Impeachment as Punishment

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reviewing

To End A Presidency: The Power of Impeachment. By Laurence Tribe and Joshua Matz. New York, N.Y.: Basic Books. 2018. Pp. 245. $28.00.

In their recent book "To End a Presidency," Laurence Tribe and Joshua Matz canvas the arguments for and against impeaching a president who has committed high Crimes and Misdemeanors. This review essay examines that same question—why impeach?—through the broader lens of criminal jurisprudence, which perennially confronts a related and familiar question: why punish? That latter question typically attracts a range of responses, which can be organized into three basic categories: Sometimes, punishing a criminal is thought to have concrete benefits, such as protecting the rest of society from future harm. Alternatively, punishing a criminal might be viewed as a morally required response to a wrongful act, irrespective of concrete benefits. Finally, punishment might be viewed as an important sociological practice, whereby society expresses the values it holds most dear and attempts to heal itself when those values are transgressed.

As this essay's introduction explains, impeachments and criminal prosecutions are not identical proceedings nor do they pursue perfectly identical aims. But still, the trio of explanations offered to justify criminal punishment can help illuminate the complex judgments driving the question of impeachment. Accordingly, the three sections of this essay examine impeachment through the lens of those three theories of punishment, organizing arguments for and against impeachment along utilitarian, retributive, and sociological axes. In so doing, the essay exposes the vexing and inescapable questions that underlie impeachment and criminal punishment alike—questions that may well be unanswerable, but that must be grappled with all the same.

Introduction
The Notion of Punishment in Impeachment and the Criminal Law

Questions of impeachment are invariably linked in our minds with questions of criminality. On some level this is not surprising. The Constitution, after all, directly ties the two together, authorizing a president's removal from office only upon his "Conviction" of either "Treason" or "Bribery" (both federal crimes) or of some "other high Crimes and Misdemeanors."[1] The process of impeachment, moreover, has readily identifiable analogs to a criminal prosecution,[2] with members of the House of Representatives as-

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[1] U.S. Const. art. II, § 4; *see also* 18 U.S.C. § 2381 (2012) (criminalizing treason); *id.* § 201 (criminalizing bribery).

[2] As a technical term, the word "impeachment" refers to the process of accusing a president of high Crimes or Misdemeanors, not to the subsequent processes of adjudicating those charges or of removing the president from office. Colloquially, however, the word is often used to refer to the entire set of impeachment-related proceedings. At times, this essay employs that colloquial usage, though it also explicitly distinguishes impeachment and removal for clarity where appropriate.

signed to file charges and "to act as prosecutors" in a formal trial held before the Senate,[3] which comes complete with a presiding judge,[4] an oath that the senators will "do impartial justice,"[5] cross-examination of witnesses,[6] and a verdict of "guilty or not guilty."[7] Perhaps more fundamentally, impeachment and criminality are linked in our minds because every major impeachment saga of the modern era has started not in the halls of Congress but rather in the Department of Justice, where a team of federal prosecutors has conducted an explicitly criminal investigation of the president and his associates. Indeed, it is hard to call these episodes to mind without immediately thinking of their central antagonists: Archibald Cox versus Richard Nixon, Kenneth Starr versus Bill Clinton, Robert Mueller versus Donald Trump—the prosecutor versus the president.

In view of all of this, it is tempting to think of impeachment as some hyperspecialized subspecies of criminal law—as a set of rules and processes designed to address what Professor Aziz Huq calls "apex criminality," that is to say, "criminal acts by elected or appointed figures at the very apex of government," including potentially the president of the United States.[8] And yet, in their new and important book *To End a Presidency*, Professor Laurence Tribe and Joshua Matz go to great lengths to complicate this understanding—to try to disentangle impeachment from criminal law. "Impeachment," they tell us, "is a political remedy wielded by politicians to address a political problem" (p. 141). In stressing this point, they aim to present "the very essence of impeachment as political rather than criminal in character" (p. 13).

On one level, this effort to disentangle impeachment from criminal law is both helpful and necessary, for there are indeed important distinctions between the two. For one, as Professor Charles Black observed decades ago, many of the procedural aspects of an impeachment trial need not and should not "be treated like the same things in a criminal trial."[9] Tribe and Matz echo this point, observing, for example, that "the right against self-incrimination" may not apply "to the president in an impeachment proceeding" (p. 157), and that the senators sitting in judgment come together not simply as

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[3] U.S. HOUSE OF REPRESENTATIVES, OFFICE OF THE HISTORIAN, *Impeachment*, https://history.house.gov/Institution/Origins-Development/Impeachment/ [https://perma.cc/W5LY-R8T5] (last visited Oct. 20, 2018); *see also* 3 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 2132 at 458–59 (1907) ("In an impeachment trial . . . the prosecutors for the House of Representatives open their case and prove it as far as they can . . . .") (quoting Rep. Roscoe Conkling).

[4] U.S. CONST. art. I, § 3 ("When the President of the United States is tried, the Chief Justice shall preside . . . .").

[5] RULES OF PROCEDURE AND PRACTICE IN THE SENATE WHEN SITTING ON IMPEACHMENT TRIALS, S. DOC. NO. 104-1, R. XXV § 125.2, at 184 (1986).

[6] *See id.* R. XVII § 116, at 181.

[7] *Id.* R. XXIII § 122.1, at 182.

[8] Aziz Z. Huq, *Legal or Political Checks on Apex Criminality: An Essay on Constitutional Design*, 65 UCLA L. REV. 1506, 1508 (2018).

[9] *See* CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK 15 (1974) (emphasis omitted).

