), two of preaching seditious sermons (Manwaring90 and Sacheverell91), and one of slandering the King and Queen of Bohemia (Floyd in 1621).92 Their offenses were crimes punishable in the ordinary courts of the land. The “crimes” of the other 13 men, however, were of a political character. Justice Berkeley93 and Baron Trevor94 had ruled in favor of Ship Money. Richard Gurney had proclaimed Charles I’s Commission of Array95 and George Benyon had circulated a petition against the Militia Ordinance.96 Northampton and eight other Lords had refused to attend the House of Lords in 1642.97 But it was a rump House of Lords that found these 13 men guilty—a rump composed of some dozen peers, puritan and radical, with all the royalist peers absent. On this one occasion, amidst revolution, in the years 1642 and 1643, the Lords punished men for political crimes, but they never did so again in the 17th century, or in any other century. The Lords, whose judgments shape the law of impeachment, were no

83. R. Berger, supra note 2, at 72.
84. See 1 H.C. Jour. 533 (1621) (charges); 3 H.L. Jour. 72 (1621) (judgment).
85. See 1 H.C. Jour. 560-61 (1621) (charges); 3 H.L. Jour. 103-06 (1621) (judgment).
86. See 1 H.C. Jour. 536-49 (1621) (charges); 3 H.L. Jour. 108-09 (1621) (judgment).
87. See 1 H.C. Jour. 536-49 (1621) (charges); 3 H.L. Jour. 123-25 (1621) (judgment).
88. See 1 H.C. Jour. 767-68 (1624) (charges); 3 H.L. Jour. 124-25 (1624) (judgment).
89. See 12 H.C. Jour. 271-72 (1698) (charges); 16 H.L. Jour. 339 (1698) (judgments).
90. See 1 H.C. Jour. 897 (1628) (charges); 3 H.L. Jour. 853-55 (1628) (judgment).
91. See 16 H.C. Jour. 257-58 (1710) (charges); 19 H.L. Jour. 121 (1710) (judgment).
92. See 1 H.C. Jour. 600-01 (1621) (charges); 3 H.L. Jour. 134 (1621) (judgment).
93. See 2 H.C. Jour. 162 (1641) (charges); 6 H.L. Jour. 211 (1643) (judgment).
94. See 2 H.C. Jour. 194 (1641) (charges); 6 H.L. Jour. 263 (1643) (judgment).
95. See 2 H.C. Jour. 647 (1642) (charges); 5 H.L. Jour. 284-85 (1642) (judgment).
96. See 2 H.C. Jour. 489 (1642) (charges); 4 H.L. Jour. 705 (1642) (judgment).
97. See 2 H.C. Jour. 623 (1642) (charges); 5 H.L. Jour. 222-23 (1642) (judgment).
readier to accept "political crimes" than they were to accept "retro-
spective treasons." They were determined that men, whether im-
peached for treason or for high crimes and misdemeanors, should be
charged with violating the known law of the land.

Raoul Berger set himself a difficult task. History, as he himself
recognizes, rarely gives clear answers. Especially is this true when the
questions posed are about an ambiguous law of impeachment in a
distant century. It can be said, however, that Berger's own work has
contributed signally to the illumination of that law. He has shown
how ready the Commons were to invent new treasons by abusing the
declaratory power and how willing they were to create new crimes
by distorting the concept of high crimes and misdemeanors. But he
has failed to see how determined were the King's ministers and the
House of Lords to prevent these abuses. The Lords, the judges before
whom impeachments were tried, possessed the power to decide what
offenses were rightfully grounds for finding a person guilty. Because
they found it intolerable, as Oxford found it intolerable, that men
should be punished for what is not clearly prohibited, they chose to
limit those offenses to a violation of the known law of the land.