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Trouble at Home

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Abstract:

In her Jacob Prize 2009 award-winning book, *At Home in the Law: How the Domestic Violence Revolution is Transforming Privacy*, Professor Jeannie Suk mounts a sustained argument to the effect that under the guise of protecting women, coercive state power has weaseled its way into the hitherto sacred area of the home. Unfortunately, Professor Suk makes a number of errors in her book, including misreporting cases, misrepresenting statutes, and misunderstanding law. Because so little is written in the area of domestic violence, it is critical to correct these errors before they have an effect on policy. The purpose of this paper is to correct those errors and to defend current approaches to combating domestic violence.
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by

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In her Jacob Prize 2009 award-winning book, *At Home in the Law: How the Domestic Violence Revolution is Transforming Privacy*, Professor Jeannie Suk mounts a sustained argument to the effect that under the guise of protecting women, coercive state power has weaseled its way into the hitherto sacred area of the home. According to Suk, this shift threatens to compromise privacy and traditional marital rights. Suk further argues that the feminist revolution has changed our society’s perception of the home from a place of refuge, to a place of violence and subordination: “Home is where the crime is.”

She laments that at the heart of this domestic violence (“DV”) revolution is a growth in the coercive power of the state in the home that results in a reduction of the autonomy of both women and men. She thus contends that “the particular shape that [the change] is currently taking desperately needs evaluation.”

While it is certainly true that the U.S.’s approach to combating domestic violence does require a serious reevaluation, Suk’s conclusions ultimately fail to convince. In the following note, I will examine *At Home in the Law* (hereinafter “*At Home*”) to expose serious errors both of fact and of law. The five sections presented here loosely coincide with the chapters of *At Home*, with the exception of Chapter 3, which is not discussed. While a detailed counter-argument to the policy

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3 *Id.*, at 7.

4 *Id.*, at 13.

5 Chapter 3 is a detailed discussion of self-defense law and its gendered implications. While I may disagree with the general arguments presented in Chapter 3, it contains no mistakes of the kind discussed elsewhere in this note.
goals of Suk would be useful, that is not the purpose of this note. Instead, this note will be
dedicated to discussing what I believe to be serious mistakes in Suk’s legal analysis. As these errors
lie at the foundation of Suk’s arguments, my ultimate hope is that the reader will remain
unconvinced by the central contentions of *At Home*. Although Professor Suk is to be applauded for
tackling this difficult and under-investigated topic head-on, the very neglected nature of the subject
means that inaccurate claims that might serve to undermine effective DV policy are of particular
concern. There have been remarkable changes in the DV field over the past four decades, and these
changes should be comprehensively reviewed to ensure that policy goals are being met and that no
unwarranted abridgement of liberties has taken place. Unfortunately, *At Home* is not that review.

*Trespassing in Your Own Home*

In Chapter 1 of *At Home*, entitled “Home Crime,” Suk argues that while it is necessary for
the state to intervene in abusive households, the intrusion into the home has gone too far: “If there
is one space in which we have seen the thoroughgoing expansion of the criminal law in recent years,
it is the home,” she writes.6 Suk contends that the reason for this expansion is not simply to combat
DV but that, “criminal law’s goal is coercively to reorder and control intimate relationships.”7 Suk
contends that this extraordinary end is reflected, “not only in the criminalization of violence proper
but also in the criminalization of a proxy – namely, an alleged abuser’s presence in the home.”8

The book begins the argument by noting that civil protection orders (“CPOs”) have
“constituted a crucial step in the criminalization of DV” and that a civil order “typically prohibits
contact with the victim and requires the subject of the order to vacate the shared home.”9 It is true that all

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6 *Id.* at 9 (citations omitted).
7 *Id.*, at 10 (emphasis in original).
9 *Id.*, at 14 (emphasis mine). Suk’s footnote cites two sources: Peter Finn & Sarah Colson, CIVIL PROTECTION ORDERS:
LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 33 (1990) and Catherine F. Klein & Leslye E. Orloff,
states now have CPOs and each state has a wide range of potential remedies that can be incorporated into the order. At its most basic, the CPO only prevents the enjoined party from abusing the victim; that is why it is sometimes referred to as an Abuse Prevention Order. Other possible remedies which may be incorporated into the CPO include no-contact orders, stay-away orders, the surrender of weapons, financial support, temporary custody of children, and even providing for exclusive use of homes – meaning that the abuser must vacate the shared residence.

Suk’s argument in the first chapter, however, relies on an assumption that ejection orders are common. Suk has provided no evidence to support this claim, however.

To be fair to Suk, it is true that the stay-away order can function as a de-facto ejection order. If the protected party stays in the shared residence, the enjoined party may not enter the home without violating a stay-away order. This effect would last for as long as the protected party physically remained in the home. In practice, however, this rarely happens, simply because the protected party doesn’t feel safe enough to stay in a shared residence. In the U.S. every year,

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Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Laws, 20 Hofstra L. Rev. 801, 910-11 (1993). These sources do support the claim that CPOs may require the subject to vacate a shared home, but do not support the claim that they always or typically do. This makes sense since they were written 22 and 19 years ago, respectively.


12 No-contact orders make it a crime for the enjoined party to contact the protected party in any way. This includes phone calls, mail, email, texts, and even messages sent through a third party (e.g.: telling a mutual friend to pass on a message.). It is important to note that no-contact orders are unidirectional, so the protected party may contact the enjoined party. This may be necessary to arrange things like mutual care of children, the picking up of personal property from the shared residence, or holiday arrangements.

13 Stay-away orders make it a crime for the enjoined party to approach the protected party. There is usually a zone of a specific distance around the protected party that the enjoined party may not enter (e.g.: 100'). For a violation of a stay-away order to be criminal, however, the entry into the protected zone must be intentional. Therefore, it would not be a crime if the enjoined party entered a store and found the protected party inside. Instead, he would simply be required to leave immediately. In addition to a zone around the protected party, stay-away orders may sometimes include locations, such as the protected party’s place of work, the protected party’s home, schools, etc.