"a jury" charged with deciding the facts but also "as a court" empowered to "overrule" legal determinations made by the Chief Justice (pp. 80, 133). More significantly, Tribe and Matz strenuously reject the argument "that only criminal offenses are impeachable," which they view as "deeply and profoundly wrong" (p. 45). Rather, they define the power to impeach more broadly as the "power to remove out-of-control presidents," regardless whether a federal crime has technically been committed (p. 10).[10] Finally, and perhaps most importantly, Tribe and Matz distinguish between the basic judgment at issue in a criminal trial and the judgment called for in an impeachment: Senators, they explain, "may consider practical, moral, and political factors that have no place in a well-constituted court of law" and that may "have little to do with the president's guilt or innocence of the alleged abuses" (pp. 80, 198).

Taking all of these considerations together, one might conclude that, facial similarities aside, impeachment and criminal law are so inherently distinct that it is at best confusing, at worst dangerous, to mix the two together. At times, Tribe and Matz appear to endorse this view, warning us that "[j]amming" debates about impeachment "into a criminal law framework often obscures what's really at stake" (p. 52). Indeed, they worry that doing so risks transforming foundational questions of democracy into technical questions that "seem legalistic and dry," and that ultimately distort "public dialogue about impeachment" by moving it beyond the ken of "ordinary Americans" into the "province of fancy lawyers" (pp. 52, 45). One might quibble with the notion that criminal law—which has spawned countless hit television shows and podcasts, not to mention nightly news bulletins—is too fancy for the ordinary among us.[11] But the broader point is well taken: As Tribe and Matz rightly explain, "it makes little sense to blindly transplant . . . criminal law doctrines . . . into the Impeachment Clause" (p. 32).

And yet, after reading Tribe and Matz's impressive book, a closer connection between impeachment and criminal law emerges than appears at

[10] Tribe and Matz are joined by others in this view. *See, e.g.*, *id.* at 30 (rejecting the argument that a president can "be impeached and removed *only* for conduct which would also be [a] punishable crime"); Noah Feldman & Jacob Weisberg, *What Are Impeachable Offenses?*, N.Y. REV. BOOKS (Sept. 28, 2017) (book review), https://www.nybooks.com/articles/2017/09/28/donald-trump-impeachable-offenses/ [https://perma.cc/H69Q-GM5S] ("[H]igh crimes and misdemeanors may go beyond the US Code. [They] are presidential actions that contradict, undermine, and derogate democracy and the rule of law [or] that weaken the liberty and equality of individuals and the capacities of other branches of government."). *But see* ALAN DERSHOWITZ, THE CASE AGAINST IMPEACHING TRUMP 11–14 (2018) ("[W]ords have meanings and crime means crime, not something else."); Nikolas Bowie, *President Trump Shouldn't Be Impeached If He Hasn't Committed a Crime*, TAKE CARE (May 22, 2017), https://takecareblog.com/blog/president-trump-shouldn-t-be-impeached-if-he-hasn-t-committed-a-crime [https://perma.cc/L9BD-Z62X] ("[I]mpeaching a president for anything less than a crime or misdemeanor—one that was written down and in effect at the time of his alleged misconduct—is unconstitutional.").

[11] *Cf.* LAWRENCE M. FRIEDMAN, AMERICAN LAW 154 (1984) ("For the layman, the criminal side of the legal system is in many ways the most familiar aspect of American law. In fact, when you mention law or the legal system, the trappings of criminal justice—police, courtrooms, juries, trials, prisons and jails—spring naturally to people's minds.").

first blush. That connection resides not in technical or legalistic doctrinal nuances, but rather in a common purpose that underlies these different domains. For among the many things that this book invites us to consider is the idea that impeachment, like criminal law, is in many ways about punishment.

At points, Tribe and Matz resist this characterization, describing impeachment as concerned with "political accountability and popular sovereignty," not with "whether removal is warranted as a punishment" (pp. 40, 47). But to a criminal law scholar at least, it is hard to read the Founding Era debates that Tribe and Matz so expertly capture without concluding that punishment loomed large in the Framers' conception of impeachment. Edmund Randolph, for example, argued that the Constitution ought to include an impeachment power because "Guilt wherever found ought to be punished" (p. 6). Benjamin Franklin likewise described impeachment as "a regular & peaceable inquiry" whereby the "guilty" are "duly punished" (p. 7). And George Mason offered up as a "reason in favor of impeachments" the notion that "the man who has practised corruption" ought not "be suffered to escape punishment" (p. 5).[12] Decades later, Joseph Story linked impeachment to punishment in his famous *Commentaries on the Constitution of the United States*, describing "the power of the senate" to remove a president as the power "to inflict punishment" (p. 12).[13] And in fact Tribe and Matz themselves occasionally embrace the connection as well, urging us when "thinking about 'high Crimes and Misdemeanors'" to "recall elementary norms of fair notice and just punishment" (p. 42).

Those who work in and study the criminal justice system will likely welcome this invitation to consider elementary norms of punishment when reflecting on impeachment, for if there is one question that criminal justice scholars perennially confront it is the question *"why punish?"*[14] And while Tribe and Matz are surely right that an impeachment is no ordinary criminal case—indeed, is not a criminal case at all in the narrow sense of the term—the Framers' close linkage of impeachment to punishment invites us to ask whether thinking of impeachment as punishment might shed some light on the central and vexing question animating Tribe and Matz's project: *"why impeach?"* Indeed, reading Tribe and Matz through the lens of punishment affords an opportunity to organize and assess the many arguments for and against impeachment that they offer. Because when simplified to its extreme, the question *"why punish?"* tends to attract three basic answers: Sometimes, punishment is useful. Sometimes, utility aside, it is simply the right thing to

[12] For Randolph, Franklin, and Mason's remarks the authors quote 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 65–68 (Max Farrand ed., rev. ed. 1966).

