

READ THYSELF

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“What makes a crime violent?” I asked in 2011. “What is a ‘violent’ crime?” asks David Sklansky in A Pattern of Violence, a decade later. Over that decade, criminal law scholars, as well as political leaders, advocates, and activists outside the academy, have increasingly scrutinized the concept of violence in criminal law. There are a number of ways of investigating this issue, and a wide range of lessons one might take from the investigation. Amid this growing attention to violence, Sklansky’s approach is eerily similar to my own, until suddenly, it is not. As explained in this Review Essay, in reading Sklansky’s book, I was—and was not—reading myself. An exploration of both the points of convergence and the points of departure between Sklansky’s work and my own may shed some light on the fate of radical critiques and the future of criminal law.

A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE. By David Alan Sklansky. Cambridge, MA: Harvard University Press. 2021. Pp. 239. \$29.95.

What makes a crime *violent*? The word “violence” triggers deeply held intuitions about physical harm, but it is also the source of considerable dispute and contestation. The intuitive familiarity of the concept of violence, in conjunction with its actual malleability, enables it to serve as an important source of legitimation for the criminal justice system. But these same features of the concept of violence may also contribute to the dysfunction of American criminal justice. Policies ostensibly designed to reduce “violent crime” are too readily embraced by the fearful without sufficient critical scrutiny. The shadow of violence impedes criminal justice reform, leaving in place policing and punishment policies that often fail to prevent, and may even exacerbate, incidents of actual physical harm. [David Sklansky’s new book] situates the law and rhetoric of “violent crime” in historical and political context in order to encourage reflection on our concern with violence and more rigorous evaluation of the steps we take to address that concern.¹

The preceding paragraph has been published before. It is the abstract of an article I wrote just over a decade ago, *Criminal Law in the Shadow of Violence*, as it was published in the *Alabama Law Review*, except I have replaced “[t]his [a]rticle”² with “David Sklansky’s new book.” My abstract could have been a blurb on the inside cover of Sklansky’s book jacket, but here’s his actual jacket text:

* Professor of Law, Brooklyn Law School. Thanks to the many colleagues who provided feedback on this project. I’m grateful to David Sklansky for many conversations, including one early in 2022 after I sent him a draft of this review. And I am particularly grateful to the student editors of the *Alabama Law Review*. Of course, any errors in my text remain my responsibility.

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

2. *Id.*

We take for granted that some crimes are violent and others aren't. But how do we decide what counts as a violent act? David Alan Sklansky argues that legal notions about violence—its definition, causes, and moral significance—are functions of political choices, not eternal truths. And these choices are central to failures of our criminal justice system.³

At the level of generality of a book jacket or an article abstract, Sklansky's *A Pattern of Violence* echoes my 2011 article. Of course, a book is so much more than a summary paragraph, and across seven chapters and 239 pages, Sklansky says a lot that I did not. For example, he gives careful attention to two different accounts of the causes of violence—one that focuses on individual character and one that focuses on situation and context.⁴ And Sklansky discusses in much greater detail the ways that biases and prejudices shape ideas about violence.⁵ I treated the influence of bias as fairly obvious,⁶ and Sklansky will do much more to convince skeptics of this point. But his overarching arguments—that criminal law does not have a consistent account of violence (7), and that the inconsistencies (some sloppy, some strategic) around violence contribute to criminal law's problems and impede reform (12)—are a reprise of my 2011 article. Sklansky's endnotes include several citations to that article (and other works of mine), but he does not anywhere describe the thesis of the 2011 article or note that his own thesis follows mine. In Sklansky's main text, I appear occasionally as one of many theorists who has mused about violence as an abstract concept (*e.g.*, 18, 19–20), but not as someone who closely analyzed conceptions of violence *in criminal law* and made the same arguments *about criminal law* that Sklansky now presents as his own.

Asked now to write a Review Essay of Sklansky's book, I find myself in an awkward position.⁷ My assessment of the book is that *A Pattern of Violence* makes a powerful and important argument. But, of course, *I* would think so. The book struck me first as what social scientists call a successful replication study: it asks the same questions as my prior study, uses approximately the same methods, and reaches the same conclusions.⁸ It does expand the sample size, in that it

3. DAVID ALAN SKLANSKY, *A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE* (2021) (emphasis omitted) (book jacket). The quotation in the Abstract to this Review, "What [i]s a '[v]iolent' crime?" can be found on page 69 of *A Pattern of Violence*.

4. *Id.* at 12.

5. *Id.* at 230–39.

6. See *Criminal Law in the Shadow of Violence*, *supra* note 1, at 617; see also *id.* at 575 ("[T]he term 'violence' . . . becomes an abstraction, and eventually that abstraction may become a repository for all we find repulsive, transgressive, or simply sufficiently annoying?").

7. This Review was first written at the request of a faculty-edited criminal justice journal, but the gentlemen who edit that journal instructed me not to mention the word *plagiarism* at all, not even to state my view, explained below, that the word does not apply to Sklansky's book. I decided it would be best to publish elsewhere and could imagine no better venue than the *Alabama Law Review*, a journal to which I remain grateful for its decision to publish my 2011 article.

8. Since the publication of my 2011 article, but alas, probably not because of it, the category "violent crime" has come under increased scrutiny both in the academy and outside of it. See, *e.g.*, JUST. POL'Y INST., *DEFINING VIOLENCE: REDUCING INCARCERATION BY RETHINKING AMERICA'S APPROACH TO*

considers conceptions of violence not only in the specific areas of law that I examined but also in others. In social science, a good replication study that expands the sample size is typically something to celebrate because it gives us greater confidence in our own efforts to understand the world.⁹ Neither my article nor Sklansky's book is social science, but still, an investigation of violence in criminal law that asked the same questions that I did and gave more detailed answers would be a valuable contribution. Had Sklansky openly framed his book as an expansion or extension of my work (or, still better, a disagreement with it), I would not now be faced with the question whether to reclaim my arguments from his adverse possession of them.¹⁰ Then this Review could start directly with the ways in which his book makes novel contributions—and the ways in which it goes astray. Ultimately, my primary concern with *A Pattern of Violence* is not that it “hepeats”¹¹ at length, though that neologism, which has as much to do with the selective hearing of the audience as it does with the repetitiveness of the speaker, certainly seems applicable. Beyond the hepeating, my greater concern is a worry that the book may have a hidden agenda: it may seek to appropriate critical analysis of criminal law in order to defang the critique and rehabilitate the law. To explain this worry, I must identify the ways in which, in reading this book, I was—and was not—reading myself.

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Read thy self is the directive that Thomas Hobbes gives at the outset of *Leviathan*, and that directive (along with many other insights from Hobbes) has influenced me deeply as a political theorist.¹² In this “bit of bad-assery,” as Ta-

VIOLENCE (Sarah E. Baker ed., 2016); Cecelia Klingele, *Labeling Violence*, 103 MARQ. L. REV. 847 (2020); Michael O'Hear, *Third-Class Citizenship: The Escalating Legal Consequences of Committing a “Violent” Crime*, 109 J. CRIM. L. & CRIMINOLOGY 165 (2019). None of these valuable contributions could be characterized as a replication study of my own 2011 article; as discussed below, these works address the same general topic but use different frames of inquiry, methods, and sources. See *infra* note 79. As the opening quotations of the *Justice Policy Institute's* report reveal, politicians too have begun to wonder about the category “violent crime.” See JUST. POL'Y INST., *supra*, at 1 (quoting former President Barack Obama and Senator Cory Booker).

