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TROUBLE AT HOME

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In her Jacob Prize award-winning book, *At Home in the Law: How the Domestic Violence Revolution is Transforming Privacy* (2009), Professor Jeannie Suk mounts a sustained argument to the effect that under the guise of protecting women, coercive state power has infiltrated the hitherto sacrosanct domain of the home.[2] According to Suk, the coercive power of statutes threatens to compromise privacy and traditional marital rights. Suk contends 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: "[h]ome is where the crime is."[3] She laments that at the heart of the domestic violence ("DV") revolution is a growth in the State's coercive power in the home that results in a

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[2] Following Suk, I will talk about domestic violence as involving a male batterer and a female victim throughout. I do not mean to suggest that abuse does not occur in the opposite pattern, and in same-sex relationships too. But the former sorts of cases are by far the most common.

[3] JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 4 (2009).

reduction of autonomy for women and men alike.[4] She thus contends that "the particular shape that revision is currently taking desperately needs evaluation."[5]

While it is certainly true that the United States' approach to combating DV requires a serious reevaluation, Suk's conclusions are ultimately unconvincing. In the following note I will examine *At Home in the Law* ("*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 Three, which is not discussed.[6] While a detailed counter-argument to the policy goals Suk advocates 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 be cautious about accepting 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 matter 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 One 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,

[4] *Id.* at 7.
[5] *Id.* at 13.
[6] Chapter Three is a detailed discussion of self-defense law and its gendered implications. While I may disagree with the general arguments presented in Chapter Three, it is not pertinent to the topic of this article.

it is the home."[7] Suk argues 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."[8] 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."[9]

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.*"[10] It is true that all states now have CPOs and each state has a wide range of potential remedies that can be incorporated into the order.[11] 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.[12] Other possible remedies which may be incorporated into the CPO include no-contact orders,[13] stay-away orders,[14] the surrender of weapons, financial support,[15] temporary custody of children, and even

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[7] *Id.* at 9 (citations omitted).
[8] *Id.* at 10.
[9] *Id.* at 10-11 (citing MICHAEL S. MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 783 (1997)).
[10] *Id.* at 14 (emphasis added). 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, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Laws*, 20 HOFSTRA L. REV. 801, 910-11 (1993). These sources support the claim that CPOs *may* require the subject to vacate a shared home, but they do not support the claim that they always or typically do. This makes sense since they were both written over two decades ago.
[11] *Enforcement of Protective Orders, Legal Series Bulletin #4*, Office for Victims of Crime (Jan. 2002) (https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin4/2.html).
[12] MASS. GEN. LAWS ch. § 209(a) § 7 (2012).
[13] 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, text messages, 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. *See, e.g., Id.*
[14] 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 feet). 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. *See, e.g., Id.*
[15] 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. For an example of this under Texas Law, *see* Kathryn J. Murphy, *Alimony, Maintenance and Temporary Spousal Support* (April 20, 2006) (http://www.gbfamilylaw.com/CM/Articles/Alimony-Maintenance-Temporary-Spousal-Support.pdf).

providing for the exclusive use of homes – meaning that the abuser must vacate the shared residence.[16] 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.

To be fair, 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.[17] 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 does not feel safe enough to stay in a shared residence. Every year in the U.S., between 1,000 and 1,600 women are killed by their intimate partners.[18] In many of these instances, the victim had a protection order at the time.[19] Ultimately, if a victim is in fear of her life, flight to a shelter is the only practical recourse, even if the law would grant her the home in theory.

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 is not awarded custody of the shared residence more often.[20]

Moreover, it is not 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

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[16] Peter Finn, *Statutory Authority in the Use and Enforcement of Civil Protection Orders against Domestic Abuse*, 23 Fam. L.Q. 43, 49-51 (1989).
[17] Stay-away orders not only prohibit the enjoined party from approaching the protected party, it prohibits him from approaching the protected party's home and place of work. *See, e.g.*, MASS. GEN. LAWS ch. § 209(a) (2012).
[18] Neil Websdale, *Reviewing Domestic Violence Deaths*, 250 NAT'L INST. OF JUST. J. 26, 27 (2003).
[19] Frances Hayes, *Seven of 73 DV Homicide Victims had Restraining Orders*, Stop Abusive and Violent Environments (Oct. 12, 2011) http://www.saveservices.org/2011/10/seven-of-73-dv-homicide-victims-had-restraining-orders.
[20] *See, e.g.*, Diane Rosenfeld, *Why Doesn't He Leave? Restoring Liberty and Equality to Battered Women*, DIRECTIONS IN SEXUAL HARASSMENT LAW 535 (Catherine A. MacKinnon & Reva B. Seigel eds., 2004).