[13] Here the authors quote 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §785, at 554 (4th ed. 1873).

[14] *See, e.g.*, Matthew A. Pauley, *The Jurisprudence of Crime and Punishment from Plato to Hegel*, 39 AM. J. JURIS. 97, 100 (1994) ("[S]ome of the basic recurrent questions in the history of criminal jurisprudence [are] Why should society punish? What are the purposes of punishment?").

do. And sometimes, punishment may help society express the values it holds most dear, and to heal itself when those values are transgressed.

Let us consider these three justifications for punishment in turn, using each one as an opportunity to examine the arguments for and against impeaching a president who has committed high Crimes or Misdemeanors.

I. Impeachment as Utility

Consider first the utility of punishment, which punishment theorists tend to describe in at least two different ways: First, punishment can deter a criminal—or others who see his fate—from engaging in criminal behavior going forward. Second, punishment can incapacitate a criminal, and thus protect society by disabling him from inflicting further harm. Arguments such as these, grounded in deterrence and incapacitation, frequently underlie claims that criminal punishment is socially necessary and therefore justified.[15] In the context of impeachment, however, these arguments carry considerably less weight.

Take first the idea of deterrence. Tribe and Matz at times invoke this idea as an argument in favor of impeachment, asserting that "[d]ecisions *not* to impeach" could "signal to future chief executives that they, too, can cross

[15] Arguments grounded in incapacitation and in deterrence share a common concern with the prevention of future harm, which Jeremy Bentham—hailed as the progenitor of modern utilitarianism—called "the chief end of punishment" and "its real justification." Jeremy Bentham, *Principles of Penal Law*, *in* 1 The Works of Jeremy Bentham 396 (John Bowring ed., 1962). Well before Bentham, Plato (speaking in the voice of Protagoras) offered a similar view: "punishment is not inflicted by a rational man for the sake of the crime that has been committed . . . but for the sake of the future, to prevent either the same man, or, by the spectacle of his punishment, someone else from doing wrong again." Pauley, *supra* note 14, at 103 (quoting Plato, *Protagoras,* 326d-e, *in* Plato: The Collected Dialogues (E. Hamilton and H. Cairns, eds. 1978)). Plato also offered an alternative justification for punishment, which modern theorists would term "rehabilitation." *See id.* at 103 ("Plato's Athenian says that punishment by law 'is never inflicted for harm's sake' but rather to make 'him that suffers it a better man . . . . [C]orrection must always be meted to the bad—to make a better man of him.'") (quoting Plato, *The Laws,* IX 854d-e & XII 944d, in Plato: The Collected Dialogues (Edith Hamilton and Huntington Cairns, eds. 1978)). Rehabilitation, however, does not much factor into debates over impeachment, as one hardly imagines Congress attempting to remove a president from office in order to thereby reform the president into a more suitable public servant for some future second act. Indeed, as Tribe and Matz note, a president's conviction in the senate could (and likely would) "disqualify him from future office holding" (p. 11), thus rendering his rehabilitation largely a moot point. *See* U.S. Const. art. I, § 3 (providing that punishment for impeachment can include "disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States"). Similarly, even an impeachment that stops short of removal lacks any associated mechanisms whereby Congress might help the President to realize his better self. On the contrary, rather than prompting a course correction, a failed effort to remove the president may only embolden him to continue on his wayward path. *See infra* note 21. Rehabilitation can thus be set aside as a utilitarian justification for impeachment—as it has to some degree been cast aside when considering punishment more generally. *Cf.* Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next,* 70 U. Chi. L. Rev. 1, 9 (2003) ("[R]ehabilitation ha[s] gone from the top of most scholars' and reformers' lists of the purposes of punishment to the bottom.").

whatever bridge proved safe for a predecessor" (p. 98).[16] A failure to impeach might also invite "other officials and bureaucrats to ask, *If the president can do this, why can't I?*" (p. 98). Impeachment, in other words, might be valuable for the broader message it sends—to future presidents and to other government actors—about the costs of engaging in wrongful activity.[17]

And yet, while impeachment could theoretically "deter official misconduct" and "remind future presidents that nobody is above the law" (pp. 13, 221), in practice deterrence seems a decidedly weak justification for impeachment, for the simple reason that impeachment—let alone removal from office—is so unlikely a prospect for any given office holder that it is unlikely to have much deterrent effect. After all, as Tribe and Matz observe, in the 229 years that we have lived under the Constitution "Congress has repeatedly declined to act" on its impeachment power, "despite credible suspicion of impeachable offenses" on the part of a "dizzying array" of presidents—including (the authors recount) John Adams, Thomas Jefferson, Andrew Jackson, John Tyler, Franklin Pierce, James Buchanan, James Polk, Warren Harding, Franklin Roosevelt, Gerald Ford, and Ronald Reagan (pp. 34–35, 71–74). Indeed, only two presidents—Andrew Johnson and Bill Clinton—have ever been impeached, and neither was removed from office.[18]

To be sure, the mere specter of impeachment might from time to time weigh on a president's mind. And in fact, Tribe and Matz point to an example of such a dynamic in the early years of the republic, when John Adams faced murmurings of impeachment.[19] But as criminologists regularly observe, it is "the certainty of punishment, as opposed to the severity of punishment,"

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[16] Emphasis has been added.