14 This is usually a temporary measure in cases where the parties are married and a divorce is likely. This support simply precedes and is ultimately superseded by alimony.

between 1,000 and 1,600 women are killed by their intimate partners.16 In many of these instances, the victim had a protection order at the time.17 Ultimately, if a victim is in fear for her life, flight to a shelter is the only practical recourse, even if the law would grant her the home in theory.

So, the idea that criminalizing the abuser’s presence in the home serves as a proxy for criminalizing their violence is arguably true in some small sub-set of cases. But, in the majority of domestic violence scenarios, it is important to remember that it is the victim who is effectively forced to leave. In fact, some scholars have wondered why the victim of DV isn’t awarded custody of the shared residence more often.18

Moreover, it isn’t really the abuser’s presence in the home that serves as a proxy for criminalizing violence, so much as proximity to the victim. From a policy standpoint, this makes a great deal of sense. Requiring that an alleged abuser refrain from contacting or approaching the alleged victim is a minimal restraint on liberty. At the same time, it affords great protection insofar as it criminalizes behavior that is an immediate but/for cause of future violence. If the abuser cannot contact or see the victim, he cannot continue to abuse her.

State v. Lilly

Early in Chapter 1, At Home introduces the case of State v. Lilly.19 Lilly is presented for two reasons: firstly, it is intended to serve as an example of the expanding power of the State into the marital home; and secondly, it is supposed to show that the general aims of DV policy influence

19 717 N.E.2d 322 (Ohio 1999) (discussed Suk, supra note 2, at 23-5).
judicial decision making. Ultimately, however, *Lilly* supports neither of these claims because its facts differ significantly from how they are described in the text.

*At Home* describes *Lilly* as a “conflict between a husband’s conviction for burglary of his wife’s home and a nineteenth-century anti-ousting statute.” Suk states that “[t]he property at issue was the marital home from which the husband had moved out, and there was no court order excluding him from the residence.” Suk goes on to state that *Lilly* entered the home through a door that he had deceptively left unlocked without his wife’s knowledge. Inside the home, he tore apart his wife’s jeans, stole her purse, and removed the spark plugs from her vehicle so she could not start it.

In reading the *Lilly* opinion, it quickly becomes clear that the actual facts of the case vary significantly from how they are represented in *At Home*. While it is true that there was no court order excluding the defendant from the residence, the property at issue was *not the marital home*, the couple having already effectively separated. The *Lilly* opinion is quite unambiguous on this point:

In this case, there is no evidence that the defendant had any right to custody or control of the leased property. The apartment was leased solely in Mrs. Lilly’s name. Defendant did not pay any part of the rent on Mrs. Lilly’s apartment. While defendant claims that he may have stayed at the apartment occasionally and performed maintenance tasks there for Mrs. Lilly, defendant never lived at the apartment, did not have a key to the apartment, and did not keep any of his belongings in the apartment. Accordingly, it was reasonable for the jury to find that when, without permission, defendant entered Mrs. Lilly’s apartment through a door he had previously by deception left unlocked, he trespassed. When he trespassed in Mrs. Lilly’s apartment for the purpose of committing a crime, i.e., theft of her purse and damage to her property, it was reasonable for the jury to conclude that defendant committed a burglary.

There can be no doubt that the property at issue was not shared and never had been. It thus can hardly serve as an example of the state’s increasing reach into the marital home.

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21 *Id.*
22 *Lilly*, 717 N.E.2d. at 327.
23 *Lilly*, 717 N.E.2d. at 327-8 (emphasis mine).
Concerning Suk’s second point, the court further found that the anti-ousting statute was not pertinent in this instance. The book states that while the Lilly court cited precedent to support the burglary finding, “These other cited cases, all from the 1980s and 1990s, involved DV, but the states in those cases did not have similar anti-ousting statutes that could have conflicted with the conclusion that a husband’s entry into his wife’s home could be burglarious. Rather than providing strong doctrinal support for the court’s holding, the citation of these other jurisdictions signaled that that the court was reasoning out of general sympathy for the widely shared policy against DV.”

This is simply not true. The court did consider precedent from other jurisdictions with anti-ousting provisions. The opinion states: “A review of other jurisdictions reveals seven other jurisdictions with a statute similar to R.C. 3103.04 [the anti-ousting provision]. Significantly, we note that our review indicates that none of these jurisdictions applies this civil statute in criminal contexts.” The court also considered the legislative intent of the statute and determined that its purpose was to prevent husbands from ousting their wives from the marital home during disagreements, by establishing that each had an equal interest in the property. In this way, husbands could not create a de-facto divorce by forcing the wife out of the home and refusing her reentry.

In light of these facts, the outcome in Lilly no longer appears to be an expansion of law into the home, but rather a routine application of well-established precedent. Even absent a stay-away order, the defendant had no legal right to enter the home and managed to do so only by secretly unlocking an entrance normally left secured. The facts are more than sufficient to support a jury finding that the defendant trespassed when he entered. Since the purpose of the trespass was to

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24 Suk, supra note 20, at 25.
25 Lilly, 717 N.E.2d. at 326 (citations omitted).
26 Id.
27 Id. at 327-8.
steal her purse and damage her belongings, the charge of burglary is entirely defensible and in no way constitutes a shift in the law.\textsuperscript{28}

\textit{Ex parte Davis}

Later in Chapter 1, Suk raises the case of \textit{Ex parte Davis}.\textsuperscript{29} She describes the facts of the case as follows:

