

RESPONSE TO PROFESSOR RISTROPH

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Alice Ristroph is a distinguished political theorist and legal scholar. I have long admired her work and learned from it. My book, *A Pattern of Violence: How the Law Classifies Crimes and What It Means for Justice*,¹ draws on her insights along with those of other scholars. So I am saddened by her reaction to its publication.²

I am particularly disappointed that Professor Ristroph thinks that I failed to give her appropriate credit. I do not believe that is true. The notes to the book cite her articles eighteen times.³ She is quoted by name four times in the book—three times in the text and once in the notes.⁴ I do not think that anyone could read the book and not see the high opinion that I have for her work.

It is true that I did not frame my book, as Professor Ristroph suggests that I should have done, as simply a “replication” or “an expansion or extension” of her work.⁵ That is because it wasn’t. *A Pattern of Violence* traces three sets of ideas about violence across a range of legal domains. The first is how violence is defined. The second is the significance of violence: how much turns on whether something is classified as violent or nonviolent. The third is how violence is understood: for example, whether it is thought to arise from people’s characters or from the circumstances in which they find themselves, and whether it tends to build on itself or is self-limiting. Professor Ristroph had written insightfully about the first set of issues, and I was careful to credit her for that. She had not, to my knowledge, written about the third. And in her 2011 Article, *Criminal Law in the Shadow of Violence*⁶—which she now suggests my book was merely replicating, expanding, or extending—she explicitly chose not to address the second.⁷

The different scope of my book led me to different conclusions. For example, one claim of *Criminal Law in the Shadow of Violence*, as I read it, was that criminal law could not get away from the ambiguity of the category of violence because it was too fundamental to how we think about the world.⁸ Professor

1. DAVID ALAN SKLANSKY, *A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE* (2021) [hereinafter *A PATTERN OF VIOLENCE*].

2. Alice Ristroph, *Read Thyself*, 74 ALA. L. REV. 493 (2022) [hereinafter *Read Thyself*].

3. *A PATTERN OF VIOLENCE*, *supra* note 1, at 247 nn.10 & 13, 248 n.23, 255 n.12, 257 nn.28 & 35, 263 n.86, 267 nn.33–36, 271 n.9, 276 n.31, 277 n.38, 290 nn.14 & 17, 291 n.19, 292 n.28.

4. *Id.* at 18, 19–20, 55, 267 n.33.

5. *Read Thyself*, *supra* note 2, at 494–95.

6. Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571 (2011) [hereinafter *Criminal Law in the Shadow of Violence*].

7. *See id.* at 621.

8. *See id.* at 587.

Ristroph argued that even when criminal law was not explicitly using violence as a master category—for example, when it distinguished instead between *mala in se* and *mala prohibita* or drew boundaries around the category of “crimes against the person”—it was still wrestling with the category of violence, just using different terminology.⁹ When I traced the history of criminal codes in Chapter 2 of my book, it was in support of a different, even opposing claim—that the distinction between violent and nonviolent offenses did not figure in criminal law in earlier eras nearly as much as it does today, and that it need not, and should not, carry so much weight.¹⁰ The book is framed by the contrast between substantive criminal law and criminal sentencing, which I argue makes too much hinge on the distinction between violent and nonviolent offenses, and the laws and regulations governing the police, which I argue do not make enough of the distinction between violent and nonviolent forms of abusive law enforcement.¹¹

It is nonetheless true that another large claim of my book—that the category of violence is socially constructed, including by the law, and that the way we configure the category deserves more attention—was also made, and made powerfully and insightfully, by Professor Ristroph in 2011.¹² That does not make my book a “reprise” or “hepeating” of her Article, any more than her Article was a reprise of earlier scholarship that had made similar points.¹³ It meant I needed to credit her, which I did. Anyone with the slightest uncertainty whether my book draws too heavily on Professor Ristroph’s Article, or fails to give her proper attribution, should read her Article and then read my book.

Professor Ristroph is right that my book is more reformist and less radical than her work. I do not call for abolishing criminal law, and I suggest, for