[17] Punishment theorists would place this argument under the heading of "general deterrence," as the intended audience for the deterrent message is broader than the president who is actually impeached. Notably, impeachment makes little sense as a tool of specific deterrence—that is to say, as a means of dissuading the president who has been impeached from future misconduct. After all, a president who is removed from office is unlikely to be president again—or to hold any other public office—such that there is no need to deter him from further abuses of the public trust. *See supra* note 15 (discussing bars on future office holding). And a president who is impeached but not removed may just as likely feel vindicated or emboldened by his acquittal, rather than chastened and deterred. For such a president, it is likely the anticipated judgment of the voters at the next election, or the anticipated judgment of history, that will have the greatest impact on his future behavior in office—not the failed impeachment effort, which voters and history may view either favorably or unfavorably once the acquittal is rendered. *Cf.* Gillian Metzger, *Impeachment: Partisan Warfare or Defending the Constitutional Order?*, TAKE CARE (June 19, 2018), https://takecareblog.com/blog/impeachment-partisan-warfare-or-defending-the-constitutional-order [https://perma.cc/4FKD-EQ78] (noting disagreement among scholars over the legitimacy of Andrew Johnson's impeachment). In short, a president who is impeached and removed need not be specifically deterred, while a president who is impeached but not removed may ultimately be emboldened.

[18] On the impact that such acquittals may have on impeachment's deterrent force, see *supra* note 17 and *infra* note 21. Of course, President Nixon's resignation in the shadow of a threatened impeachment stands as the sole but notable counterexample. R

[19] As Tribe and Matz recount, "opposition leaders demanded impeachment" after Adams surrendered a mutineer who claimed American citizenship over to the British government (p. 84). Adams was never at serious risk of removal. But according to Tribe and Matz, the chatter "made a lasting impression" all the same, prompting them to conclude that "[e]ven when the

that is most "likely to produce deterrent benefits."[20] And given that reality, the fact that murmurs like those Adams confronted have so rarely materialized into actual attempts at removal from office—and that the only two such attempts ever undertaken have failed—simply underscores how unlikely impeachment and removal actually are, and thus how little power the threat of impeachment holds to deter bad behavior.[21]

More weighty are arguments grounded in incapacitation. Indeed, at various points Tribe and Matz suggest that incapacitating a dangerous president may be the *only* legitimate grounds for attempting to remove him from office: Impeachable offenses, they write, "are necessarily defined by substantial risk of future danger," such that the "all-important question is whether we must remove a leader whose continuation in office poses a grave risk" (p. 95).[22] But when framed as a matter of incapacitation, Tribe and Matz's answer to that all-important question almost always seems to be "no," and sensibly so. For in virtually every instance in which impeachment might arise, it will either be an unnecessary or an inadequate tool for incapacitating the president.

Tribe and Matz recognize as much. With respect to impeachment's lack of necessity, they note that if "the stars are aligned such that impeachment is on the table, other responses" will almost always be available to mitigate the risk that the president will "inflict further damage . . . if he remains in office" (pp. 82, 42). In fact, Tribe and Matz argue that "Congress's arsenal

odds of removal from office are very low, serious legislative consideration of impeachment can strike fear into a president" (p. 84).

[20] VALERIE WRIGHT, THE SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 1 (Nov. 2010) (emphasis omitted) (surveying empirical research).

[21] As Tribe and Matz note, "impeachment talk" has only increased in frequency since President Adams' time—a fact that when coupled with the paucity of impeachments and removals over those ensuing centuries only underscores the minimal deterrent force of impeachment chatter itself (p. 193) (describing the "normalization of impeachment talk"); (p. 194) ("When calls to impeach the president are played on repeat . . . they lose their punch. And two full decades after the Clinton saga, that is where we find ourselves."). Indeed, the deterrent power of impeachment might have actually been diminished by the two failed attempts to remove a president from office, as Professor Michael Gerhardt argues. *See, e.g.*, Michael J. Gerhardt, *Impeachment Defanged and Other Institutional Ramifications of the Clinton Scandals,* 60 MD. L. REV. 59, 77 (2001) ("One commonly overlooked consequence of President Clinton's acquittal is that it is likely to underscore the lack of utility of impeachment as an effective weapon against serious presidential abuses of power. . . . The threat of impeachment no longer seems to carry the stigma it once did."); *cf. id.* at 72 ("The most notorious acquittals in the nineteenth century, namely those of President Andrew Johnson and Justice Samuel Chase, have each had the effect of dissuading subsequent congresses from initiating impeachments based on similar misconduct.").

[22] *See also* Tribe & Matz at 23 (describing impeachment as a tool "for avoiding genuine catastrophe" when "allowing the President to remain in office poses a clear danger of grave harm"); *id.* at 198 (focusing on "whether [the President] poses a continuing danger if he remains in office"). In foregrounding incapacitation, Tribe and Matz echo those punishment theorists who contend that "[o]f all the justifications for the criminal punishment, the desire to incapacitate is the least complicated . . . and often the most important." FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME at v (1995).

should not be underestimated" in this regard, given its substantial "power to legislate," "power of the purse," "powers over personnel," and "power of investigation" (pp. 82–83)—not to mention softer constraints imposed by "evolving norms and culture" that can further limit presidential power (p. 23).[23] Taken together, "these powers allow Congress to coerce obedience to its will" and to "hold the president and his staff accountable" (pp. 82–83). Congress, in other words, has substantial power to incapacitate all but the most diabolically destructive presidents—not by impeaching them but rather "by checking them, balancing them, and running out the clock on their four-year term" (p. 19).[24]