The defendant and his wife lived in a residence that he owned with his brother. Pursuant to a pending divorce suit, a court order barred the defendant from the premises. The defendant entered the residence with his brother’s consent. Inside he killed two people and wounded several others, including his wife. The defendant challenged the burglary charge upon which his capital murder charge was based, claiming that his entry into his home was not burglarious, and that the charge of capital murder represented a ‘wanton and freakish’ application of the law.\textsuperscript{30}

After noting that the court upheld the burglary conviction, Suk rails against the outcome using two dubious arguments. Firstly, she contends that it was preposterous that the defendant could be said to be trespassing upon his own property, and secondly, even if it might have been trespass had he entered without permission, his brother, co-owner of the property, had granted him access.\textsuperscript{31}

In support of her first claim, Suk states: “So by operation of the protection order, the defendant, who owned the property was not the ‘owner’ of the home for the purposes of the burglary statute; his wife was.”\textsuperscript{32} Throughout the discussion of this case, the book routinely makes reference to the “protection order” that was granted on the basis of a history of DV. But the judicial opinion does not state that a protection order was in place. In fact, nowhere in the opinion is a history of DV ever mentioned (other than the obvious point that the defendant ultimately killed

\textsuperscript{28} Id.
\textsuperscript{29} Suk, supra note 20, at 27-30. (discussing \textit{Ex parte Davis}, 542 S.W.2d 192 (Tex. Crim. App. 1976)). It bears noting that this \textit{habeas corpus} petition is from 1976, long before many of the modern DV policies that Suk takes issue with were even enacted.
\textsuperscript{30} Id. at 27-8 (citations to \textit{Ex parte Davis} omitted).
\textsuperscript{31} Id., supra note 15.
\textsuperscript{32} Id. at 28.
his wife). The defendant was barred from the property not because of a protection order, but rather because the divorce proceedings had granted the wife exclusive access to the home. It is possible that the divorce decree was predicated on a history of DV, but nowhere in the opinion is this even hinted at. Contrary to Suk’s claims, the court was not swayed by DV policy, seemingly.

While Suk appeals to the commonsensical argument that one cannot be found to trespass upon one’s own property, the law is more complex than she suggests. Suk has failed to distinguish between the legal concepts of “ownership” and “control.” If a person owns a property but does not control it, entry without the controller’s permission is indeed trespass. The most obvious example of this distinction is the renting of an apartment from a landlord. When the landlord turns over control of the apartment to the tenant, the landlord may no longer re-enter the property without the tenant’s permission. Failure to obtain that permission makes entry a trespass. The distinction between ownership and control is ubiquitous throughout the law.

Regarding Suk’s second point, the opinion in Ex parte Davis clearly states that the order of the divorce court gave the wife “exclusive possession of the residence and appellant [defendant] was ordered to stay away from the premises.” As a result of this order, the wife became the sole controller of the property. The implications of this court order were twofold: firstly, since exclusive control was granted to the wife, the defendant no longer had the right-of-entry, even if his name was on the deed. Secondly, the brother could not grant the defendant the right to enter the property. There are two independent reasons why this is so, and either would be sufficient to defeat the defendant’s claim to legal entry. The court makes note of both. Firstly, the brother could not grant

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33 Although the parties may always agree upon exceptions in the rental agreement. What is specified here is simply the default situation if the parties do not explicitly address the issue in their contract.
34 Other common examples highlighting the difference between control and ownership are pawn shops, legal bailments, and repossessing rented or secured items.
35 Davis, 542 S.W.2d at 195.
anyone permission to enter the property because the wife had exclusive possession. Even though his name was on the deed, the brother did not have control of the property and thus could not allow anyone access, and in fact could not even enter himself without the wife’s permission. Secondly, the divorce court explicitly barred the defendant from entering the property. By analogy, if a court order barred an abuser from entering his victim’s place of work, the fact that the guard let him in is of no legal consequence. A third-party’s permission to enter a property is insufficient to overturn the power of a court order to the contrary. If one disagrees with the outcome of this decision in Ex parte Davis, the criticism should be leveled at the divorce court which entered this order, not the appellate court that upheld the obvious implications of that order.

Ultimately, then, both of Suk’s arguments regarding Ex parte Davis fail. A person certainly can trespass on property they own, if they do not control it, as here. And the brother’s consent to entry was irrelevant for two independent reasons. The court did not treat the defendant as if he were “more of a stranger … than a true stranger would have been.” It treated him like a person who was explicitly barred from entry by a court order. And in conclusion it bears repeating: the order in this 1976 case was not a protection order, as Suk repeatedly claims. So the connection between this case and DV policy remains quite obscure.

Rhorer & Colvin

On pages 30-34 of At Home, Professor Suk discusses two cases: People v. Rhorer37 and State v. Colvin.38 Her concern in this section is that DV policy has led to a broader understanding of what may constitute burglary. Burglary in modern criminal law requires two elements: criminal trespass

37 967 P.2d 147 (Colo. 1998).
38 645 N.W.2d 449 (Minn. 2002).
and the intent to commit a further crime while trespassing. While the previous section discussed trespass, this section concerns the second element. Suk worries that criminal trespass in violation of a CPO could serve double duty. This would occur if entry onto the property is only a trespass because of an outstanding CPO and the ‘independent crime’ is the intent to violate the CPO. Suk writes that “At common law, the crime the defendant intended to commit had to be distinct from his trespass into the property.” The worry would be that CPOs have led to an illicit shift in the law, allowing for both elements of a burglary to be satisfied by violating a CPO. At Home presents Rhorer and Calvin together in the attempt to show that both cases dealt with this issue but reached different outcomes. This contention, however, is not true. The book’s discussion of the two cases is marred by several crucial errors, as I will now show.