9. A replication study identifies itself as such. Indeed, one standard practice is preregistration, in which the researchers who seek to replicate an earlier study register their plans with the authors of the original study. See Susan Goldin-Meadow, *Preregistration, Replication, and Nonexperimental Studies*, ASS'N FOR PSYCH. STUD. (Sept. 9, 2016), <https://www.psychologicalscience.org/observer/preregistration-replication-and-nonexperimental-studies>.

10. Of course, if Sklansky had acknowledged the extent to which his conclusions replicate mine, a publisher or colleague might have encouraged Sklansky to develop a thesis more clearly differentiated from my own. I'm confident he could have done so, and then his book would still have done more to advance scholarly understandings of violence and criminal law. See *infra* text accompanying notes 73–75.

11. See *Hepeat*, Macmillan Dictionary, <https://www.macmillandictionary.com/us/dictionary/american/hepeat> (last visited Oct. 12, 2022) (defining hepeat as “when an idea or opinion that has been stated by a woman or non binary person is ignored but then greeted with enthusiasm when it is repeated by a man”).

12. THOMAS HOBBS, *LEVIATHAN* 10 (Richard Tuck ed., rev. ed. 1996).

Nehisi Coates calls the passage,¹³ Hobbes asks how we humans might better understand one another. Among the key lessons in trying to understand humans are remember always that you are one; examine your own motivations; ask what you share with other humans; and when you see differences, remember that you are all the same species and ask how those differences occur.¹⁴ For the scholar of humans, *being* a human is both an asset and a liability—it gives us many insights into the subject of our study, but it also renders us subject to the same shortcomings that are usually easier to identify in others than in ourselves. I try to remind myself, *you're in the mix and not above it, you're one of these creatures, too*. We aren't good at tracing the origins of our own beliefs or identifying our own biases. Awareness that a cognitive bias exists does not do much to eliminate decisions that reflect the bias. That is part of what's so hard about the concept of violence: It is such an easy place for biases to operate, and at the same time, the bodily experience of injury seems so obvious and undeniable that we think we must know what we are talking about when we talk about violence.

I wrote the 2011 article motivated by a sense that the inability to achieve criminal law reform “stems partly from a failure to attend adequately to violence.”¹⁵ My argument was not that we avoid talking about violence, but that we do not examine closely the things we say about it. I sought to show that “all the talk about violent crime has not produced sufficient critical analysis of what we classify as violent.”¹⁶ I wrote that “the centrality of the concept and rhetoric of violence to the criminal law suggests that those who would change the law must pay attention to violence.”¹⁷ I identified racialized policing and mass incarceration as specific examples of “[w]hat [v]iolence [h]ath [w]rought,” or what the rhetoric of violence has helped legitimate and sustain.¹⁸

Sklansky, in turn, wrote his book because he was “increasingly convinced that thinking sensibly about criminal justice requires thinking sensibly about violence” (5). Whereas I asked about “the conceptual and normative presuppositions” about violence that underlie criminal law,¹⁹ Sklansky asks “how violence is understood, and how the concept of violence is employed, in

13. See Ta-Nehisi Coates, *Reading Thy Self*, ATLANTIC (Jan. 28, 2013), <https://theatlantic.com/personal/archive/2013/01/reading-thy-self/272562/>. Coates uses the method to investigate slavery and the Civil War: “I believe, as Hobbes lays out here, that I am subject to the same whims as any slaveholder. I don’t feel that there is anything in my bones that makes me any more moral. Thus the question becomes not ‘How awful was Robert E. Lee?’ but ‘How could I have acted as he did?’” *Id.*

14. HOBBS, *supra* note 12. Again, Coates illustrates the method well. After asking yourself how you could have acted as Robert E. Lee did, Coates explains, “[Y]ou work to not ask that question with incredulity, but at the same time without apology[.] It’s ‘Read Thy Self’ not ‘Construct Some Way [t]o Excuse Thy Self.’” Coates, *supra* note 13.

15. *Criminal Law in the Shadow of Violence*, *supra* note 1, at 575.

16. *Id.*

17. *Id.* at 621.

18. *Id.* at 610–18.

19. *Id.* at 576.

legal rules and legal discourse” (6). Sklansky notes that “[t]he twin tragedies of contemporary criminal justice”—“mass incarceration and the collapse of police reform”—are both related to violence and, more specifically, “*ideas* about violence: how the legal system understands violence and tries, or does not try, to tame it” (2, 4). “Confused thinking about violence does not just make the legal system less effective,” Sklansky writes. “The way the law thinks about violence can determine whether the law itself becomes an engine of inequality and a factory of needless suffering” (230).

Do all these claims seem general enough that any number of scholars might make them? Let’s get more specific. Again, I took as my point of departure the question of what constitutes a violent crime. To answer this question, I wrote:

[I]t would help to know what kind of question it is. The inquiry may be one of positive law, or of statutory interpretation. But it also seems to invite explorations in normative legal theory, philosophy, and political theory, among other disciplines. . . . [W]hen courts or legislatures consider what counts as violence, they rely either implicitly or explicitly on conceptual constructs. Even if the definition of violence is a question of positive law, one can and should ask about the conceptual and normative presuppositions that underlie the positive law.²⁰

I then investigated legal definitions of violent crime from three angles: common law classifications of crimes;²¹ the precise definitions of specific “violent” offenses such as homicide, sexual assault, or domestic violence, alongside the idiosyncratic exceptions from criminal liability created for boxing and other “manly sports”;²² and finally, federal sentencing provisions that enhance penalties for persons with prior convictions for offenses classified as “violent.”²³ Throughout, I drew upon a range of sources both legal and non-legal, taking specific care to place ideas about violence in historical and political context. As a political theorist, I also examined philosophical studies of violence, emphasizing in particular two questions that recur in those studies: Is violence necessarily physical, involving force or harm against a body? And is it necessarily wrongful, such that violence always implies a violation of some kind?²⁴ Inspired by scholars such as Rene Girard, I characterized violence as a “dual concept, used to describe both the overwhelming of the human body and the transgression of social and cultural norms.”²⁵

20. *Id.*

21. *Id.* at 576–84.

22. *Id.* at 588–93.

23. *Id.* at 603–10.

24. *Id.* at 584–88.

25. *Id.* at 574; *see also id.* at 575 (“In the study of violence, one might begin with concrete facts of human embodiedness and physical vulnerability; one might strive to set aside value judgments. But as we trace the seemingly empirical, positive notion of violence, like ants on a Mobius strip we eventually find ourselves enmeshed in the normative, and if we continue farther, we wind up back in the material world.”). It is thus silly to suggest, as Sklansky does in a Response to this Review, that I did not address “the significance

Sklansky's book takes much of the same approach. His first chapter begins with an examination of philosophical definitions of violence, highlighting (as I did) both disputes about whether violence is necessarily physical and whether it is necessarily wrongful (15–22). He too emphasizes the special treatment of sports violence (33–36). To be sure, here the work is primarily descriptive: Sklansky is describing the same literature that I did, relying on many of the same sources.²⁶