Of course, in rare and perilous cases such checks may "be inadequate to the task of thwarting tyranny . . . especially in the realms of foreign affairs and national security" (p. 84).[25] But should such a frightening eventuality come to pass, arguments that "impeachment is our system's last resort for avoiding genuine catastrophe" (p. 23) run into a second and more significant practical problem: "Ending a presidency" through impeachment "requires months or years of concerted political and investigative activity" (p. 238). Indeed, given how cumbersome the process is, Tribe and Matz ultimately turn to a wholly separate constitutional device to deal with "a truly insane, destructive . . . crisis" prompted by a president bent on causing mayhem: "the vice president and the cabinet," they argue, "should invoke" the Twenty-Fifth Amendment "to immediately dispossess [the president] of power" and thereby keep him "under control while Congress conducts" the laborious process required "to permanently remove him from office" (pp. 230–31).[26]

The Twenty-Fifth Amendment entails its own set of practical difficulties.[27] But the very fact that Tribe and Matz invoke it as an alternative to

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[23] *See also* Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187 (2018) (discussing informal constraints on presidential power).

[24] For more on the tools Congress can use to check the President, *see generally* JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS (2017). Of course, partisan gridlock may impede Congress's efforts to utilize such tools. But notably, many of these checks are easier to implement than impeachment and removal from office, such that their availability can safely be assumed in any situation in which impeachment and removal are on the table. *See generally id.*

[25] Indeed, Congress's ability to curtail the president's authority in this domain may be subject to constitutional limitations, though the scope of those limitations is subject to debate. *See generally,* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — Framing the Problem, Doctrine, and Original Understanding,* 121 HARV. L. REV. 689 (2008).

[26] *Cf.* Peter Baker, *Talk of the 25th Amendment Underscores a Volatile Presidency,* N.Y. TIMES (Sept. 22, 2018), https://www.nytimes.com/2018/09/22/us/politics/trump-25th-amendment.html [https://perma.cc/R73J-JXPW] (reporting that multiple officials in the Trump administration discussed invoking the Twenty-Fifth Amendment due to fears that the president is "unstable").

[27] Notably, the process for permanently disabling a president under the Twenty-Fifth Amendment is even more difficult than the process of impeachment if the president resists the effort, as the process still requires congressional action but is subject to a higher super-majority threshold. *See, e.g.*, Brian Kalt, *The Case Against Using the 25th Amendment to Get Rid of Trump,* N.Y. MAGAZINE (Oct. 14, 2017), http://nymag.com/intelligencer/2017/10/the-case-

impeachment underscores the central point: While it is undeniably true that a president who "has been removed from our highest office . . . cannot use its power to cause harm" (p. 12), incapacitating a president through impeachment seems in most cases unnecessary—and in the remainder much too cumbersome to be useful.

II. Impeachment as Justice

What, then, of the second answer to the question *"why punish?,"* namely that doing so may sometimes simply be the right thing to do? In the philosophy of punishment, arguments in this vein take on a multitude of hues,[28] stretching back as least as far as Immanuel Kant's assertion that punishing a wrongdoer is a categorical imperative, without which "Justice would cease to be Justice."[29] Students of criminal law will recognize this argument as the fountainhead of the idea that punishment is justified—nay, required—as an act of retribution against a depraved and immoral actor whose very "moral culpability," to quote philosopher Michael Moore, gives society not "merely a *right* to punish" but also "the *duty* to punish."[30]

At times, one catches glimpses of this retributivist sentiment in Tribe and Matz's work, as they trenchantly remind us that when confronted with presidents "who abuse their power" we must "call evil by its name" (p. 238). Indeed, in training our "moral vision" (p. 18) on an impeachable president's "evil deeds" (p. 41), Tribe and Matz warn us of "a monster lurking in the Oval Office" (p. 57), in much the same way that a retributivist might invoke and seek to punish other monsters thought to be lurking in our midst.

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against-using-25th-amendment-to-get-rid-of-trump.html [https://perma.cc/5U3P-WUSM]. Given these "cumbersome and antiquated" processes for removing a president from office, Professor Michael Gerhardt suggests yet another mechanism for dealing with "a president who does something truly and almost universally regarded as a legitimately impeachable offense," namely forced resignation. *See* Gerhardt, *supra* note 21, at 61 ("Once informed about a severe abuse of power by a president, the American people are unlikely to be patient . . . with a chief executive's refusal to fall on his sword . . . . A president's loss of substantial support from the public and congressional leaders is likely to produce inescapable pressure for him to resign."). And yet, the only example of a forced resignation in history—that of Richard Nixon—occurred only after the House Judiciary Committee recommended his impeachment. Prior to that point, less than half of the American public supported Nixon's removal. *See* Andrew Kohut, *How the Watergate Crisis Eroded Public Support for Richard Nixon*, Pew Res. Ctr. (Aug. 8, 2014), http://www.pewresearch.org/fact-tank/2014/08/08/how-the-watergate-crisis-eroded-public-support-for-richard-nixon/ [https://perma.cc/Z898-H2CQ] (noting that in June of 1974, a mere two months before Nixon's resignation, "44% in the Gallup Poll thought he should be removed from office, while 41% disagreed").

[28] *See generally* John Cottingham, *Varieties of Retribution*, 29 Phil. Q. 238 (Jul. 1979).

[29] Immanuel Kant, The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right 196 (W. Hastie trans., T. & T. Clark eds., 1887) (1796). Some trace retributivism to roots predating Kant. *See* Pauley, *supra* note 14, at 107–12 (offering "a retributivist reading of Aristotle's penal philosophy").

[30] Michael S. Moore, *Closet Retributivism*, *in* Placing Blame: A Theory of The Criminal Law 91 (1997).

