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Book Review

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Abstract

What is violence? What may appear in its face to be a simple question does not have a simple answer, especially when we are searching for it within our legal systems. The answer is not clear, and yet it has wide-reaching and potentially life-changing implications. Professor and former Assistant United States Attorney David Alan Sklansky does not seek to answer this question, but rather suggests that there is no definition of violence “that will allow the category of violence to do the work that we have asked it to do.”3 In A Pattern of Violence, Sklansky instead turns to the answers of others—of politicians, judges, and US legislators, now and throughout the country’s history. Violence is often defined in order to serve a particular purpose; it is not neutral. A Pattern of Violence reveals how the US legal system’s inconsistent and sometimes contradictory views of violence inform the legal treatment of violent crime.

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Book Review

A Pattern of Violence: How the Law Classifies Crimes and What It Means for Justice by David Alan Sklansky[1]

AINSLEY DOELL[2]

WHAT IS VIOLENCE? WHAT MAY APPEAR ON ITS FACE to be a simple question does not have a simple answer, especially when we are searching for it within our legal systems. The answer is not clear, and yet it has wide-reaching and potentially life-changing implications. Professor and former Assistant United States Attorney David Alan Sklansky does not seek to answer this question, but rather suggests that there is no definition of violence "that will allow the category of violence to do the work that we have asked it to do."[3] In *A Pattern of Violence,* Sklansky instead turns to the answers of others—of politicians, judges, and US legislators, now and throughout the country's history. Violence is often defined in order to serve a particular purpose; it is not neutral. *A Pattern of Violence* reveals how the US legal system's inconsistent and sometimes contradictory views of violence inform the legal treatment of violent crime.

A Pattern of Violence interrogates the way that the law thinks about violence: how it is understood and how it is employed, both in codified law and broader legal discourse.[4] Much of the US legal system's response to crime is predicated on the idea of violence. So much so that, according to Sklansky, the term has

1. (Harvard University Press, 2021) [Sklansky, *Violence*].
2. JD Candidate (2023), Osgoode Hall Law School.
3. "106 David Sklansky" (7 June 2021) at 00h:15m:32s, online (podcast): *Decarceration Nation* <decarcerationnation.com/106-david-sklansky>.
4. Sklansky, *Violence*, *supra* note 1 at 6.

become an overly burdened "master category."[5] Characterizing behaviour as "violent" is one way in which people seek to classify it as serious and worthy of attention. The law has developed a tendency to categorize crimes which are deemed to be the most reprehensible as "violent," which has led to an unstable conception of what violence is. Sklansky provides a warning that when we seek to define violence, we risk overlooking everything that does not fall into the binary categories we have constructed.[6] He urges that we interrogate two processes: how the rhetoric of violence functions around us and seeps into our laws, and how the law diverges from reality or our true beliefs about which crimes warrant the most serious response.

The book consists of seven chapters. The first two feature a broader exploration of violence that highlights the conceptual murkiness of violence as a legal problem and introduces a vital distinction in American criminal law: violent versus non-violent offenses. These chapters set up the author's arguments and provide the context to underscore the importance of the next five chapters, from which several significant patterns begin to emerge. By exploring the historical development of the concept of violence and tracking the way its significance has shifted over time, Sklansky paints a somewhat amorphous picture of "violence." Starting with this understanding, it is much easier to appreciate that violence is not a static, uniform concept across different legal domains. Chapters three through five each narrow in on a different domain that is affected by its own legal conceptions of violence. Sklansky addresses police violence; rape and domestic assault; violence and youth; prison violence; and constitutional rights to freedom of speech and gun ownership.

One of the most prevalent patterns that emerges throughout Sklansky's book is the idea that violence is often incorrectly seen as "dispositional." Early on, Sklansky introduces the notion that violence can be understood as either "situational" or "dispositional": Is violence something that is borne from its context or is it indicative of characterological features?[7] How this question is answered by a legal actor can have a significant impact on their belief about how the law should address violence. The belief that violent crimes result from the free actions of violent individuals, rather than from context, for example, lends itself to arguments in favour of harsher prison sentences and views about the inevitability of recidivism. Characterological understandings of violence often perpetuate harm to marginalized communities. For example, Black men

5. *Ibid* at 236.
6. That is, the classification of behaviour as either violent or non-violent. *Ibid* at 5.
7. *Ibid* at 37.

are far more likely to be characterized as violent. They are convicted and given disproportionately harsh sentences far more often than white men charged with similar offenses.

Any exploration of violence in the United States would be remiss not to address the role that race plays in the legal system. This is not a topic that Sklansky shies away from, nor is this the first time that he has addressed the interactions between race and the law.[8] He traces this interaction from the Black criminality of the Jim Crow era[9] to the contemporary moment. A great deal of attention is paid to the racial element of violence in the chapter on police brutality, in particular, and it is noted in each chapter. For example, in his discussion of the "school-to-prison pipeline," Sklansky observes that zero-tolerance policies against violence in schools have disproportionately disadvantaged young Black and Latino[10] students while not actually leading to decreased rates of violence among youth.[11] He also addresses the role that fear of Black men has played in the public imagination around sexual violence and, in discussing the idea of "permissible violence," points to the way that violence against Black bodies is lauded in the context of sports.[12]