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 One, *At Home* introduces the case of *State v. Lilly*.[21] *Lilly* is presented for two reasons: first, it is intended to serve as an example of the expanding power of the state into the marital home; and second, it is supposed to show that the general aims of DV policy influence 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."[22] 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."[23] 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.[24]

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 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.

[21] 717 N.E.2d 322 (Ohio 1999) (*supra* note 3, at 23-5).
[22] JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 23 (2009).
[23] *Id.*
[24] *Lilly*, 717 N.E.2d. at 327.

> 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.[25]

There can be no doubt the apartment at issue had never been shared. It thus can hardly serve as an example of the state's increasing reach into the marital home.

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.[26]

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."[27] The court also considered the legislative intent behind the statute and determined that the purpose was to prevent husbands from ousting their wives from the marital home during disagreements, by

[25] *Lilly*, 717 N.E.2d. at 327-8 (emphasis added).
[26] SUK, *supra* note 22, at 25.
[27] *Lilly*, 717 N.E.2d. at 326 (citations omitted).

establishing that each had an equal interest in the property.[28] 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 still had no legal right to enter the home and managed to do so only by secretly unlocking an entrance normally left secured.[29] The facts here are more than sufficient to support a jury finding that the defendant trespassed when he entered. Because the purpose of the trespass was to steal her purse and damage her belongings, the charge of burglary is entirely defensible and in no way constitutes a shift in the law.[30]

Ex parte Davis

Later in Chapter One, Suk raises the case of *Ex parte Davis*.[31] 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.[32]

After noting that the court upheld the burglary conviction, Suk rails against the outcome using two dubious arguments. First, she contends that it was preposterous that the defendant could be said to

[28] *Id.*
[29] *Id.* at 327-28.
[30] *Id.*
[31] SUK, *supra* note 22, at 27-30. (discussing *Ex parte Davis*, 542 S.W.2d 192 (Tex. Crim. App. 1976)). It bears noting that this *habeas corpus* petition is from 1976, long before many of the modern DV policies that Suk takes issue with were enacted.
[32] *Id.* at 27-28 (citations to *Ex parte Davis* omitted).

be trespassing upon his own property, and second, even if it might have been trespass had he entered without permission, his brother, co-owner of the property, had granted him access.[33]

In support of her first claim, Suk states that, "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."[34] Throughout the discussion of this case, Suk 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 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 seemingly not swayed by DV policy.

While Suk appeals to the common sense 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 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.[35] Failure to obtain that permission makes entry a trespass. The distinction between ownership and control is ubiquitous throughout the law.[36]

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[33] SUK, *supra* note 20.
[34] *Id.* at 28.
[35] Although the parties may 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.
[36] Other common examples highlighting the difference between control and ownership are pawn shops, legal bailments, and repossessing rented or secured items.

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."[37] As a result of this order, the wife became the sole controller of the property. The implications of this court order were twofold: first, since exclusive control was granted to the wife, the defendant no longer had a right-of-entry, even if his name was on the deed. Second, 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. First, the brother could not grant 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. Second, 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.

Therefore, 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 is the case here. And the brother's consent to entry was irrelevant for two independent reasons. Thus, the court did not treat the defendant as if he were "more of a stranger … than a true stranger would have been."[38] It treated him like a person who was explicitly barred from entry by a court order. And it bears repeating: the

[37] *Ex parte* Davis, 542 S.W.2d at 195.
[38] JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 30-34 (2009).

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*

In *At Home*, Professor Suk discusses two cases: *People v. Rhorer*[39] and *State v. Colvin*.[40] 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 and the intent to commit a further crime while trespassing.[41] 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 "[a]t common law, the crime the defendant intended to commit had to be distinct from his trespass into the property."[42] Suk is concerned 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 *Colvin* 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.