And yet, much like arguments from deterrence, arguments for impeachment grounded in retributivism ultimately fall flat—for the simple reason that removal from office is a price *too small to pay* for a president who has truly "done something so awful that we must seriously consider" such a sanction (p. 42). An anonymous Virginian, writing to his local paper in 1795 and quoted by Tribe and Matz, captures this point well: "The constitution has given [only] the mild punishment of impeachment for the greatest abuses" (p. 154).[31] Impeachment, in other words, is a punishment so light—offered against crimes so severe—that it offends retributivism's core tenet of proportionality: the punishment should fit the crime.[32]

Notably, the decision to attach such "mild punishment" to impeachment was no accident. On the contrary, as Tribe and Matz explain, in crafting the American version of impeachment the Founders expressly rejected the far harsher penalties embraced "in England and France, where legislatures could impose capital punishment in cases of impeachment" (p. 11). In so doing, the Founders drew what Tribe and Matz call "a sharp line between political and criminal penalties," and thereby ensured that true retribution—exacted through "fines, imprisonment, or a death sentence"—would be "reserved for the courts" and "the criminal justice system" to mete out as "punishment for misdeeds committed while in office" (p. 12).

It is, however, precisely the punishments available through the criminal justice system—imprisonment, not impeachment—that retributivism's proportionality principle demands when high Crimes have been committed. And notably, while impeachment cannot serve up such retribution, the criminal justice system stands ready to do so when a president commits such egregious wrongs, whether he has been impeached first or not.[33]

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[31] The authors quote a Letter from Casca, *in* AURORA GENERAL ADVERTISER (Oct. 16, 1795). The letter's author goes on to observe that calls for impeachment "are not sanguinary" (p. 154), thus underscoring the distinction between impeachment and retribution, the latter of which often trumpets its more sanguinary features. *See* IMMANUEL KANT, THE METAPHYSICS OF MORALS 142 (Mary J. Gregor trans., 1991) (1785) (arguing that a society has a duty to punish a criminal so that his "blood guilt does not cling to the people"); George P. Fletcher, *The Place of Victims in the Theory of Retribution,* 3 BUFF. CRIM. L. REV. 51, 60 (1999) (explaining "the role of blood in punishment for homicide" and describing blood guilt "as a good metaphor for the evil of . . . offenders getting away with their crimes").

[32] *See* Richard A. Posner, *Retribution and Related Concepts of Punishment*, 9 J. LEGAL STUD. 71, 73, 83 (1980) (stating that "retributivists . . . believe the punishment should be equal or proportional to the gravity of the crime" and that "proportionality [is] required by the principle of retribution"). Posner quotes the political philosopher John Rawls, who defined "the retributive view" as the theory "that punishment is justified on the grounds that" a wrongdoer "merits punishment . . . in proportion to his wrongdoing." *Id.* at 71 (quoting John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4–5 (1955)).

[33] Impeachment could at best facilitate retributive punishments by hastening the end of a president's term and thus smoothing the path to a subsequent criminal prosecution through which such punishment might be attained. Notably, however, the statute of limitations for most criminal offenses is longer than a president's term of office, which means that retributive justice can be obtained via the criminal process after the president's term ends, no matter how that end comes to pass. *See* 18 U.S.C. § 3282 (2012) (establishing five-year statute of limitations for most federal offenses). Moreover, it is possible that such a prosecution could be

III. Impeachment as Social Reconstruction

Having measured impeachment against the preceding theories of punishment and found it lacking, we are left with the strong sense that the question *"why impeach?"* might best be answered by saying simply, well, *"Don't."* And in fact, while Tribe and Matz carefully canvas the arguments on all sides, their message rings perhaps most clearly when it sounds a cautionary note against impeachment—a warning inherently wise given the gravity of what is at stake, and all the more credible coming from two thoughtful scholars who may have once harbored different intuitions.[34]

Yet still, after considering impeachment through the lens of punishment, one cannot help feeling that standard justifications grounded in deterrence, incapacitation, and retribution come up short—that they miss an

commenced while the president is still in office (that is to say, independent of any impeachment proceedings), although the constitutionality of such a prosecution raises an open and sharply disputed question that divides not only legal scholars but also the Department of Justice. *See* Garrett Epps, *The Only Way to Find Out If the President Can Be Indicted,* Atlantic (May 23, 2018), https://www.theatlantic.com/ideas/archive/2018/05/presidential-indictment/560957/ [https://perma.cc/TU8M-HG7U] (interviewing "half-a-dozen distinguished scholars, of varying professional backgrounds," each of whom "had a different suggestion for how to [analyze the immunity] question"); *see also* Andrew Manuel Crespo, *Is Mueller Bound by OLC's Memos on Presidential Immunity?*, Lawfare (July 25, 2017, 9:00 AM), https://www.lawfareblog.com/mueller-bound-olcs-memos-presidential-immunity [https://perma.cc/9M42-RV4N] (describing "an internal divide within the Department of Justice on this important question"). Professor Tribe is among those experts who believe that a sitting president can be indicted while in office. *See* Laurence H. Tribe, *Why Impeachment Must Remain a Priority*, Take Care (May 23, 2017), https://takecareblog.com/blog/why-impeachment-must-remain-a-priority [https://perma.cc/AYU3-P9ER] (endorsing the argument that "the President enjoys immunity from trial, conviction and sentencing while in office, but not immunity from indictment"); *see also* Barry H. Berke et al., Brookings Inst., Presidential Obstruction of Justice: The Case of Donald J. Trump 81 (2017), https://www.brookings.edu/wp-content/uploads/2017//-of-justice-the-case-of-donald-j-trump-final.pdf [https://perma.cc/99UP-4SBD] (arguing that the president's unique status supports "special accommodation[s]" during a criminal prosecution but "not immunity"); Walter Dellinger, *Yes, You Can Indict the President*, N.Y. Times (Mar. 26, 2018), https://www.nytimes.com/2018/03/26/opinion/indict-president-trial.html [https://perma.cc/CK39-9TLM]; Bob Bauer, *A Disabled Executive: The Special Counsel Investigation and Presidential Immunities,* Lawfare (June 19, 2017, 10:10 AM), https://lawfareblog.com/disabled-executive-special-counsel-investigation-and-presidential-immunities [https://perma.cc/3EK9-A42W] (rejecting arguments that the president enjoys "temporary immunity from indictment or prosecution [as] grounded in dubious reasoning about the implications of the 'constitutional structure' . . . that, if taken to its logical conclusion, would also insulate a president from investigation into serious criminal wrongdoing"). For arguments in favor of immunity, *see, e.g.*, Symposium, *Ought a President of the United States Be Prosecuted*, 2 Nexus 7 (1997).