At Home presents People v. Rhorer as “the leading case to embrace” the use of intent to trespass in violation of a CPO as an independent crime. The facts are presented accurately: “The defendant broke through a window into his ex-girlfriend’s home while there was a no-contact restraining order in effect. He was charged with burglary and menacing, but a jury acquitted him of the menacing charge. The defendant was convicted of burglary based on his intent to commit the misdemeanor crime of violating a restraining order and was sentenced to twenty-five years’ imprisonment.”

The discussion goes awry, however, when Suk writes that, “the court found it consistent with DV policy to treat the entry in violation of a protection order as a burglary. Under the court’s formalistic reasoning, entry in violation of a protection order would become the crime of

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39 The common law further required that the act take place at night. While this requirement has largely been abolished, it is still required in Massachusetts. Mass. Gen. Laws ch 266, § 14 (2012). Furthermore, some states require that the independent crime be a felony, while others do not.
40 Suk, supra note 36, at 30. This is certainly true.
41 Id.
42 Id. at 30-1.
burglary…” Suk appears to be suggesting that the court found that the intent to violate the CPO by trespassing was sufficient to satisfy the criteria for the crime of burglary. She believes that the court is holding that trespassing in violation of a CPO would always constitute burglary because there is always an intent to violate the order when trespassing. This is not the reasoning of the court, however. The opinion reads:

When the Denver County Court issued a no-contact order barring Rhorer from contacting Martinez [the ex-wife], it invoked its authority pursuant to sections 14-4-102(1) and (2). Violation of a restraining order issued pursuant to that authority constitutes a crime under sections 18-6-803.5(1) and 18-6-803.5(2). Thus, Rhorer’s violation of the no-contact order was an appropriate predicate crime under the second degree burglary statute.

It was not the defendant’s intent to break the CPO by trespassing that acted as the independent crime, it was his intent to violate the no-contact order. The defendant broke into the home with the intent of confronting his ex-wife. That confrontation was a crime as a result of the CPO. Therefore, Suk’s contention that the intent to trespass in violation of a CPO satisfied the independent crime element is simply false.

But what if the defendant trespassed but had no intention of doing anything in violation of the CPO once inside? That is exactly the situation in State v. Colvin.

Suk incorrectly argued that in Rhorer, the court found that both elements of a burglary charge were satisfied because of the intent to trespass in violation of the CPO. But with Colvin she writes that “the Minnesota Supreme Court reached the opposite answer on the same question of whether entry in violation of a restraining order satisfies the independent crime element of burglary.” But the facts are not materially the same, and in fact, the courts reach exactly the same conclusion on the law.

43 Id. at 31.
44 Rhorer, 967 P.2d at 150 (emphasis mine).
45 Suk, supra note 36 at 31.
The book accurately describes the facts of *Colvin*:

The defendant’s ex-wife had obtained an emergency *ex parte* civil order prohibiting him from contacting her or going to her home. The defendant entered her residence through an unlocked window, watched television, drank a beer, and left when asked to leave. The predicate crime alleged and proven was the entry in violation of the protection order. The defendant was charged and convicted of first-degree burglary, which Minnesota law defined as the entry of a dwelling while another person is inside ‘without consent and with intent to commit a crime,’ or such entry coupled with actual commission of a crime inside. The Minnesota Supreme Court reversed the conviction, concluding that entry in violation of a protection order, which did satisfy the unconsensual [sic] entry element of burglary, could not also satisfy the independent crime requirement.\(^{46}\)

Suk is right that the court did go on at some length, finding “that [the] violation of a no-entry provision of an OFP [the same as a CPO] is, like trespass, excluded from the crimes that can be the basis for the independent crime element of burglary.” Such inclusion is what she incorrectly claimed occurred in *Rhorer*. In fact, the two courts’ rulings are entirely compatible on this point. So why the different outcomes? In *Rhorer*, the court found that the defendant had the intent to commit the independent crime of contacting his ex-wife. In *Colvin*, however, the court found that the evidence was insufficient to show beyond a reasonable doubt that the defendant had the intent to break the no-contact order. The defendant, upon breaking in and finding his ex-wife away from home, decided to watch television and have a couple of beers. When the ex-wife returned, he left immediately with no argument. It appears that his only intent was to spend some time in his man-cave. The *Colvin* court was clear that “because the stipulated facts establish that there is no allegation that *Colvin* committed or intended to commit a crime other than the OFP violation, and because the district court specifically found that Colvin’s OFP violation was a violation of the prohibition against entry onto his ex-wife’s residence, Colvin’s unconsented entry in violation of the OFP cannot be the basis for a burglary charge.” If the defendant had intended to do anything illegal other than just enter the property, there might have been a different finding, as in *Rhorer*, but in the end, his only crime was trespass.

\(^{46}\) Id. at 31-32 (citations omitted).
*At Home* concludes Chapter 1 by arguing that “The implication resting just below the surface [of such cases] is that the defendant does not have much good reason to be present in the home other than to engage in violence.”⁴⁷ This is a fundamental misunderstanding of the policy of stay-away orders, and stems from a number of erroneous claims. The first mistake, as I’ve shown, is the undefended assumption that orders requiring the defendant to vacate the home are common. The second mistake is thinking that courts go out of their way to convict defendants of burglary for entry into their own home. As Colvin and Rhorer demonstrate, courts are careful to determine whether the defendant intends to commit an independent crime. Thirdly and finally, contra Suk, I believe it does make sense in certain cases to think that the defendant does not have much good reason to be in the home when he has been ordered to stay out of it. If he is willing to violate a CPO to illegally enter protected property, it may be a reasonable assumption that his motive is to engage in violence against the protected party.