At Home presents *Rhorer* as "the leading case to embrace" the use of intent to trespass in violation of a CPO as an independent crime.[43] The facts are presented accurately:

> [t]he 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

[39] 967 P.2d 147 (Colo. 1998).
[40] 645 N.W.2d 449 (Minn. 2002).
[41] 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.
[42] SUK, *supra* note 38, at 30. This is certainly true.
[43] *Id.*

> 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.[44]

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 burglary."[45] 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.[46]

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 under 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 *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

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[44] *Id.* at 30-1.
[45] *Id.* at 31.
[46] *Rhorer*, 967 P.2d at 150 (emphasis added).

reached the opposite answer on the same question of whether entry in violation of a restraining order satisfies the independent crime element of burglary."[47] But the facts are not materially the same, and in fact, the courts reach exactly the same conclusion on the law. 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 entry element of burglary, could not also satisfy the independent crime requirement.[48]

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."[49] 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.[50] 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.[51] The defendant, upon breaking in and finding his ex-wife away from home, decided to watch television and have a beer or two.[52] When the ex-wife returned, he left

[47] SUK, *supra* note 38, at 31.
[48] *Id.* at 31-32 (citations omitted).
[49] *Colvin*, 645 N.W.2d at 454.
[50] *Rhorer*, 967 P.2d at 149.
[51] *See Colvin*, 645 N.W.2d at 453.
[52] *Id.* at 451.

immediately with no argument.[53] It appears that his only intent was to spend some time in his man-cave.[54] 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.[55]

If the defendant had intended to do anything illegal other than just enter the property, there might well have been a different finding, as in *Rhorer*. But in the end, his only crime was trespass.

At Home concludes Chapter One by arguing that "[t]he 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."[56] 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 have 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. Third, 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, given his history of committing such violence.

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[53] *Id.*
[54] *Id.*
[55] *Colvin*, 645 N.W. at 456.
[56] SUK at 33.

What's Good for Manhattan…

In Chapter Two, *At Home* argues 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.[57] Suk writes that "[c]ourt-ordered separation becomes a goal of prosecutors in bringing criminal charges – a substitute for, rather than a means of, increasing the likelihood of punishment."[58] 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.[59] Suk finds this especially problematic because "[a]s a product of the plea bargain, *de facto* divorce goes into effect without the benefit of traditional criminal process or proof of the crime."[60]

We shall see that Suk's worries are not without merit, and the fear of prosecutorial overreach is a legitimate one. The actual extent of such practices, however, is in no way clear; there is 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 this is actually occurring in a widespread fashion, there is no reason to reform well-established DV policy.

Chapter Two also misrepresents the outcome of an unpublished Washington State case from 1996, *State v. Ross*. When properly understood, the outcome of *Ross* should actually go a long way towards reassuring us that the state fully recognizes the fundamental right of marriage, discussed later in this note.[61]

The first half of Chapter Two focuses on the standard policy for prosecuting DV cases in the Manhattan District Attorney's Office ("Manhattan DA's Office").[62] *At Home* outlines the

[57] *Id.* at 35.
[58] *Id.* at 42.
[59] *Id.*
[60] *Id.* at 45.
[61] *See infra.* page ????.
[62] *Suk*, at 35-48.

standard operating procedure for dealing with criminal domestic violence cases in the Manhattan District Attorney's Office. Suk states that DV cases in Manhattan trigger a "mandatory domestic violence protocol."[63] 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.[64] All of these actions can be taken regardless of the wishes of the victim.[65]

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.[66] 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."[67] No-contact and stay-away orders are the cornerstone of DV protection.[68] The final and strongest claim, that the defendant is excluded from the victim's home, even if it is a shared residence, is not supported by any citation.[69] Most protection orders do allow for the possibility of excluding the defendant from the victim's residence. However, judges are often reluctant to implement this remedy in cases where the parties share a residence.

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[63] SUK, *supra* note 2, at 36. Here Professor Suk cites the "2004 Criminal Court Crimes Manual." The Manual is not generally available to the public, but I received a redacted copy of the DV section through a New York Freedom of Information Law request (PUB. OFFICERS L. ART. VI, § 84-90). Chapter Two of *At Home* cites the Manual more than a dozen times.
[64] *Id.*
[65] *Id. At Home* here cites the Mandatory Domestic Violence Checklist on page 55 of the 2004 Criminal Court Crimes Manual. The list states: "A Family or Non-family order of protection must be filled out for each case." The language here seems to suggest that if there are multiple cases pending against a single defendant, then an order of protection needs to be filled out for each case. The mandate is clearly designed to force the DA to take action. There is no language whatsoever to suggest that the DA should ignore the wishes of the victim, though.
[66] *Id.* at 38. *At Home* cites the Mandatory Domestic Violence Checklist discussed *Id.*
[67] *Id.* (citations omitted); 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.
[68] Barbara J. Hart, *The Legal Road to Freedom*, BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE 13 (Marsali Hansen & Michele Harway eds.,1993).
[69] SUK, *supra* note 2, at 35.