In his second chapter, Sklansky examines the distinction between violent and nonviolent offenses, considering (as I did) other traditional subcategories of criminal offenses, though where I gave greater attention to the categories “crimes against the person” and “*mala in se*” offenses,²⁷ Sklansky emphasizes instead “infamous crimes” and the felony/misdemeanor distinction (45–51). I called Part II of my article “Codifying/Classifying Violence”; Sklansky offers a section called “Codes and Classifications” that examines (as I did) the specific phrases “‘violent crime[.]’ or ‘crimes of violence’” in federal law (51–54).²⁸ In the last part of Chapter Two, he examines (as I did) sentencing provisions that enhance penalties for persons with prior convictions classified as “violent,” giving particular emphasis (as I did) to the Armed Career Criminal Act (75–87).²⁹ Sklansky does give more attention than I did to definitions of “violent crime” in state sentencing law (69–74), and his analysis of the legislative history of federal sentencing law is far lengthier and more detailed than my own (75–

of violence” or that the definition of violence and the significance of violence are separate inquiries. David Alan Sklansky, *Response to Professor Ristraph*, 74 ALA. L. REV. 513, 513 (2022). Scholars occasionally try to define violence while bracketing questions of the significance of the designation, but, as I argued, their effort eventually fails. See, e.g., *Criminal Law in the Shadow of Violence*, *supra* note 1, at 587–588; c.f. SKLANSKY, *supra* note 3, at 231 (“Ideas about the significance of violence and the definition of violence are closely related . . .”). Oddly, Sklansky cites my demurral of the question of whether violence is “worse than other forms of wrongdoing” as support for the very different claim that I chose not to address about the significance of violence. Sklansky, *supra* (manuscript at 100 n. 7) (citing *Criminal Law in the Shadow of Violence*, *supra* note 1, at 621). But one need not offer one’s own moral ranking of violence vis-à-vis other acts in order to explore the significance of violence, if Sklansky is right that significance means “how much turns on whether something is classified as violent or nonviolent.” *Id.* (manuscript at 100). Indeed, like me, Sklansky doesn’t tell his readers whether violence is the very worst thing that humans can do to one another, nor does he offer his own independent assessment of its “moral significance.” C.f. SKLANSKY, *supra* note 3, at 234–35 (acknowledging that his study “does not tell us how violence can best be defined, what moral significance it has, or how it can best be understood”). It would be interesting to know whether Sklansky subscribes to the view that fraud is more blameworthy than violence, but for now, we can only guess.

26. Sklansky also relies on many sources that I did not use. For example, his deft deployment of pop culture is admirable. Among other fan favorites, the television show *Cheers* (13–14), the television show *Justified* (19), and some Clint Eastwood movies (24, 110) help Sklansky illustrate his claims.

27. *Criminal Law in the Shadow of Violence*, *supra* note 1, at 584. The two of us agree, however, that none of these other subdivisions of criminal law maps neatly onto the category of “violence.”

28. *Id.* at 588. This chapter is one of a few places where my name appears in Sklansky’s main text; he quotes my observation that “from the general public to the specialists, everyone seems to think of crime in terms of violence” (55) (quoting *id.* at 572–73). Sklansky renders me one of several thinkers who has noticed that people think of crime in terms of violence, but he does not mention that I used this observation to introduce a specific *argument* about the concept of violence in criminal law, nor that his own argument echoes the one I made.

29. *Id.* at 603–10.

85).³⁰ From this analysis, Sklansky concludes that “[t]he category of violent crime is thus very much a social and legal construct” (74), echoing my own claim that “in federal jurisprudence, ‘violent crime’ is a judicial construction . . . [and] judicial constructions are likely to reflect *social* constructions.”³¹

Sklansky’s Chapter Four addresses rape and domestic assault, noting that debates about “what should count as violence—and, even more so, about the nature of violence, and sexual violence in particular”—have shaped this area of law, though the law has answered these questions differently at different times (125). Unsurprisingly, Sklansky emphasizes that “gender is the demographic fault line that has most powerfully shaped these areas of the law” (125). That is certainly true. Sklansky’s analysis here is a close parallel to my 2011 arguments in sections called “Sex and/or Violence” and “Domesticated Violence,” both of which emphasized shifting ideas about the extent to which overwhelming physical force was a necessary element of rape or domestic abuse.³² I argued that

[t]he ongoing struggles to define and prosecute rape illustrate the law’s normative construction of violence—and the limits of legal construction. . . . [I]t’s not just a question of what we think about women. It’s also a question of what we think about violence, and what we think is violence.³³

I noted that “domestic abuse provides one more illustration of the contingent and contested parameters of violence. A reform campaign that began by emphasizing the vulnerable, injured body has evolved into an argument that

30. *See id.* at 614 (noting in passing that many states have sentence enhancements for prior violent crime convictions, and citing a few examples); *see also* O’Hear, *supra* note 8 (providing a fifty-state survey of sentencing law and collateral consequences imposed on persons convicted of offenses classified as violent). Sklansky’s analysis of the legislative history of the Armed Career Criminal Act is detailed but not entirely accurate. Sklansky argues that the proponents of this law were concerned more with recidivism than violence, and he says that “no one argued explicitly, before the passage of the ACCA in 1984, that burglary was a ‘violent crime’” (77). In fact, the idea that burglary should be classified as violent arose in legislative discussions at least as early as 1983. *See* S. REP. NO. 98-190, at 4 (1983) (challenging the view of burglary as non-violent and noting that “its character can change rapidly”); *see also id.* at 5 (“The prevalence of robbery and burglary as the most common violent street crimes is undeniable.”); S. REP. NO. 98-225, at n.692 (1984) (“The Committee intends that crime[s] such as burglary . . . with their likelihood to provoke violence and bodily injury be included in the ‘substantial risk’ category.” (alteration in original)). I am not sure that it matters greatly whether burglary became violent before 1983, in that year, or, as Sklansky argues, not until 1986 (81), but I do think that Sklansky fails to give sufficient attention to the implications of defining violence in terms of a *risk* of force or injury. Burglary came to be classified as violence at least partly on the grounds that it poses a risk of injury to persons. Once violence includes any act that poses a risk of injury, almost any crime—even one by a person with no prior convictions—can be classified as violent. *See Criminal Law in the Shadow of Violence, supra* note 1, at 603–10.

31. *Criminal Law in the Shadow of Violence, supra* note 1, at 609.

32. *Id.* at 593–602. I am not mentioned in the text of Sklansky’s chapter on rape and domestic violence, but my 2011 article is cited in the endnotes (*See* 271 n.9).

33. *Id.* at 598 (emphasis omitted).

domestic violence is not necessarily physical.”³⁴ To be sure, Sklansky devotes many more pages to these topics than I did in one article; he has a much more detailed analysis of domestic violence literature than I did.

What lessons does Sklansky believe his book teaches? He writes:

If the first lesson of this book is not to oversimplify violence—not to treat the category of violence as having sharp and uncontroversial boundaries—a closely related and equally important lesson is not to ignore or downplay violence because it doesn’t match a stereotyped preconception of what ‘violence’ means (237).

It is very tempting for me to believe that I taught Sklansky both of those lessons.³⁵ But maybe I flatter myself. Whatever the chain of causation, whether or not Sklansky holds his current views *because* he read my work, he did read my work. He was on the Berkeley Law faculty and in the room when I presented a draft of *Criminal Law in the Shadow of Violence* at a workshop there in 2009, and he invited me back the following year (at which time I presented a different paper that argued we should not fail to recognize policing and punishment as violent).³⁶ We last crossed paths in person at a workshop in 2018, at which time I discovered he was writing a book about conceptions of violence in criminal law, and we discussed whether the claims of his manuscript were too similar to my prior arguments. It was a sensitive conversation that seemed best kept private, until Sklansky wrote a Response to this Review that was one paragraph too long.³⁷

He said; she said. It grows tedious, and we grow old, we grow old. Better to stick to the published texts, which are likely to be more stable than our self-serving memories of unrecorded conversations. To emphasize again, in his 239-page book, Sklansky examines conceptions of violence in areas of law that I did not address in my 50-page article: laws concerning offenses by juveniles, physical attacks inside prisons, and constitutional protections for speech and guns (152–80, 181–97, 198–229).³⁸ His chapters on these topics offer important new insights, especially with regard to the ways in which law assumes, in

34. *Id.* at 602.