What’s Good for Manhattan …

In Chapter 2, *At Home* makes the argument that the State uses its power to push the defendant out of the home as a means of imposing a sort of de-facto divorce. Suk writes that “Court-ordered separation becomes a goal of prosecutors in bringing criminal charges – a substitute for, rather than a means of, increasing the likelihood of punishment.”⁴⁸ The argument is essentially that prosecutors pursue every violation of domestic violence prevention law, and then over-charge relatively minor infractions in order to force plea bargains and state-mandated separations.⁴⁹ Suk

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⁴⁷ Id. at 33.
⁴⁸ Id. at 42.
⁴⁹ Id.
finds this especially problematic because “As a product of the plea bargain, de facto divorce goes into effect without the benefit of traditional criminal process or proof of the crime.”

We shall see that Suk’s worries are not without merit, and the fear of prosecutorial overreach is indeed a legitimate one. The actual extent of such practices, however, is in no way clear; there is woefully little evidence to suggest that the problems extend much beyond Manhattan. No evidence is given for the problems afflicting any other jurisdiction. While we should all be unnerved by the possibility of the State attempting to drive couples apart, with no evidence to suggest that it is actually occurring in a widespread fashion, there is no reason to reform well-established DV policy.

Chapter 2 also misrepresents the outcome of an unpublished Washington State case from 1996. When properly understood, the outcome of *State v. Ross* should actually go a long way towards reassuring us that the State fully recognizes the fundamental right of marriage, as we will shortly see.

The first half of Chapter 2 focuses on the standard policy for prosecuting DV cases in the Manhattan District Attorney’s Office. It is difficult to dispute the specific policies alleged here because more than a dozen of the footnotes in this section reference the “2004 Criminal Court Crimes Manual” from the Manhattan DA’s Office. I have contacted the Manhattan DA’s Office and they assure me that they are not aware of any such manual. They do say that there are some written guides for prosecuting DV cases, but that these are not released to the public. A Freedom of Information Act request is pending.

*At Home* outlines the standard operating procedure for dealing with criminal domestic violence cases in the Manhattan District Attorney’s Office. Suk states that DV cases in Manhattan

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50 Id. at 45.
51 I have emailed Professor Suk to request the manual on two occasions. She has stated that she would be happy to provide a copy, however, she is unable to locate it at this time.
trigger a “mandatory domestic violence protocol.”52 This protocol requires the DA’s office to take certain actions including: mandatory arrest upon probable cause, no-drop prosecution, and the mandatory request for a protection order at arraignment that includes no-contact and stay-away provisions. All of these actions are taken regardless of the wishes of the victim of the crime.53

After arraigning DV defendants, Suk states that the primary goal of the Manhattan DA’s office is to ask the criminal court for the issuance of a criminal temporary order of protection (“TOP”), usually as a condition of bail.54 The book states that the TOP, “normally prohibits any contact whatsoever with the victim, including phone, e-mail, voicemail, or third-party contact. Contact with children is also banned. The order excludes the defendant from the victim’s home, even if it is the shared home.”55 The footnotes for the first two sentences reference the Criminal Court Crimes Manual, so I cannot verify them. As described, however, the first several provisions are well within the norm for criminal TOPs. No-contact and stay-away orders are the cornerstone of DV protection.56 The final and most extraordinary claim, that the defendant is excluded from the victim’s home, even if it is a shared residence, is not supported by any citation. Most protection orders do allow for the possibility of excluding the defendant from the victim’s residence. Judges are often reluctant to implement this remedy in cases where the parties share a residence, however.

At Home then elaborates, for some pages, an argument to the effect that prosecutors over-charge their cases in order to force plea bargains that may include permanent protection orders. Suk argues that unsophisticated defendants may elect to take plea deals against their own interests, simply to avoid the possibility of a felony conviction, even if the likelihood of a conviction is

52 Jeannie Suk, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 36 (2009). Again, this may be true, but it cannot be confirmed without a copy of the Criminal Court Crimes Manual.
53 Id.
54 Id. at 38.
55 Id. (citations omitted).
exceptionally low. Suk contends that defendants will accept the state-imposed end of a romantic relationship, in order to avoid the full force of the state’s punitive power.

Suk may well be right to condemn such policies. The State has an interest in preventing future crime, but the actions alleged in this section are clearly excessive in light of the misdemeanor nature of most DV. Mandatory arrest and no-drop policies, although well-intentioned, have been much criticized over the past decade, and not without reason. There are also serious feminist concerns about ignoring the wishes of the victim, even if her wishes are different than what we might want on her behalf. Suk is well within the mainstream to criticize these paternalistic policies, and her arguments have merit.

The same can be said of Suk’s worry about prosecutorial overreach. This problem has been much discussed in the legal literature, and there is no doubt that perverse incentives exist for prosecutors to over-charge defendants. This problem is by no means limited to DV cases. The goal of prosecutors in most areas is to force a plea deal by effectively threatening the maximum penalty.

But note here that At Home has only alleged that these are the policies of a single, albeit the largest, criminal jurisdiction in the U.S. Although Suk later attempts to generalize from this example, no evidence is ever given to support the claim that these policies are practiced on a wide scale. Furthermore, her putative evidence is from eight years ago. While it may well be true that if

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57 Suk, supra note 52 at 45.
58 Id.
the practices Suk cites are widespread, then there is a serious problem with current DV policy, it is simply not clear whether such practices are widespread or not.

Chapter 2 ends with a discussion of the unpublished *per curiam* opinion, *State v. Ross*. As the book grossly misrepresents the nature of the case, it will be necessary to quote it at length. *At Home* describes *Ross* thusly:

*State v. Ross* was a 1996 Washington case in which a criminal sentence after the defendant’s trial and conviction for felony harassment and assault included a no-contact order. Between the defendant’s trial and his sentencing, the defendant and the victim married, in violation of a temporary no-contact order that had been in effect since criminal charges were filed. As part of the defendant’s sentence, the court ordered that the convicted felon have no contact for ten years with his wife, who opposed the order. The defendant challenged that no-contact order as nullifying his marriage and thereby violating his right to marry. The Washington appellate court upheld the sentence.