9. See *id.* at 576–88.

10. A PATTERN OF VIOLENCE, *supra* note 1, at 41–87.

11. See, e.g., *id.* at 1–5, 232.

12. See *Criminal Law in the Shadow of Violence*, *supra* note 6, at 575.

13. See, e.g., STUART HALL ET AL., POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER 4–18, 32–38, 67–68, 74, 148, 225–26, 282, 300–02 (1978); STUART A. SCHEINGOLD, THE POLITICS OF LAW AND ORDER: STREET CRIME AND PUBLIC POLICY 24–27 (Irving E. Rockwood ed., 1984); Paul G. Chevigny, *From Betrayal to Violence: Dante’s Inferno and the Social Construction of Crime*, 26 LAW & SOC. INQUIRY 787, 798 (2001); Richard Delgado, *Rodrigo’s Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503, 524–31 (1994); M. Jackson Jones, *Ten Out of Eleven Federal Circuits Agree: No One Knows Whether Section 4B1.2 of the United States Sentencing Guidelines Covers Burglary of Commercial Structures*, 8 APPALACHIAN J.L. 59, 65–88 (2008); Heather Harrison Volik, *Driving Down the Wrong Road: The Fifth Circuit’s Definition of Unauthorized Use of a Motor Vehicle as a Crime of Violence in the Immigration Context*, 39 ST. MARY’S L.J. 149, 161–84 (2007); Robert Paul Wolff, *On Violence*, 66 J. PHIL. 601, 606 (1969); John Patrick Crossett, Comment, *The United States Sentencing Commission and the Problem of Non-Residential Burglary Under the Career Offender Provision of the Federal Sentencing Guidelines*, 6 GEO. MASON L. REV. 675, 682–706 (1998); Maria-Theresa Davenport, *Deportation and Driving: Felony DUI and Reckless Driving as Crimes of Violence Following Leocal v. Ashcroft*, 96 J. CRIM. L. & CRIMINOLOGY 849, 853 (2006); Jeremy D. Feinstein, Note, *Are Threats Always “Violent” Crimes?*, 94 MICH. L. REV. 1067, 1074 (1996); R. Daniel O’Connor, Note, *Defining the Strike Zone—An Analysis of the Classification of Prior Convictions Under the Federal “Three Strikes and You’re Out” Scheme*, 36 B.C. L. REV. 847, 853–75 (1995); see also *Rosales-Lopez v. United States*, 451 U.S. 182, 194–95 (1981) (Rehnquist, J., concurring) (doubting that “a precise definition of ‘violent crime’ . . . will ever be arrived at”).

example, that it is coherent and important to distinguish between more violent and less violent prisons.¹⁴ Just as Professor Ristroph bracketed the question of how much significance the law should attach to violence,¹⁵ I explicitly refrained from addressing the inherent violence of the law. I thought then, and think now, that limiting my focus in this way allowed me to sharpen my contribution.

Imagining a world without prisons is vital work. So is questioning the need for criminal law. But I believe that there will be prisons and criminal law at least for the duration of our lifetimes. That makes a range of reforms imperative in the near term, including sharply reducing the scale of imprisonment in the United States and ending the scandalously inhumane conditions in many American prisons. Being imprisoned anywhere in the United States is demeaning, degrading, and often needlessly cruel. But the horrendous violence tolerated in some prison systems in the United States takes the violation of human dignity and the institutionalized cruelty to entirely different levels, and that needs addressing in the here and now. Similarly, it is essential to question the institution of policing and to build space for approaches to community safety that do not involve quasi-militarized forces of armed officers. But in one form or another, police will be with us for the foreseeable future, so it is also critical—a matter of life and death for thousands of people—to reduce the present levels of police violence in the United States. Part of that project, my book argues, is seeing police violence as violence and distinguishing it from other forms of police abuse.¹⁶

It is reasonable to challenge me about all of this—as Professor Ristroph does toward the end of her Review Essay when she suggests that by bracketing the question of the law’s own violence and by arguing for reforming criminal law rather than for its abolition, I wound up propping up institutions of injustice and inhumanity.¹⁷ I think that is making the ideal the enemy of the urgent, but there are serious and crucial discussions to be had about how best to balance idealism and pragmatism in remaking the criminal legal system. So, it is all the more regrettable that Professor Ristroph chose to devote the bulk of her Review instead to a groundless attack on my scholarly integrity.

One final note: In addition to citing Professor Ristroph in the notes to my book and quoting her by name in the text, I also thank her in the acknowledgements.¹⁸ That is because in 2018, three years before the book was published, I presented its early chapters, which include most but not all of the material to which Professor Ristroph now objects, at a small roundtable conference that we both attended. I wish she had given some hint then of the concerns she now raises, either in her comments on my chapters at the

14. A PATTERN OF VIOLENCE, *supra* note 1, at 186–91.

15. See *Criminal Law in the Shadow of Violence*, *supra* note 6, at 621.

16. See A PATTERN OF VIOLENCE, *supra* note 1, at 94–107, 114, 238.

17. See *Read Thyself*, *supra* note 2, at 510–11.

18. A PATTERN OF VIOLENCE, *supra* note 1, at 301.

conference, or when I pulled her aside to ask whether she thought my book would overlap too much with the book she was writing, or in the email she sent me after the conference.