At Home then attempts to develop, for some pages, an argument that prosecutors over-charge their cases in order to force plea bargains that may include permanent protection orders.[70] 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 exceptionally low.[71] 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.[72]

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 as a society 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.[73] This problem is by no means limited to DV cases, however. The goal of prosecutors in *most* areas is to force a plea deal by effectively threatening the maximum penalty.

It does not seem to me that Manhattan's Mandatory Domestic Violence Protocol constitutes a significant departure from prior DV procedures. *At Home* repeatedly stresses the mandatory nature of the protocol in an attempt to argue that Manhattan DAs are exercising significant authority

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[70] *See, id.*
[71] Suk, *supra* note 2, at 45.
[72] *Id.*
[73] *See, e.g.,* H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U.L. REV. 63 (2011); Ana Maria Gutierrez, *The Sixth Amendment: The Operation of Plea Bargaining in Contemporary Criminal Procedure*, 87 DENV. U. L. REV. 695 (2010); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2519 (2004).

in the home and in the relationships of couples. Reading the mandatory domestic violence protocol, however, one gets the impression that it was designed to crackdown on DAs who were not taking DV seriously. The protocol's "mandatory" nature is designed to force DAs to take action.[74] It would seem that Manhattan likely created the mandatory protocol to force DAs to properly prosecute DV cases and help protect DV victims.

And even if one accepts the argument made in Chapter Two, it applies only to a single jurisdiction. Suk later attempts to generalize from the Manhattan example, but no evidence is given to support the claim that these policies are practiced in any other jurisdiction. Furthermore, her putative evidence is now nine years old and may no longer be the protocol even in Manhattan.[75]

Chapter Two ends with a discussion of the unpublished *per curiam* opinion, *State v. Ross*.[76] 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.[77]

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

[74] For example, page 55 of the Manual is a "Mandatory Domestic Violence Checklist." This page lists all of the steps that a DA must take in prosecuting a felony or misdemeanor DV case.
[75] The Criminal Court Crimes Manual is from 2004.
[76] SUK, *supra* note 2, at 48-50 (2009) (discussing *State v. Ross*, No. 35448-5-I, 1996 WL 524116 (Wash.Ct.App. Sept. 16, 1996)).
[77] *Id.* at 48.

marriage, previously unknown to the trial court.[78] The court refused to vacate the order, but agreed 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].[79]

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"[80] can be seen to be baseless. Suk is surprised that the opinion remained unpublished "notwithstanding its evident relevance to the areas of criminal law, family law, and constitutional law."[81] 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."[82] But in fact, that is exactly what *State v. Ross* was. On appeal, the defendant sought only to move up the reconsideration of his no-contact order from the date of completion of the DV treatment program to the date of enrollment in the program.[83] 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.[84]

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[78] *State v. Ross*, No. 35448-5-I, 1996 WL 524116, at *2 (Wash. Ct. App. Sept. 16, 1996).
[79] *Id.*
[80] SUK, *supra* note 2, at 49.
[81] *Id.*
[82] *Id.*
[83] *Ross*, 1996 WL 524116 at *4.
[84] *Id.*

Chapter Two 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.[85] A review of all state jurisdictions, however, shows that there is only *one* state in the Union that has mandatory criminal orders: Colorado.[86] 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-away order in addition.[87] 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 extraordinary claims in Chapter Two, for which she offers no evidence. She states that cases ending in *de facto* divorce "often involve little or no physical injury."[88] The author gives no evidence to support this claim, and, furthermore, 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."[89] 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.[90] No suggestion is made that this was done on the advice of counsel, either in the text of the article or in the transcript.[91] There is also no evidence that divorce lawyers assume abused women are not being candid. A person filing a request for a CPO when not actually in fear