Everything stated here is technically correct, however, the account neglects to mention that after sentencing but before appeal, Ross moved to vacate the no-contact order on the grounds of his marriage, previously unknown to the trial court. The court refused to vacate the order, but did agree to amend it. The appeals court decision reads as follows:

The [trial] court declined to vacate the provision, but agreed to modify it to allow any contact prison officials approved, and to allow contact after Ross’ release as follows:

When the defendant is released from custody to community placement, the [CCO] is required to supervise the defendant in enrolling in and completing a state approved treatment program for domestic violence batterers. Successful completion of the program is ordered as an additional condition of placement. The court will consider striking or lifting the no contact order…only upon successful completion of domestic violence battering treatment at an agency approved by the department of corrections for both the defendant, and Mary Burke-Ross. Contact will be permitted while on community placement notwithstanding the no contact order, as approved in writing by the treatment agencies, and submitted to the court through the [CCO].

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61 Id. at 48.
When the outcome of State v. Ross is properly understood, Suk’s worry that “the Ross court was strikingly nonchalant about the interference of the no-contact order with the right to marry” 63 is seen to be baseless. Suk is surprised that the opinion has remained unpublished “notwithstanding its evident relevance to the areas of criminal law, family law, and constitutional law.” 64 She is further concerned that “the court’s brevity suggested that it perceived the case as a nearly frivolous claim of the kind that courts constantly dispose of with cursory analysis.” 65 But of course, that is exactly what State v. Ross was. The defendant’s appeal of the no-contact order concerned only his desire to vacate it upon his enrolment in the DV treatment program, rather than upon his successful completion of the program. 66 This is exactly the kind of frivolous claim that courts constantly dispose of with cursory analysis. In fact, the bulk of the Ross decision is dedicated to an unrelated hearsay issue. 67

Chapter 2 of At Home is dedicated to the discussion of prosecutorial overreach and the dangers inherent in a system that can impose a de-facto divorce on couples who would otherwise wish to remain together. While the chapter does raise some legitimate concerns, the evidence is limited to the jurisdiction of Manhattan. Suk implies that mandatory criminal protection orders requiring ejection are the law in most states, regardless of the wishes of the victim. 68 A review of all state jurisdictions, however, shows that there is only one state in the Union that has mandatory criminal orders: Colorado. And even in Colorado, the mandatory order only prohibits menacing and intimidation of the victim or other witnesses, although the DA may request a no-contact or stay-

63 Suk, supra note 60 at 49.
64 Id.
65 Id.
66 Ross at 1.
67 Id.
68 Suk, supra note 60 at 50-2.
away order in addition.\textsuperscript{69} Furthermore, the worry that courts no longer respect the fundamental right to marry is misplaced, as the case cited in no way supports that conclusion.

Finally, Suk makes certain rather extraordinary claims in chapter 2, seemingly without any evidence at all to back them up. She states that cases ending in de-facto divorce “often involve little or no physical injury.”\textsuperscript{70} There is no evidence given to support this claim, and it seems difficult to believe. She further states that “[m]any divorce lawyers routinely recommend pursuit of civil protection orders for clients in divorce proceedings, either because they assume abused women are not being candid about being abused or as a tactical leverage device.”\textsuperscript{71} She cites an article which claims that CPOs can be used for tactical leverage, and features a transcript indicating one instance where a party did use this tactic. But no suggestion is made that this was done on the advice of counsel, either in the text of the article or in the transcript.\textsuperscript{72} There is also no evidence that divorce lawyers assume abused women are not being candid. Filing a request for a CPO when not actually in fear of abuse is perjury, and an attorney who recommends that a client seek a CPO under false pretenses has committed professional misconduct. It is difficult to believe that “many divorce lawyers” do this. Finally, Suk worries that “[i]f the protected party were to call the police and report a violation, mandatory arrest and no-drop prosecution would all but guarantee at least a night in jail … [so] in theory, sophisticated users of the DV and criminal justice systems could use the protection order as a strategic threat within the intimate relationship.”\textsuperscript{73} Again, Suk presents no evidence that this is actually happening. And of course, filing a false police report also constitutes a crime. We can never be sure that people aren’t “gaming” the system. But in cases of DV, shouldn’t we err on

\begin{footnotes}
\item[70] Suk, supra note 60 at 45.
\item[71] Id. at 47.
\item[73] Suk, supra note 60 at 47.
\end{footnotes}
the side of caution, in assuming the worst of alleged victims? It seems to me dangerous and
disingenuous to raise such concerns about what is happening in the DV arena with little to no
evidence, even of an anecdotal kind. Domestic violence is a difficult and emotional topic, which is
all the more reason to rely on carefully-gathered empirical evidence when considering matters of
policy.

You Can Take My House, but You Can’t Take My Family

Chapter 4 of *At Home* takes on two controversial, yet rarely paired Supreme Court cases: *Kelo
v. City of New London*[^74] and *Town of Castle Rock v. Gonzales*.[^75] *Kelo* concerned the understanding of
“public purpose” as applied to the government’s right of eminent domain. *Gonzales* tackled the issue
of whether or not a holder of a CPO has a “right” to its enforcement. Although these two cases
make an odd pair, Suk is astute to note that they both constituted major shifts in our legal
understanding of the home. She begins with *Kelo*, which held that invoking the power of eminent
domain to seize private property for the purpose of selling the property to another private party
could constitute a “public purpose” under the Constitution.[^76] The traditional understanding of
eminent domain was that the government could force private parties to sell their land to the State so
that it could make use of the land itself – to build a park, say, or a military base. In *Kelo*, the city of
New London exercised eminent domain to force the sale of land which it then sold to another
private party who could make more efficient use of it, thus generating more state tax revenue and

[^74]: 545 U.S. 469 (2005).
[^75]: 545 U.S. 748 (2005).
[^76]: *Kelo*, 545 U.S. at 484.
increasing property values. The Supreme Court found that this was a proper “public purpose,” as the State had an interest in more tax revenue.