35. *See, e.g., id.* at 571 (“The word ‘violence’ triggers deeply held intuitions about physical harm, but it is also the source of considerable dispute and contestation.”); *id.* at 611 (arguing that we fail to recognize that certain practices, such as imprisonment and policing, “actually leave some bodies—especially those of racial minorities in impoverished urban areas—in greater physical danger”); *see also* Alice Ristroph, *Covenants for the Sword*, 61 U. TORONTO L.J. 657, 657 (2011) [hereinafter *Covenants for the Sword*] (noting that people tend not to notice the violence of ordinary policing and punishment).

36. The latter paper was eventually published as *Covenants for the Sword*. *See supra* note 35.

37. Sklansky, *supra* note 25 (manuscript at 102).

38. Sklansky also has a chapter on “police violence,” in which he claims that while violence has become increasingly more consequential in “substantive” criminal law, it has become “progressively less consequential” in “the rules governing what the police can and cannot do” (89) (emphasis omitted). I do not think this is accurate; I think expansive police powers have been rationalized partly on the grounds that police need these powers to protect themselves and others from threats of violence. *See* Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182 (2017) [hereinafter *The Constitution of Police Violence*].

different contexts, different answers to the etiological question of whether violence is “dispositional” or “situational” (e.g., 155–56, 182–83, 214–15).³⁹ The overarching lesson of each of these chapters, however, reiterates and reinforces the overall argument of the book, which was also my argument in 2011: Across time and context, we are inconsistent in how we define and assess violence, and these inconsistencies enable the concept of violence to legitimize many aspects of our criminal laws even as it contributes to the dysfunction of those laws.⁴⁰

Can we achieve a better understanding of violence—a better understanding of our own ideas and assumptions and judgments about violence? Sklansky does not take a strong position on the best way to define violence, though he offers some hints, as discussed below. Back in 2011, I did not take a strong position on the right way to understand violence either, beyond noting that “the concept spans both body and norm,” joining “the fact of bodily vulnerability” with “moral condemnation of those who would exploit that vulnerability.”⁴¹ In subsequent works I emphasized a (Hobbesian) conception in which “[v]iolence . . . is a concern of human beings because they are physically embodied, vulnerable, and mortal creatures.”⁴² My emphasis in 2011 was less an effort to develop my own definition of violence than an effort to show “[w]hat [v]iolence [h]ath [w]rought”⁴³—what Sklansky might call “the significance of violence.” I argued that the “dystopia” of American criminal law was “at least partly produced by the conceptions of violence” that I had discussed.⁴⁴ I ended by recalling Dante’s suggestion in *Inferno* that at the very bottom of hell, those punished most severely are those who commit fraud, not those who are violent. Humans and other animals are all prone to violence, “[b]ut fraud, because of man peculiar evil, [t]o God is more displeasing.”⁴⁵ I juxtaposed Dante’s condemnation of fraud over force with the philosopher Gerald Runkle, who exclaimed, “How refreshing a little honest violence would be!”⁴⁶ And I wondered “whether we are capable of being honest about violence—whether we even know what it would mean to be honest about violence.”⁴⁷ My point was not that we lie to ourselves deliberately, but that this is a question on which it has been particularly difficult to *read thyself*, or

39. Earlier in the book, Sklansky argues that “[c]riminal violence is increasingly understood as a property of individuals, not just of actions. . . . The premise of [modern] laws is that violent crime is largely a problem of violent criminals: repeat offenders who engage in criminal violence again and again, because it is in their nature” (85) (emphasis omitted).

40. *Criminal Law in the Shadow of Violence*, *supra* note 1.

41. *Id.* at 587.

42. Alice Ristorph, *Just Violence*, 56 ARIZ. L. REV. 1017, 1024 (2014) [hereinafter *Just Violence*].

43. *Criminal Law in the Shadow of Violence*, *supra* note 1, at 610.

44. *Id.* at 611.

45. *Id.* at 620 (quoting DANTE, *INFERNO*, CANTO XI, 23–29).

46. *See id.* at 621 (quoting Gerard Runkle, *Is Violence Always Wrong?*, 38 J. POL. 367, 375 (1976)).

47. *Id.* at 621.

collectively, to read ourselves.⁴⁸ We have not been able to connect our own lived experiences as physically vulnerable creatures to a consistent and coherent account of violence. It is often tempting, and effective, to deploy the concept strategically, perhaps even in the service of deception. But even when we mean well, even when we make a good faith effort to understand and minimize violence, we might be constrained by limitations of human rationality, such as cognitive biases, acute fears of harm, and enduring self-preference.

For somewhat different purposes, Sklansky connects the very same passage from Dante to the very same line from Runkle. He suggests that the embrace of “a little honest violence” can illustrate ways in which ideas about violence “are wrapped up with ideas about gender and about class” (25–26). He is surely right about that and is also right to emphasize the connection between ideas about violence and race. Sklansky offers sustained and careful attention to that issue (*e.g.*, 35–36, 61–63, 101–03, 135–37, 155–56, 218–19). In 2011, I treated the influence of race on conceptions of violence as self-evident, but it is better to assemble the supporting evidence, as Sklansky does well.⁴⁹

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So many similarities. So much for the similarities. Where Sklansky and I diverge is this: We seem to have different practices in mind when each of us worries that forms of real violence are being tolerated because they have not been recognized *as* violence. In a range of works that followed *Criminal Law in the Shadow of Violence* (and some that preceded it), I have examined criminal law as itself a constellation of violent practices.⁵⁰ There is the legal violence commonly named as such, including the death penalty, assaults inside prisons, and police killings, but I have sought also to highlight the ordinary acts of violence that are par for the course in criminal law, such as stops, frisks, arrests, jail custody, and *prison itself*, whether or not the person incarcerated is beaten or raped.⁵¹ Sklansky seems to have noticed the violence of a few discrete criminal practices, like stop-and-frisks (103–105), but he does not (yet) seem persuaded

48. See HOBBS, *supra* note 12. Hobbes argued that if each of us were to contemplate, *not only do I fear violent death, but everyone else does, too*, this reflection on common vulnerability would be the first step from a war of all against all to civil peace. *Id.*

49. I noted that “[v]iolent crime is widely perceived in gendered and racialized terms” but did not develop this claim with regard to race in any detail. *Criminal Law in the Shadow of Violence*, *supra* note 1, at 617; see also *id.* at 575.

50. *E.g.*, *Covenants for the Sword*, *supra* note 35.