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[85] SUK, *supra* note 2, at 50-52.
[86] COLO. REV. STAT. § 18-1-1001 (2011).
[87] *Id.*
[88] SUK, *supra* note 2, at 45.
[89] Suk, *supra* note 2 at 47.
[90] Randy Frances Kandel, *Squabbling in the Shadows: What the Law Can Learn from the Way Divorcing Couples Use Protective Orders as Bargaining Chips in Domestic Spats and Child Custody Mediation*, 48 S.C.L. REV. 441, 448 (1997).
[91] *Id.*

of abuse has committed perjury. An attorney who recommends that a client seek a CPO under false pretenses has committed professional misconduct.[92] It is difficult to believe that "many divorce lawyers" do this. In addition, 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.[93]

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 the side of caution, rather than assuming the worst of alleged victims? It seems to me to be 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 DV policy.

[92] Ethical rules vary by state, but the American Bar Association's Model Rules for Professional Conduct states: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." MODEL RULES OF PROF'L CONDUCT R. 3.1 (2012).
[93] SUK, *supra* note 2, at 46-47.

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

Chapter Four of *At Home* takes on two controversial, yet rarely paired, Supreme Court cases: *Kelo v. City of New London*[94] and *Town of Castle Rock v. Gonzales*.[95] *Kelo* concerned the understanding of "public purpose" as applied to the government's right of eminent domain.[96] *Gonzales* tackled the issue of whether or not a holder of a CPO has a "right" to its enforcement.[97] 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.[98] 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 or a military base.[99] 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 city and state tax revenue and increasing property values.[100] The Supreme Court found that this was a proper "public purpose," as the State had an interest in more tax revenue.[101]

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.

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[94] 545 U.S. 469 (2005).
[95] 545 U.S. 748 (2005).
[96] 545 U.S. 469 (2005).
[97] 545 U.S. 748 (2005).
[98] *Kelo*, 545 U.S. 469 at 484.
[99] For a history of eminent domain in Britain and the United States *see*, Bruce L. Benson, *The Evolution of Eminent Domain: A Remedy for Market Failure or an Effort to Limit Government Power and Government Failure?* The Independent Review, v. XII, n. 3, Winter 2008, pp. 423–32.
[100] *Id.* at 472-76.
[101] *Id.* at 484.

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.[102] How can you keep up with the Jones' in terms of home "efficiency?" While it is possible that some people genuinely experienced this anxiety, it does appear that such a fear would be misplaced. *Kelo* was not about seizing property from homeowners 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 Suk's discussion of *Kelo* is her 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.[103] Violating the order, Gonzales' husband kidnapped the three children from the yard where they were playing.[104] Gonzales called the police half-a-dozen times, pleading with them to search for her husband and missing daughters.[105] She even went to the police station to try to make her case in person.[106] In each instance she was told by police to just wait, and the husband would probably show up later with the girls.[107] Ultimately, the husband did show up at the police station, where he opened fire on police officers.[108] He was shot dead, and the three daughters were found murdered in the back of his pick-up truck.[109]

Determining the heart of the *Gonzales* decision is no easy matter. 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."[110] 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

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[102] SUK, *supra* note 76, at 94.
[103] 545 U.S. 748 (2005).
[104] *Gonzales*, 545 U.S. at 753.
[105] *Id.* at 753-54.
[106] *Id.*
[107] *Id.*
[108] *Id.* at 754.
[109] *Id.*
[110] *Id.* at 752.

property right, and the state may not retract that right without due process of law.[111] 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. However, many things the law recognizes as property rights seem odd intuitively, including welfare benefits[112] and social security disability payments.[113]

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.[114] None of this is controversial and it was not a serious subject of dispute in the *Gonzales* decision.

The majority opinion in *Gonzales* 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 take any particular action, and therefore no promise of protection was made.[115] The dissent by Justice Stevens rightly pointed out that while the police were not required to take any *particular* action, the one thing they could *not* do was nothing.[116] 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.[117] 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 entitlement to police enforcement.")[118] But this is not madness; rather it is exactly what the Colorado legislature

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111 Usually a hearing.
112 *Goldberg v. Kelly*, 397 U.S. 254, 255-62 (1970).
113 *Mathews v. Eldridge*, 424 U.S. 319, 323 (1976).
114 42 U.S.C. § 1983.
115 *Gonzales*, 545 U.S. at 761.
116 *Id.* at 784 (Stevens, J., dissenting).
117 *Id.* at 780.
118 SUK, *supra* note 2, at 97.

was attempting to make possible.[119] The *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 a bill which employed the "shall" language.[120]

As a final point on the *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.[121]

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.