[34] *See* Laurence Tribe, *Trump Must Be Impeached. Here's Why.* Wash. Post (May 13, 2017), https://wapo.st/2QlS3o0 [https://perma.cc/HS8T-TEW7] ("The time has come for Congress to launch an impeachment investigation of President Trump for obstruction of justice."); Joshua Matz, *Donald Trump's Panoply of Abuses Demand More than a Special Counsel*, Guardian (May 23, 2017, 11:54 PM), https://www.theguardian.com/commentisfree/2017/may/23/donald-trump-abuse-of-power-special-prosecutor [https://perma.cc/FQ8S-7JFG] ("[W]hile some have urged that congressional investigations (and calls for impeachment) take a back seat while Mueller works, that is the wrong conclusion. If anything, the appointment of a special counsel confirms the need for a vigorous, bipartisan congressional review of attacks on America's political order.").

argument in impeachment's favor that may be closest to the mark. That argument has its roots not in utilitarian cost-benefit analyses or in retributivism's moral reasoning but rather in social philosophy, a scholarly tradition that views punishment fundamentally as a social practice through which we express and construct core and shared values.[35] Professor Joshua Kleinfeld ties the various arguments in this vein together under the heading "reconstructivism,"[36] an idea that echoes an earlier theory of punishment called "expressivism,"[37] and that is elegant in its simplicity. The core of Kleinfeld's account is that we and our fellow citizens inhabit "a normatively laden social fabric" that is "worth defending and reinforcing."[38] Serious criminal acts, including perhaps most especially acts of "apex criminality,"[39] tear that fabric apart. In the face of such existential societal violence, "societies typically do and must respond" with "[c]ondemnatory punishment," because punishment's "primary purpose and primary competence," Kleinfeld argues, "is to restitch a torn social fabric," an essential act of "normative reconstruction."[40]

And yet, powerful as this conception of punishment may be, it is when viewed through the lens of reconstruction that Tribe and Matz's account of impeachment offers perhaps its most vexing and most provocative analysis. For the authors engage the subject of impeachment deeply (if implicitly) on reconstructivist terms—and come away profoundly skeptical that punishing a president can ever help us as a nation to heal.

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[35] As Professor Joshua Kleinfeld explains, "The essential thought is this: criminal law has a distinctive role to play in the social world, a function that gives it a different center from other areas of law, because criminal law is the primary legal institution by which a community [constructs and] reconstructs the moral basis of its social order, its ethical life . . . ." Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1489 (2016). As Kleinfeld goes on to explain, "a diverse array of scholars and lawyers" have offered versions of this sociological theory of punishment, "[f]rom Hegel to James Fitzjames Stephen to Nietzsche to Durkheim to Lord Patrick Devlin to Foucault to Henry Hart to contemporaries like Jean Hampton, Jeffrie Murphy, David Garland, Antony Duff, Dan Kahan, Paul Robinson, Nicola Lacey, and Günther Jakobs." *Id.* at 1488.*; see also id.* (putting Hegel, Durkheim, Hampton, and Duff at the forefront of this field).

[36] *See id.* at 1490.

[37] *See id.* at 1533 (observing that "reconstructivism *is* a subcategory of expressivism" and pointing to "self-described expressivists" whose work "merges with reconstructivism") (first citing R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 79–80 (2001) and then citing Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996)). *But cf.* Kleinfeld, *supra* note 35, at 1533–34 (arguing that reconstructivism "has a great deal of content that expressivism by itself does not"). For further thoughts on expressivism, see Joel Feinberg, *The Expressive Function of Punishment*, in DOING AND DESERVING 95, 95–98 (1970); ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 370–74 (1981); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution,* 39 UCLA L. REV. 1659 (1992); Heidi Hurd, *Expressing Doubts About Expressivism,* 2005 U. CHI. LEGAL F. 405.

[38] Kleinfeld, *supra* note 35, at 1488.

[39] Huq, *supra* note 8, at 1508.

[40] Kleinfeld, *supra* note 35, at 1490, 1538–39; *see also* Paul H. Robinson & John M. Darley, *The Utility of Desert,* 91 NW. U. L. REV. 453, 457, 471 (1997) ("Criminal law . . . plays a central role in creating and maintaining the social consensus necessary for sustaining moral norms. . . . [Its] most important real-world effect may be its ability to assist in the building, shaping, and maintaining of these norms and moral principles.").