51. See *id.* A doctoral advisor once exclaimed to me, “You want to argue that punishment is itself violent!” I remember thinking, “Does that even need to be argued?” At that time (in the early 2000s), I looked at what people were saying about punishment, especially incarceration, and concluded that, yes, the argument did need to be made. It is less necessary to make the argument now, and that shift has little to do with the influence of my scribbles and much to do with social movements. *C.f.* Amna A. Akbar et al., *Movement Law*, 73 STAN. L. REV. 821 (2021) (noting the importance of connecting legal scholarship with grassroots organizations).

that ordinary arrests and custodial sentences are forms of violence.⁵² Instead, overlooked acts of violence that he wants to highlight include “forms of rape and domestic abuse that are not conventionally ‘violent’” (151) and “prison violence,” a term that Sklansky uses to refer to direct physical assaults within prison (182).⁵³

If we could discern what Sklansky counts as *real* violence, it might clarify the differences between us. I think (but am not sure) he might argue that notwithstanding some confusions over the term violence, criminal law remains a necessary and rational response to acts of violence. It is also possible that I imagine this particular claim from Sklansky now only because it is a possibility I floated, without endorsement, in 2011.⁵⁴ If a call to refocus criminal law on real violence is indeed Sklansky’s position, it is largely buried—not something he would put on the book jacket or identify as the book’s main lesson. There is a glimmer of this argument in the Introduction but only a glimmer. After emphasizing that “[t]he main themes of this book will be descriptive and analytical,” Sklansky writes that he “will draw some morals, as well, and [he] might as well flag them at the outset” (5). He continues:

Nothing in this book will suggest that the concept of violence is incoherent, or that the law would be better off without it. Violence is an evil—sometimes a necessary evil, and often a great evil. . . . I will also suggest that we can go astray, and often do go astray, by excusing violence too readily or refusing to name it (5–6).

What is Sklansky’s own conception of violence, the coherent conception? I could not find a direct statement of it. I think Sklansky did the same thing that he chides Steven Pinker for doing—he wrote a whole book about violence without stating clearly how *he* uses the term.⁵⁵ In his discussion of rape and

52. Apparently assuming that most police conduct is not violence, Sklansky notes that Fourth Amendment doctrine does not treat police violence “as a category apart, deserving of an especially aggressive legal response” (106). It is true that the doctrine does not treat uses of force as a special category, but I do not think that supports his conclusion that violence has “low salience . . . in the modern law of criminal procedure” (90). The prospect of violence *against* police officers is frequently invoked as a rationale for granting broad powers for police. See *The Constitution of Police Violence*, *supra* note 38, at 1192 (“Fourth Amendment law places great importance on officer safety, and its usual strategy to protect officers is to expand police authority to use force.”).

53. For Sklansky, violence is something that occasionally takes place in carceral institutions—and something we should strive to eliminate from them. But prisons are not themselves inherently violent. Sklansky states that “[m]any prisons are horrifically violent, but many others are not” (182).

54. *Criminal Law in the Shadow of Violence*, *supra* note 1, at 618 (“If the criminal law does best when violence—the old-fashioned, physically harmful kind—is involved, then perhaps the law needs a renewed focus on ‘true’ violence. Perhaps the energies of law enforcement should be directed anew toward the protection of vulnerable bodies from actual injuries.”). But I was skeptical that this renewed focus was the right path forward: “Renewed attention to vulnerable bodies might narrow the scope of the criminal law, but it might do so with inequalitarian effects. There is always the question of which bodies will be perceived as most vulnerable.” *Id.*

55. “Steven Pinker . . . wrote close to a thousand pages about violence a decade ago without ever seeing a need to define the term.” (15) (referencing STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: HOW VIOLENCE HAS DECLINED* (New York: Viking 2011)).

domestic violence, Sklansky finds value in both an expansive account of violence that encompasses “psychological, emotional, and economic persecution” that is not necessarily physical *and* a narrower definition “in the traditional sense of physical assault, actual or threatened” (151). In much of the rest of the book, Sklansky seems to rely more heavily on the narrower approach, repeatedly using the term “violence” in ways that focus on physical injury and exclude psychological coercion. For example, he emphasizes the Supreme Court’s “shift in focus in interrogation cases, away from violence and toward psychological pressure” (99).⁵⁶ I do not want to argue with this focus on physical violence; as noted above, my own understanding of violence is based on the fact that humans are physically embodied, mortal creatures.⁵⁷ But once we have noticed the contingency and manipulability of conceptions of violence in criminal law, and once we have settled on a more precise account of violence that emphasizes bodily vulnerability, what comes next?

I worry that what comes next could be yet another effort to perfect criminal law, not to abandon or abolish it.⁵⁸ Running alongside Sklansky’s learned critical analysis of legal conceptions of violence is what I will call violent crime essentialism: an unreflective assumption that certain acts are obviously violent and should obviously be treated as criminal. Repeatedly, Sklansky seems to forget that the book is about the ambiguity of the term violence in criminal law, and then uses the phrase violent crime uncritically and unreflectively. Here’s violent crime essentialism: To explain how violent crime became “a synonym for serious crime,” Sklansky writes, “crime *in general* increased in the 1960s and 1970s, and the increases in nonviolent crime were, if anything, sharper than the increases in violent offending” (55). To support this claim, Sklansky examines Uniform Crime Reports data compiled by the FBI—even though he later uses the Uniform Crime Reports to illustrate the “ambiguity” of definitions of violence (72). If one has fully understood how manipulable conceptions of violence can be, one cannot rely on the FBI’s accounting of violent crime to tell you anything meaningful about the amount of real violence in the world. If the concept of violence is not defined consistently in criminal law, it probably does not make sense to speak of violent crime going up or down.⁵⁹

Lest it seem that violent crime is just infelicitous phrasing here and Sklansky might have spoken more precisely about murder going up or down, notice that the classification of a killing as a homicide or as a given type of homicide is itself a judgment made on the basis of contingent and shifting conceptions of

56. But by the Conclusion, Sklansky may have lost track of what violence is, or lost faith in his Introduction’s confident assertion that the concept of violence is coherent (235-239).

57. *Just Violence*, *supra* note 42, at 1024.

58. See Alice Ristroph, *Farewell to the Felony*, 53 HARV. C.R.-C.L. L. REV. 563, 611-13 (2018) [hereinafter *Farewell to the Felony*].

59. Sklansky observes, correctly, that “rape statistics are notoriously hard to interpret,” in part because “the meaning of the term ‘rape’ has varied over time” (130). Replace “rape” with “violence” and you get my point.

violence.⁶⁰ A prosecutor may make this judgment as they do when killings of unarmed Black men by police or private individuals claiming self-defense are not charged as crimes. I do not dispute that killings or other instances of violence may vary by time and place, and those variations might occur independently of legal manipulations. But I can say that coherently only because I do have a conception of violence that is independent of what criminal law labels as violence.

Well, *now* I do. In 2011, I wrote that “[p]hysically violent crime is concentrated in certain geographic areas: namely, poor, urban, minority communities.”⁶¹ *Read thysself*. I did specify “*physically* violent crime,” so I am consistent in that respect, but my understanding of the distribution of this type of violence was based upon sociological research that itself relied heavily on police departments’ own data about violent crime.⁶² It seems that in 2011, I held traces of violent crime essentialism alongside my conviction that punishment was another form of violence. I sensed there was something to be gained in trying to be honest about violence, but I had so much more work to do. As I keep learning, it has become clear to me that we cannot measure violence by looking at Uniform Crime Reports. If you’ve really understood that criminal law construes acts as violent in contingent and inconsistent ways, then you cannot look to criminal law to tell you how much violence there is.⁶³

And I don’t think you can look to criminal law to fix violence, either. There are many reasons why doing more violence does not solve the problem of violence. Sklansky seems to recognize the weakness of tit for tat logic (*e.g.*, 30–32, 190), though as noted above, he does not seem to view ordinary criminal justice interventions as forms of violence. The past and present of crime and punishment in America should make very clear that state violence does not eliminate private violence.⁶⁴ And, as I have argued across several works, state violence has proven very difficult to regulate or constrain.⁶⁵ Sklansky seems to assume that we will and should continue to use direct and threatened force to cage humans—that we should keep the prison—in part because he thinks it is

60. See *Criminal Law in the Shadow of Violence*, *supra* note 1, at 588–91.

61. *Id.* at 617.