Permissible versus impermissible violence is another distinction which becomes centrally important to *A Pattern of Violence*—the idea that there are certain kinds of violence that are not only seen as allowable, but even desirable. Violence in sports, for example, is almost never condemned, both because of the social utility of sports and the fact that the players are thought to have consented.[13] More sinister is the idea that prison violence is permissible. While incarcerated individuals have the protection of the law, their lived reality does not always reflect this.[14] Sklansky discusses how prison violence is treated as a spectacle, as a punch line, and seen as something allowable because, after all, prisons are supposed to be sites of punishment.[15] Often the kinds of violence that are deemed to have a social utility and are therefore desirable in some form are called something else entirely, to avoid the negative connotations of the term. Police violence, for example, is repackaged as "use of force."[16] This idea

8. See, *e.g.* David Sklansky, *Democracy and the Police* (Stanford University Press, 2008).
9. Sklansky, *Violence*, *supra* note 1 at 62-63.
10. *Ibid* at 153.
11. *Ibid* at 167.
12. *Ibid* at 35.
13. *Ibid* at 33-34.
14. *Ibid* at 186.
15. *Ibid* at 181-97.
16. *Ibid* at 115.

of permissible violence complicates the use of "violence" versus "non-violence" as a distinction that is foundational to the US criminal justice system.

Many of the topics featured in *A Pattern of Violence*, such as police violence, mass incarceration, and sexual violence, are already the subjects of growing bodies of literature. However, Sklansky frames these topics and brings them together in a way that is both insightful and rewarding. Literature focusing on the interactions between violence and the law tends to address either the violence inherent in the law,[17] or, from a more localized lens, a particular type of violence. Sklansky is doing something new by interrogating how violence is conceptualized and functions across areas of criminal law. The value of his book comes from the patterns that he extrapolates from the subjects of his focus. This book's project is to position these important topics side by side and thereby reveal how the law's treatment of violence both differs and remains the same across contexts. Stopping to notice and interrogate these patterns is essential to ensuring that the law does not give meaning to violence in a way that ends up "justifying the unjustifiable."[18]

Sklansky does an excellent job addressing the intersection of race and violence. Over the course of the book, he also addresses the ways in which gender and class complicate beliefs about violence.[19] But these different considerations are sometimes treated in silos. At times, his discussion could have benefited from more intersectional nuance. The opening of chapter four provides an example. As with all of his chapter openings, Sklansky uses an event or pop culture artefact to introduce the chapter's subject and its salience. Here, he opens with a description of George MacDonald Fraser's racist and sexist novel, *Flashman*, but his discussions of race and sex remain separate. Harry Flashman is racist, but Sklansky notes that the "deeper problem" is the way that he ruthlessly beats women.[20] Sklansky missed an opportunity here to acknowledge the intersection of gender and race in sexual violence in the context of victimization. When he comes around to this topic later in the chapter, it is from a historical perspective[21] and to note that the legal system tends "to respond more forcefully" when victims are white.[22] This falls short of properly recognizing the inadequacy of law enforcement's response to claims made by Black women. It could be argued that engaging in this analysis is beyond the scope of the book, which is a legal rather

17. Much of this literature builds on the work of Robert Cover. See *e.g.* Austin Sarat, ed, *Law, Violence, and the Possibility of Justice* (Princeton University Press, 2001).
18. Sklansky, *Violence*, *supra* note 1 at 229.
19. *Ibid* at 8.
20. *Ibid* at 123.
21. *Ibid* at 135 (the routine rape of enslaved Black women).
22. *Ibid* at 139.

than a sociological study. However, in a discussion of "how the law classifies crimes and what it means for justice," it seems highly relevant that there are particular intersectional identities that do not have the same access to justice as others who are subject to the same or similar victimization. Sklansky notes elsewhere that violence "exists alongside and often works in combination with other dimensions of domination, persecution, and victimization."[23] The general recognition of the intersectional nature of violence is there, but more could have been done, in my opinion, to make these connections.

Sklansky asks, *is there something exceptional about the American experience with violence?* He posits violence as the "dark reverse" of the "freedom and abundance" of America.[24] While his book centres its discussion on the American legal system, it proposes a line of thinking that is fundamentally important no matter where readers are located. What Sklansky's book argues for, at the most general level, is the importance of critically reflecting on the ideas that underpin the US legal system. To dismiss the topics that he engages with as tragedies that do not concern those of us located outside of the United States would be just as dangerous as the totalizing categorizations of violence that Sklansky warns against. His interpretative project can and should be applied to other legal systems and contexts. The patterns that he points to reveal an inconsistent treatment of violence that allows the law to act in ways that may go against our moral intuitions and fail to appropriately address the problems that we think it should.

Sklansky does an artful job of giving each topic he addresses the attention and care it deserves while taking on such a large task. *A Pattern of Violence* succeeds in demonstrating both the fluidity of conceptions of violence and how fundamental they are to the US justice system. It is essential that foundational concepts are not taken for granted, and that what is meant by "violence" is continually revisited, to ensure that it is being used to capture the activities and offenses that we want it to, and nothing more. Inappropriate responses to violence often end up disproportionately harming those in our society who are already more vulnerable. *A Pattern of Violence* is an important read for legal professionals, but the clarity of Sklansky's style and argument makes it a widely accessible and engaging read.

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23. *Ibid* at 239.
24. *Ibid* at 39, citing David T Courtwright, *Violent Land: Single Men and Social Disorder from the Frontier to the Inner City* (Harvard University Press, 1996).