Notably, Tribe and Matz's point of departure from the reconstructivist ideal is not over the nature of the harms associated with high Crimes and Misdemeanors. On the contrary, using language Kleinfeld would embrace, Tribe and Matz describe such conduct as inflicting "injury on the state itself" and as posing "a menace to the political order" (pp. 39, 19). Indeed, Tribe and Matz frame impeachment in starkly reconstructivist terms when they warn that tolerance of such misdeeds "may forever change how the American people understand their own democracy," a concern we see perhaps most clearly presented when they ask: "Will we survive this presidency, and, if we do, *what kind of nation will we have become?*" (pp. 97, 53).[41]

But when it comes to existential threats to our social fabric, there is one thing that Tribe and Matz fear more than a president's high Crimes and Misdemeanors—and that is impeachment itself. With dark foreboding they warn that when "Congress ends a presidency before its natural life span, there's no avoiding profound and enduring national trauma" (p. 100). They fear that the "high-stakes drama of an impeachment proceeding might embitter Americans against one another, further fraying our sense of devotion to a shared national project" (p. 105). They caution that "impeachments can birth a cycle of angry, existential politics, breaking settled political structures and surfacing latent divisions" (p. 106). Indeed, they see impeachment itself as inflicting "'a measure of violence'" on "'our constitutional democracy,'" through a process "bound to be divisive and disheartening" and from which we would "'by no means inevitably recover'" (pp. 100, 234).[42]

In short, Tribe and Matz strongly suggest that it is the punishment, not the crime, that holds the greatest risk of our undoing—leaving us only to ask, *are they right?* And therein lies the ultimate dilemma, from which Tribe and Matz admirably do not shrink: "we can't know in advance whether an impeachment will raze or reinvigorate the cultures, norms, and institutions that define our democracy" (p. 106). Perhaps an impeachment, however "disruptive," will ultimately "trigger productive dialogue about reform and reformation," catalyzing the very "political reconstruction" that Kleinfeld's vision of punishment predicts and celebrates (p. 106). The Nixon saga may offer an encouraging example in this regard, to the extent that it "unified much of the nation," albeit "in fury and horror" (p. 106). And indeed, the

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[41] Emphasis has been added.

[42] The authors quote Jane Chong, *To Impeach a President: Applying the Authoritative Guide from Charles Black*, LAWFARE (July 20, 2017, 2:00 PM), https://www.lawfareblog.com/impeach-president-applying-authoritative-guide-charles-black [https://perma.cc/6ZK8-NCS5]. The notion that state-imposed punishment is a harmful act of violence—or even its own unique form of evil—has deep conceptual roots. *See, e.g.*, JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 158 (J.H. Burns & H.L.A. Hart eds., 1996) (1789) ("[A]ll punishment is mischief: all punishment in itself is evil. . . . [I]f it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil."); THOMAS HOBBES, LEVIATHAN 353 (C.B. MacPherson ed., 1985) (1651) ("A Punishment, is an Evil inflicted by publique Authority, on him that hath done, or omitted that which is Judged by the same Authority to be a Transgression of the Law; to the end that the will of men may thereby the better be disposed to obedience.").

very fact that presidential removal requires sixty-seven votes in the Senate means that it can only ever arise from serious "bipartisan consensus," which in turn "requires extensive national deliberation" and "agreement from many Americans," including many "who originally supported the disastrous leader" (pp. 140, 237). Reconstruction, in other words, is not necessarily beyond impeachment's reach.

Or perhaps, instead, we are already too far gone for all of that. Perhaps the "forces of decay, disinformation, and disunion" have already produced a "rot in our political system" beyond any power of punishment to repair (p. 241), leaving only the "distinct risk that impeachments will unleash and concentrate the ugliest forces in US politics" (p. 105).[43] If that is the case, then it may not ever matter whether the president is "guilty as charged," for "removing him would 'only serve to further undermine a public trust that is too much damaged already'" (p. 70).[44] In that event, impeachment is likely to yield only a "cynicism" that could "persist a generation or longer, seeping like a poison into American life" (p. 105).

It is on this discordant note that Tribe and Matz leave us, not with resolution but with a call to answer on our own the question *"why, if ever, impeach?"* More fundamentally, they leave us with a call to action, and to a project of reconstruction divorced from punishment—a call "to transcend our deepest divisions in search of common purpose and mutual understanding," to "draw together in defense of a constitutional system that binds our destinies," and ultimately to save our democracy ourselves (pp. 240–41). "Maybe impeachment should play a role in that process; maybe it will only make things worse" (p. 240). The best we can hope is to be guided by wisdom equal to that offered in this worthy book, and "that the nation survives with its spirit intact and the strength to rebuild all that's been broken" (p. 108). If, however, we conclude in the end that "the pain" of punishing the president is not "worth the price" (p. 100), then perhaps Tribe and Matz will have taught us a worthwhile lesson not just about impeachment but about punishment itself: Punishment of criminals, high and low, always carries with it a serious risk of destruction—of communities, of lives, of the social fabric—even as it enticingly promises to help us rebuild.

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[43] *Cf.* Jack M. Balkin, *Constitutional Rot*, CAN IT HAPPEN HERE?: AUTHORITARIANISM IN AMERICA 19, 19–20 (Cass R. Sunstein ed., 2018) (defining "constitutional rot" as a "decay in the features of our system that maintain it as a healthy republic" and observing that such "rot has been going on for some time in the United States, and . . . has produced our current dysfunctional politics").

[44] The authors quote a statement made by Senator Robert Byrd when casting his vote to acquit during the impeachment trial of President Clinton. For a record of that statement, see 145 CONG. REC. S1636 (daily ed. Feb. 12, 1999).