62. *Id.* (emphasis added).

63. For more instances of violent crime essentialism, see Sklansky’s discussion regarding “the concentration of violent crimes in heavily Black, urban neighborhoods” (63), the decline of “rates of youth violence” (153), and the fact that “[v]iolent crime is less common in the United States than it was twenty years ago, but it still takes a horrible toll” (230). To be clear, I do not mean to question the claim that acts of criminalized violence are more prevalent in some communities than others. But I do question whether crime data provided by law enforcement officials is a reliable way to track the distribution of violence. See also Klingele, *supra* note 8, at 857–61 (noting the limitations of criminal justice statistics as a measure of “the universe of violent behavior” and detailing various forms of violence not captured by those statistics).

64. See generally MARIAME KABA & ANDREA J. RITCHIE, NO MORE POLICE (2021).

65. *E.g.*, *Covenants for the Sword*, *supra* note 35; *Just Violence*, *supra* note 42, at 1037–51; *The Constitution of Police Violence*, *supra* note 38, at 1238–44; Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 263 (2005); Alice Ristroph, *State Intentions and the Law of Punishment*, 98 J. CRIM. L. & CRIMINOLOGY 1353, 1394–1404 (2008).

possible to develop “a more demanding standard” that will reduce assaults in prison (194). Following Margo Schlanger (and crediting her in the main text), he suggests that a standard of “objective reasonableness” like the one we see in Fourth Amendment doctrine would be preferable to the existing “deliberate indifference” standard that governs the state’s liability for assaults in prison (194–195).⁶⁶ The optimism seems misplaced. As Sklansky seems to recognize in an earlier chapter, in practice the “objective reasonableness” standard has operated to license, not limit, police violence.⁶⁷ In any case, the book contemplates fixing the prison but not abolishing it, and fixing the police, but not abolishing them. There is a whiff of “justice” around this book, justice in the classic prosecutor’s sense in which imposing punishment just is what justice is. It’s only a whiff, though, because notwithstanding the book’s subtitle—*How the Law Classifies Crimes and What It Means for Justice*—I don’t think Sklansky ever tells his readers what his book means for justice or what he means by “justice.”⁶⁸

I mentioned above that whether a killing is a homicide can be a matter of prosecutorial discretion, which leads to one more aspect of *A Pattern of Violence* that is worth emphasis. Prosecutors are nearly absent from the book despite (or because of?) the fact that Sklansky is a former prosecutor who writes about

66. See Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357 (2018).

67. See SKLANSKY, *supra* note 3, at 106 (“We really do not have rules for police uses of nondeadly force; instead we mostly have highly deferential, after-the-fact, case-by-case review . . .”); see also *The Constitution of Police Violence*, *supra* note 38.

68. I have argued that the legal academy has “contributed affirmatively to . . . mass incarceration . . . by telling a particular story about criminal law as limited in scope, careful in its operation, and uniquely morally necessary. The story has always been fiction, but it is presented as fact.” Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1635–36 (2020) [hereinafter *The Curriculum of the Carceral State*]. Sometimes *A Pattern of Violence* seems to invoke that same pro-carceral story, although it is difficult to tell whether Sklansky is presenting it as fiction or fact. For example, he claims that “the centuries-old doctrine of *actus reus* requires that crimes be defined by actions, not by a defendant’s character or status. This . . . reflect[s] . . . an ethical commitment to punishing people for what they have done, not for who they are” (37). Does Sklansky believe that criminal law actually adheres to this commitment, or ever did? He suggests that the understanding of violence as a character trait is a relatively recent development (*e.g.*, 61–62), but he also notes that Khalil Gibran Muhammad’s work on the condemnation of Blackness describes a phenomenon that “predated the late twentieth-century rise in the importance of violence in criminal law” (87). (Indeed, Muhammad describes an effort to associate Blacks with violence at least as early as the 1890s. See KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS* 41–51 (2010)). One would think vagrancy law is a prime example of an area of criminal law that, even before the twentieth century, imposed criminal sanctions on the basis of a defendant’s character or status rather than his actions. But vagrancy seems to figure differently in Sklansky’s account: “[T]he ‘habitual criminals’ that received the most attention from reformers [before the late twentieth century] were thieves and violators of morals laws: pickpockets, dissolutes, and vagrants.” (86). I cannot tell what Sklansky means in characterizing vagrants and dissolutes as “violators of morals laws”—were they being punished for their status, or not? (86). In any case, criminal law has long operated to impose punishment on the basis of status or character, and the suggestion that a character-focused approach is a recent development strikes me as a dangerous form of nostalgia for a past that never was. See Alice Ristroph, *What Is Remembered*, 118 MICH. L. REV. 1157, 1158 (2020) [hereinafter *What Is Remembered*] (book review) (“One challenge . . . is to learn criminal law’s history without succumbing to nostalgia for a past that never existed.”). Such nostalgia may lead to efforts to make criminal law great again instead of confronting the reality that criminal law has always been terrible. See Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1952 (2019) [hereinafter *Intellectual History*].

prosecutors in other work.⁶⁹ In this book, there isn't even an entry for prosecutors in the index. Sometimes, it seems Sklansky avoids the word—for example, in noting the ambiguity of definitions of assault, he writes, “how the assaults are charged and classified is typically a matter of official discretion” (74). Official discretion, yes, but which officials? Say the p-word; it is an important part of the story that needs to be told. I do not mean police, though their discretion can certainly influence which charges are filed.⁷⁰ Even more than police, more than any other state actor, prosecutors have the greatest power in the individual case to decide whether a crime is violent. Where are they in this book? An idea for Sklansky's next project: an answer to the question, in your years as an Assistant U.S. Attorney, working for the Department of Justice, what were *you* thinking?⁷¹ What conceptions of violence, and justice, shaped your decisions? What conception of violence, or justice, allowed (and still allows?) you to see imprisonment as a way of treating people “as human beings”?⁷² *Read thyself*.

* * *

There is another p-word, one I have not used, but readers may conjure it if I am not clear. Sklansky's use of my work is not plagiarism, a term that seems to me to have little applicability to ideas or insights rather than specific sequences of words. I noticed only one sentence in *A Pattern of Violence* where Sklansky seemed to take my exact words. In his first chapter (just before juxtaposing Dante and Runkle), Sklansky writes, “Fear of crime, for the most part, is fear of violence” (24). The third sentence of my 2011 article is, “Fear of crime, to a substantial degree, is fear of violence.”⁷³ Frankly, it's not my best sentence.⁷⁴ He can have it. In any case, I am sympathetic to the claim that

69. *E.g.*, David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473 (2016); David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647 (2017).

70. Sklansky identifies police, not prosecutors, as the officials with discretion that he has in mind (74).

71. *Cf. Intellectual History*, *supra* note 68, at 1950 (“This Article asks, as Americans built the carceral state, what were we thinking?”). Reflections on prosecution by former prosecutors are often insightful and powerful, whether they defend or decry the profession. *See, e.g.*, PAUL BUTLER, *LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE* (2009); Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835 (2018) (book review); I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561 (2020); Maybell Romero, “*Rained*,” 111 GEO. L.J. (forthcoming Dec. 2022).