Although *Kelo* was not a radical transformation of the law, it certainly made many lawyers and laypeople nervous. Low-income housing is never going to be an “efficient” use of land from a tax perspective, so the prospect of mass-repurposing of land taken from the poorest Americans was a real fear. Of course, what is constitutionally permissible is not necessarily good policy. Fortunately, then, the fears stemming from *Kelo* have yet to be realized. Suk discusses the middle-class anxiety that the *Kelo* decision tapped into: that the family home will never be “efficient” enough. How can you keep up with the Jones’ in terms of home “efficiency?” While I’m not denying that some people genuinely experienced this anxiety, it does appear that such a fear would be misplaced. *Kelo* was not about seizing property from home-owners who were not doing a good enough job keeping up appearances. ‘Efficiency’ in the mouths of the court has to do solely with property tax revenue. But far more problematic than her discussion of *Kelo* is Suk’s misrepresentation of the *Gonzales* decision.

In *Gonzales*, the plaintiff-wife had a valid CPO against her husband requiring him to stay 100 feet away from her, the home, and their three daughters. Violating the order, Gonzales’ husband kidnapped the three children from the yard where they were playing. Gonzales called the police half-a-dozen times, pleading with them to search for her husband and missing daughters. She even went to the police station to try to make her case in person. In each instance she was told by

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77 Id. at 472-6.  
78 Id. at 484.  
79 Suk, supra note 60, at 94.  
80 *Gonzales*, 545 U.S. at 753.  
81 Id. at 753-4.  
82 Id.
police to just wait, and the husband would probably show up later with the girls.\textsuperscript{83} Ultimately, the husband did show up at the police station, where he opened fire on police officers.\textsuperscript{84} He was shot dead, and the three daughters were found murdered in the back of his pick-up truck.\textsuperscript{85}

Determining the heart of the *Gonzales* decision requires a nuanced understanding of the law. When the State of Colorado issued Ms. Gonzales the CPO, it stated on the document that the police “shall use every reasonable means to enforce [the] order.”\textsuperscript{86} If “shall” meant that the police “must” act, then the State of Colorado was making a promise. Under the law, the right to have this promise enforced is a *property right*, and the State may not retract that right, without due process of law.\textsuperscript{87} To the layperson, it may seem strange that one has a “property right” to the enforcement of a CPO, and Suk makes much of this seeming oddity. But many things the law recognizes as property rights seem odd, intuitively, including welfare benefits\textsuperscript{88} and social security disability payments.\textsuperscript{89} There was no real legal dispute in *Gonzales* on the following point: if the police were *required* by the CPO to take some action (any action) to enforce the protection order, then Ms. Gonzales had a property right. If Ms. Gonzales had a property right, she could not be deprived of it without due process of law. If she was deprived of the property right without due process of law, she was entitled to sue for damages under federal law.\textsuperscript{90} None of this is controversial and was not a serious subject of dispute in the *Gonzales* decision.

The majority opinion in the case held that when the protection order said that the police “shall” use every reasonable means necessary to enforce the order, it did not require the police to

\begin{verbatim}
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id. at 752.
\textsuperscript{87} Usually a hearing.
\textsuperscript{89} Mathews v. Eldridge 424 U.S. 319 (1976).
\textsuperscript{90} 42 U.S.C. §1983.
\end{verbatim}
take any particular action, and therefore no promise of protection was made.\textsuperscript{91} The dissent by Justice Stevens rightly pointed out that while the police were not required to take any \textit{particular} action, the one thing they could \textit{not} do was nothing.\textsuperscript{92} The legislative history suggested that the “shall” language in the CPO was specifically mandated in an attempt to combat police under-enforcement in DV matters.\textsuperscript{93} Suk frames the issue as if we live in a world gone mad, where people can sue the state based on a property right in a protection order (she calls it a “private right to the police”).\textsuperscript{94} But this is not madness, so much as exactly what the Colorado legislature was attempting to make possible.\textsuperscript{95} The \textit{Gonzales} dissent, for example, notes that it was precisely the type of gross police negligence that occurred in this case that the legislature was trying to prevent when it passed the “shall” language.\textsuperscript{96}

As a final point on the \textit{Gonzales} opinion, doesn’t it make sense as a policy matter that we would want the police to be forced to take action to enforce a protection order? Ultimately, a CPO is just a piece of paper if the police are not required to act on it. A civil suit for damages is the manner by which we ensure that the state is fulfilling its responsibility to its citizens. While Suk depicts this as a radical idea, civil enforcement of constitutional rights is at the foundation of American jurisprudence. Most civil rights cases have been brought under 42 U.S. C. §1983, the federal law which creates a cause of action in federal court for the violation of constitutional rights.

\textsuperscript{91} \textit{Gonzales}, 545 U.S. at 761.
\textsuperscript{92} Id. at 784 (Stevens, J., dissenting).
\textsuperscript{93} Id. at 780.
\textsuperscript{96} At issue in \textit{Gonzales} was a state statute and in most situations before the Supreme Court, the plaintiff would have requested that the question of whether the “shall” language required the police to act be certified to the Colorado Supreme Court. For some reason, that did not happen in this case. One possible explanation I have heard to explain this anomaly is inadequate counsel for the plaintiff.
Kelo and Gonzales certainly did change our understanding of the home, and neither in a good way. If there is any lesson to be taken from these decisions, it seems to be that courts should be more sensitive to constitutional and legislative intent. It does not appear that a radical change in DV policy is actually driving the outcomes in these cases.

To Whom Does a Woman’s Privacy Belong?