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[119] Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1662-63 (2004).

[120] At issue in *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. That did not happen in this case. One possible explanation I have heard to explain this anomaly is inadequate counsel for the plaintiff. *See* 545 U.S. at 756 (Scalia, J.).

[121] 42 U.S.C. § 1983.

To Whom Does a Woman's Privacy Belong?

Chapter Five 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."[122] 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 Court's 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 Five is the 2001 Supreme Court case of *Kyllo v. United States*.[123] In *Kyllo*, the police used a thermal image (infrared) scanner to look at the heat signature of the defendant's home.[124] Based on the location and intensity of heat, the police believed that they had probable cause to suspect that the defendant was using heat lamps to grow marijuana.[125] The police obtained a warrant and searched the defendant's home; they discovered marijuana and arrested him.[126] At trial, the defendant moved to suppress the seized marijuana arguing that the use of the scanner constituted an illegal "search" under the Fourth Amendment, and thus all evidence gathered as a result of it was fruit of the poisonous tree.[127] When the judge denied his motion, the defendant entered a conditional guilty plea and appealed.[128]

Central to Suk's case is Justice Scalia's offhand reference to "the lady of the house [taking] her daily sauna and bath."[129] 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 probably no accident that Justice Scalia chose the

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[122] SUK, *supra* note 2, at 112.
[123] 533 U.S. 27 (2001).
[124] *Id.* at 29.
[125] *Id.* at 30.
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.* at 44.

image of a woman to illustrate his point. 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. While *At Home* goes on for five pages[130]arguing that Justice Scalia was suggesting that women ought to be hidden from view and sequestered in the home, I contend that this is the full extent of the implication of Scalia's example. 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 supposedly been violated. That is more needlessly complicated than the simpler explanation, that it was the wife's privacy that was supposed to have been violated. Suk is simply reading too much into a colorful and gendered example, in my view.

Next in Chapter Five's trilogy of Supreme Court cases is *Georgia v. Randolph*.[131] 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?[132] 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.[133] The Chief Justice laments: "[t]he 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."[134] Suk argues that the Chief Justice, a member of a younger generation brought up to internalize DV policy, sees household violence everywhere.[135] In doing so, Suk has misrepresented the basis of the dissents in *Randolph*.

Suk implies that by merely bringing up the possibility that a husband could prevent the police from entering the home, even when a battered wife requests their presence, that Scalia and

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[130] *See* SUK, *supra* note 2, at 4.
[131] 547 U.S. 103, 103 (2006).
[132] *Id.* at 106.
[133] *Id.* at 139. (Roberts, C.J., dissenting).
[134] *Id.*
[135] SUK, *supra* note 2, at 120.

Roberts have gone too far in a feminist direction.[136] She states: "[a]ccording 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."[137] Suk may criticize 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,[138] is it wrong to suggest that certain kinds of police protection are 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 the husband refuses them entry. Roberts and Scalia seem to be appealing to such imagery, though it is nothing more than a red herring. In *Randolph*, the police did not have probable cause to believe that any crime had occurred.[139] 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.[140] But while Robert's and Scalia's analysis is thus flawed, it is not a problem with DV policy, but rather with their analysis.

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[136] *Id.*
[137] *Id.* at 121 (citation omitted).
[138] Neil Websdale, *Reviewing Domestic Violence Deaths*, 250 NAT'L INST. OF JUST. J. 26, 27 (2003).
[139] *Randolph*, 547 U.S. at 118.
[140] *Id.* (citing *Texas v. Brown*, 460 U.S. 730, 737-739 (1983) (plurality opinion)).

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.[141] What this has to do with DV, however, is unclear.

The real epilogue of *At Home* is the significant mistakes of fact and law that run throughout the book. DV policy has come a long way since it became a priority about forty years ago. A book that accurately and carefully explored where this policy stands today would be useful and welcome, but *At Home* is not that book. In *At Home*, Suk inaccurately describes several cases that underpin her argument. 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 important to consider, but Suk's criticisms and concerns are often misleading and off-base.

[141] *See* 10 U.S.C. §§ 948-50; 115 Stat. 272 (2001).