72. “You can do good and important work as a prosecutor. I was a prosecutor, and many of my best friends are or were prosecutors. . . . [But] there are reasons . . . for us to focus intensely on ensuring that people accused of crimes are treated as human beings” David Alan Sklansky, *Populism, Pluralism, and Criminal Justice*, 107 CALIF. L. REV. 2009, 2013 (2019).

73. *Criminal Law in the Shadow of Violence*, *supra* note 1, at 572.

74. Maybe it's not even my sentence. See Klaus Boers, *Fear of Violent Crime*, in INTERNATIONAL HANDBOOK OF VIOLENCE RESEARCH 1131-1149 (2003) (“Fear of crime means fear of violence and sex offenses.”).

information wants to be free, and maybe ideas want to be free, also.⁷⁵ Certainly the broad claim that the concept of violence is deeply contested has been made by so many that it is fully in the public domain. The more specific claim that underexamined ideas about violence have fueled criminal law and shielded it from necessary critique is an *insight*, and I doubt that an insight can be plagiarized.

In my view, there's no sin in reading another's work and engaging with it so closely that ideas or phrases first articulated by another person come to live in one's own head. Read each other, but also, read thyself, which sometimes means going back to look to remember what, or who, has influenced you.⁷⁶ And acknowledge your influences; it's a way of being human to one another. After Thomas Hobbes died, many of his ideas and arguments were reproduced without attribution by John Locke.⁷⁷ When confronted about the similarities, Locke claimed ignorance of the relevant passages from Hobbes and refused to even consult them.⁷⁸ Locating and acknowledging one's influences is not just a matter of good manners; it is important for scholarly progress, I suspect. Had Sklansky acknowledged openly the degree to which his main thesis had been previously argued, he probably would have done more to differentiate his position, and more new ground may have been broken. Critical scrutiny of the concept of violent crime has proliferated in recent years, and there is much to learn from those works.⁷⁹

75. See ALICE RISTROPH, *CRIMINAL LAW: AN INTEGRATED APPROACH* (2022) (open-source criminal law textbook published under a Creative Commons license). There is a risk that a too-rigorous property right in ideas will impede scholarly inquiry by making scholars less likely to engage one another's work or try to improve upon it. See Jeannie Suk Gersen, *Originality*, 115 HARV. L. REV. 1988, 2006–08 (2002). In a delightful plot twist, Jeannie Suk Gersen also gave a blurb for Sklansky's book jacket: "A stunning book of enormous learning, experience, and compassion, explaining how the role of violence as an idea has formed the law's impact on race, gender, and class inequality. . . . I wish I had been able to write this book" (quoting the book jacket).

76. *What is Remembered*, *supra* note 68, at 1179 ("[W]e often forget or remember in ways that serve our own interests. Some memory lapses are harmless, but some lapses have profound consequences for other people. When the interests of others are at stake, it is important to go back and look. We will forget to do so, and so we must remind each other to go back and look. And when we go back and look, we may see only what we want to see. We may notice only the aspects of the past that fit the narrative we want to believe. We have no option but to try to do better, and to call upon one another for help.")

77. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 72–73 (Peter Laslett ed., Cambridge Univ. Press 1988) [hereinafter *TWO TREATISES*] (detailing the reproduction of Hobbes's ideas and noting Locke's "unwillingness to do so much as open the book and check a reference when the challenge arose").

78. *Id.* at 73. Ever sly about authorship, Locke would later extol the virtues of *Two Treatises* without disclosing that he had written the book. "Property I have nowhere found more clearly explained, than in a book entitled, *Two Treatises of Government*." *Id.* at 3 (quoting Letter from John Locke to Rev. Richard King).

79. For example, Michael O'Hear offers a comprehensive survey of definitions of violent crime in state law; he shows that the interaction of various violent crime designations can be devastating for an individual who has not, in fact, done anything very harmful. See O'Hear, *supra* note 8. A report from the *Justice Policy Institute* also focuses on state law, with particular emphasis on assault and burglary classifications. This report offers a concrete analysis of policy effectiveness and has a number of specific reform recommendations. JUST. POL'Y INST., *supra* note 8. I particularly appreciate Cecelia Klingele's call for honesty about violence *outside* of criminal law; she asks us to notice that violence and aggression, as sociological

The historical Virgil (not Dante's Virgil) was accused by *his* contemporaries of plagiarism since the *Aeneid* borrows so much from Homer's *Odyssey* and *Iliad*. Virgil allegedly replied that it would be easier to steal a club from Hercules than steal a line from Homer.⁸⁰ The usual interpretation is that Virgil was denying plagiarism on the grounds that he had not "stolen Homer," which was impossible, but rather he had taken Homer's text and made something new and different. Given that the *Aeneid* has survived as a Latin classic alongside Homer's ancient Greek texts, history seems to have judged that Virgil was right.

I'm no Homer, and Sklansky no Virgil, but the two of us may yet illustrate Virgil's claim about the difficulty of stealing Homer. Sklansky and I are two distinguishable people with distinguishable ideas about criminal law. *Read thyself*: why do we think differently? Some of the divergence probably comes from personality differences, or different educations; possibly he has not read enough Hobbes. But we probably also think and write different things because of different biographies. Sklansky notes his past as a prosecutor in explaining why *he* wrote (5). Almost none of my brief practice experience was in criminal law. I got my most relevant experiential education not in law school or afterward, but before. In my early twenties, I spent many hours at a jail waiting to see one of the people I love most in all the world. There were after-work visiting hours one evening a week, and I would go directly from my summer job, wearing office clothes and the uncomfortable shoes that I thought women had to wear to offices. The visitors' line would stretch across the parking lot outside the jail, a long line of humans mostly dressed very differently than I, each enduring the heat and the wait to obtain a 10-minute visit with someone dear. In that line, I had lots of time to think about what it might be like not to be able to go home when visiting hours ended, what it might be like to return to a cell, to live all one's hours locked in a cage.

At the jail, lawyers had a separate entrance—no waiting. In the visitors' line once, a woman wearing cut-off jeans and flip-flops kept turning back to look at me with contempt. Eventually she asked, "Who are *you* here to see?" When I said, "my brother," her expression softened, and I like to think that she suddenly saw me as a fellow human rather than a lost lawyer. She sighed, and said more kindly, "Always somebody's brother, fool enough to get himself into jail. And always some sister, fool enough to stand in this line to wait to see him."

Fool enough I was, and it was not long (in carceral time) before my brother got out of jail and went on to lead a happy, unincarcerated life. I went to law school and to graduate school and eventually read a lot of Hobbes and wrote a dissertation, and then as a young law professor, I thought I would turn that

phenomena rather than legal categories, are much more prevalent than we typically acknowledge. This realization, Klingele suggests, can help us "[c]halleng[e] [s]tereotypes of [i]rrredeemability" that attach to persons convicted of "violent" offenses and also help us identify the ways in which criminal law itself involves various inflictions of violence. Klingele, *supra* note 8, at 869–75.

80. See SCOTT MCGILL, PLAGIARISM IN LATIN LITERATURE 205 (2012).

dissertation into a book called *The Law of Violence*. When I began that project over a decade ago, people looked at me strangely when I said I was writing about criminal law and violence. “You mean, *domestic* violence? Or violent crime more generally?” they would say. “No,” I would reply, “I mean policing and punishment.” So many of my interlocutors found it confusing to think of policing and punishment as violence that I began to wonder how they defined violence and if they could be persuaded to think differently about it.⁸¹ Thus was launched a book chapter that later became a stand-alone article called *Criminal Law in the Shadow of Violence*.