Chapter 5 of At Home concerns the function of privacy in today’s world. The chapter’s primary argument is that “the notion of privacy is wrapped up in the idea of shielding the woman in the home.” Suk discusses class, gendered understandings of privacy, and the balance of protecting women while also respecting the privacy of the home. Ultimately, however, Suk seems to me to read far too much into the Supreme Courts’ opinions, and she is incorrect when she argues that the decisions she cites are influenced strongly by DV policy.

At issue in the beginning of Chapter 5 is the 2001 Supreme Court case of Kyllo v. United States. Kyllo, the police used a thermal image (infrared) scanner to look at the heat signature of the defendant’s home. Based on the location and intensity of heat, the police had probable cause to suspect that the defendant was using heat lamps to grow marijuana. The police obtained a warrant and searched the defendant's home; they discovered marijuana and duly arrested him. The defendant moved to suppress the seized marijuana, arguing that the use of the scanner constituted an illegal “search” under the 4th Amendment, and thus all evidence gathered as a result

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98 Id. at 29.
99 Id.
100 Id.
of it was fruit of the poisonous tree. When the judge denied his motion, the defendant entered a guilty plea and appealed.

Central to Suk’s case is Justice Scalia’s offhand reference to “the lady of the house [taking] her daily sauna and bath.” Justice Scalia raises this example simply to point out that the ability to read heat signatures inside the home could allow police to view exactly the kinds of things that we wish to keep private, namely our nakedness. It is not irrelevant here that Justice Scalia chose the image of a woman, not a man. The idea is imbedded in our history that a woman’s nakedness is more private than a man’s nakedness, especially when viewed by the opposite sex. But I contend that this is the full extent of the implications of Scalia’s gendered example. At Home goes on for some five pages, arguing that Justice Scalia was suggesting that women ought to be hidden from view, sequestered in the home. Suk believes that Scalia is arguing that the potential violation of privacy in Kyllo was actually that of the husband. Suk’s argument is that if the police saw the wife naked in the scanner image, the husband’s right to have exclusive access to the naked image of his wife would have been violated. This would be as opposed to the simple explanation that it was the wife’s privacy that had been violated. Suk is simply reading far too much into a colorful and gendered example, it seems to me.

Next up in Chapter 5’s trilogy of Supreme Court cases is Georgia v. Randolph. The question in Randolph was quite simple: do the police have the right to enter the home without a warrant when one resident permits them entry but a second resident refuses? While the facts of Randolph had nothing to do with DV, Chief Justice Roberts’ dissent worried that the majority’s opinion, holding that the police could not enter, might impede DV enforcement. The Chief Justice laments: “The

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101 Id.
102 Id.
103 Id. at 38.
majority’s rule apparently forbids police from entering to assist with a domestic dispute if the abuser
whose behavior prompted the request for police assistance objects.”\textsuperscript{105} Suk argues that the Chief
Justice, a member of a younger generation brought up to internalize DV policy, sees household
violence everywhere. She further suggests that Justice Scalia is parroting the views of Catherine
MacKinnon.\textsuperscript{106} While I’m certain that Professor MacKinnon would be surprised and delighted to
learn that Justice Scalia is a feminist convert, I think that Suk has misrepresented the basis of the
dissents in \textit{Randolph}.

Suk implies that by merely bringing up the possibility that a husband could prevent the
police from entering the home, even when the battered wife requests their presence, that Scalia and
Roberts have gone too far in a feminist direction.\textsuperscript{107} She states: “According to the received wisdom
of legal feminism, a battered woman’s domination by her husband severely limit [sic] her autonomy
to leave the home or the relationship. What the battered woman, needs, therefore, is not home
privacy but rather protection from the home.”\textsuperscript{108} Suk may pooh-pooh the feminists’ “received
wisdom,” but is it really so unreasonable an argument that the battered woman needs protection, not
privacy? In a country where thousands of women are murdered by their partners or exes every year,
is it so wrong to suggest that certain kinds of police protection is called for? In this context, privacy
is the excuse we often use for political inaction.

The most likely explanation for the discussion of DV in Roberts’ and Scalia’s dissents is that
the two were attempting to appeal to a kind of loaded imagery. Imagine the police arriving at a DV
scene where the wife wishes the police to enter the home, but the husband refuses. We can picture
her crying, with a black eye, pleading with the police to do something, but they are helpless because

\textsuperscript{105} Id. at 139.
\textsuperscript{106} Suk, supra note 94 at 120.
\textsuperscript{107} Id.
\textsuperscript{108} Id. at 121 (citation omitted).
the husband refuses them entry. Roberts and Scalia seem to be appealing to such imagery, even though it is clearly a red herring. In *Randolph*, the police did not have probable cause to believe that any crime had occurred. In the above scenario, however, there is plenty of probable cause to believe that a crime, namely the abuse of the wife, has occurred. When the police have probable cause, they may enter a residence, regardless of the objections of one of the residents. But while Roberts’ and Scalia’s analysis is thus flawed, this is not a problem with DV policy, but rather with their analysis.

Epilogue

The epilogue of *At Home* warns that in the post-9/11 world of increased security and focus on the homeland, the violation of privacy and the home are serious concerns. There is little doubt that this is true. The Military Commissions Act and the USA PATRIOT Act constitute significant infringements of basic civil liberties.\(^\text{109}\) What this has to do with DV, however, is not entirely clear.

The real epilogue of *At Home* is the serious mistakes of fact and law that run throughout the book. DV policy has come a long way since it was first taken seriously about forty years ago. A book sensitively exploring where this policy stands today is necessary and welcome. Unfortunately, *At Home* is not that book. *At Home* either inaccurately or deceptively describes at least a half-dozen cases. These mistakes lead to false conclusions about the dangers of effective DV policy. Criticisms of our current system for defending women against their abusive partners are welcome, but Suk’s criticisms and concerns are often largely baseless.