It was only the first step in the argument, though. Once you’ve shown that violent crime is a confused category, then you have to investigate whether there *is* a meaningful way to use the term violence. And once you have articulated a corporeal account of violence derived from the fact that humans live in vulnerable bodies, then you have to show that policing and punishment are violent. And then you still have to show that legal efforts to regulate and limit state violence are recurring failures. I have never (yet) published *The Law of Violence* in book form, but I kept peeling off chapters and publishing them as separate articles about policing and punishment as state violence, and the attempts to regulate it: *Just Violence*; *The Constitution of Police Violence*; and *Covenants for the Sword*. A few years ago, sensing that my deconstruction of violent crime had not had the impact I had hoped, I went back to other basic categories of criminal law, starting with “felony.” Apologies if this sounds familiar, but I found that “felony” was a “contingent and constructed category, but its contingency is obscured . . . by connotations of intrinsic wrongfulness.”⁸² I argued that the classification of persons as felons—a highly discretionary decision made in individual cases by prosecutors—“operates as a lever in American law,” increasing the burdens of a conviction “without an individualized assessment of appropriate treatment.”⁸³ Many of the arguments that I (and now Sklansky) have made about violent crime also apply to felony—and to the category “crime” itself.⁸⁴ We humans have constructed these categories as we rationalize impositions of state violence—as we rationalize the inequalities that violence hath wrought. We have convinced ourselves that the categories are natural, and principled, and that the nature of the category could itself justify the violence we would impose in its name.⁸⁵ My investigation of the conception

81. Of course, public views on such questions have shifted dramatically in the past few years. See KABA & RITCHIE, *supra* note 64; MICOL SEIGEL, *VIOLENCE WORKERS* (2018).

82. *Farewell to the Felony*, *supra* note 58, at 567.

83. *Id.* at 569–70.

84. *Id.* at 567.

85. *Id.* at 617 (“Criminal law theorists are . . . the last natural law theorists . . .”); *see also Intellectual History*, *supra* note 68; *The Curriculum of the Carceral State*, *supra* note 68. The latter two articles are about the influence of ideas, especially ideas articulated in the academy, on carceral practices. If I am right that ideas do influence practices, then it matters a great deal which ideas gain prominence and in what form they do so. It

of violence was not (merely) a chin-stroking academic exercise, but a necessary step in a broader project that seeks to understand, and hopes to eliminate, the huge, institutionalized violence of the American criminal legal system.

If Sklansky would join me in trying to end that violence, I'd be delighted to share insights, ideas, even words if he wants them. I can be generous; I've got more where those came from. And many in the legal academy can hear an argument spoken from Stanford Law School or Harvard University Press that they cannot hear when it is articulated from Brooklyn Law or the *Alabama Law Review*. "My" insights could get far more attention—already *have* received far more attention—delivered from his mouth rather than mine. I'm Hobbesian and prefer self-preservation to self-sacrifice, and I think I have about the usual share of a desire for glory. Even so, if someone were going to use my unattributed ideas to write a book that could have freed my brother, that could free all those sisters' brothers and the many sisters themselves now incarcerated, I hope I would not have jeopardized that project with a bonfire of academic vanities. But at a moment when there is real, meaningful scrutiny of the violence of criminal law, I do not want my arguments appropriated to rehabilitate the field.⁸⁶ I do not want the first step toward ending the violence of criminal law to also be the last.⁸⁷

(There's probably something aesthetic in my motivations now, too. One just can't pair the definitive deconstruction of violent crime with a renewed commitment to criminalize and punish the real violent crime. It doesn't work. The meter doesn't scan.)

The meter doesn't scan, but maybe verse, too, wants to be free. Sklansky once wrote an article about the Fourth Amendment that inspired me not just for its substantive insights but also for the beauty of its opening, which invoked Kenneth Koch's free verse poem, "One Train May Hide Another."⁸⁸ I loved the image there, and Sklansky's call to check whether the thing that is easiest to

matters whether the definition of violence becomes one more aspect of criminal law that we need to repair or if instead a better understanding of violence leads us to turn away from criminal law altogether.

86. Cf. Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 308–15 (2018) (suggesting that "over" critiques, which see the goal of criminal law reform as reducing the scope of criminal law rather than eliminating it altogether, may interfere with or prevent the deeper societal transformations sought by "mass" critiques); see *id.* at 318 (cautioning that to collapse "over" and "mass" critiques creates a danger that we will "los[e] the power of the critiques that got us to this moment of possibility in the first place").

87. See *id.* at 314 ("[C]riminal justice reform's first step—relief for nonviolent drug offenders—could easily become its last." (quoting JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 230 (2017))).

88. David Alan Sklansky, "One Train May Hide Another": Katz, *Stonewall*, and the Secret Subtext of *Criminal Procedure*, 41 U.C. DAVIS L. REV. 875, 877 (2008) ("Traveling through Kenya in the 1980s, the poet Kenneth Koch saw a sign at a railroad crossing warning that 'one train may hide another.' The admonition struck him as so evocative and so generative that years later he expanded it into sixty-eight lines of free verse. One idea may hide another, he wrote, one song may hide another, one injustice may hide another. 'It can be important / To have waited at least a moment to see what was already there.'" (quoting KENNETH KOCH, *One Train May Hide Another*, in ONE TRAIN 3, 3–4 (1994)).

see might hide something else that is equally important. Here, though, I think that the train of this book that is mine and the train that is his are not two engines on parallel tracks, one occasionally obscuring the other. These trains are on a collision course. I worry that with its two dueling theses, *A Pattern of Violence* is an effort (perhaps unconscious) to divert my train, to climb aboard but then shift course by rehabilitating the category violent crime with more elaborate definitions. It often happens that a transformative project is appropriated and redirected for more conservative ends.⁸⁹ Forgive me if I reclaim the throttle in this way.

To David Sklansky, my fellow human, my fellow poetry lover, my fellow violence obsessive, I am nonetheless grateful that you wrote this book. This book, exactly the way it was written, gives me renewed hope. I am not plagued by the anxiety of influence, but I have on occasion been troubled by the anxiety of no influence—a sense that my arguments might not matter, that it is always experiences *and only experiences* that determine what humans think and believe. And now there seems a possibility (just a possibility!) that in fact I succeeded at step one, when I argued that we need to look to violence and realize that our very real and understandable fear of physical harm does not justify or rationalize our responses to violent crime. If—if, *if!*—I could succeed so well at step one that a former prosecutor would forget that this was “my” thesis and see it as a fact about the world that he needed to write a book about—if all of that could happen, so much more might yet be possible.

89. Radicalism tamed is arguably the story of the experiment with social contract theory called the United States of America. Hobbes's radical theories of consent and equality were recognized as radical by his contemporaries and feared for that reason. Far less controversy troubled John Locke, in part because he did not disclose what he was doing when he appropriated and adapted Hobbes's ideas. Moreover, Locke revised social contract theory to allow a society ostensibly founded on principles of liberty and equality to accommodate colonialism, slavery, and punishment. And it is Locke, not Hobbes, that Americans have long seen as their intellectual forefather. Hobbes is now portrayed as an authoritarian absolutist, and his most radical ideas—such as a right to resist punishment!—are all but forgotten. See Alice Ristroph, *The Second Amendment in a Carceral State*, 116 NW. U. L. REV. 203, 230–35 (2021); Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CALIF. L. REV. 601 (2009); Alice Ristroph, *Sovereignty and Subversion*, 101 VA. L. REV. 1029 (2015).