Home is at once an owned object and an idea. The home as material thing and home as idea are sometimes deeply and emotionally shared; at other times, the physical place and the meaning of home are zealously contested, even violently guarded. As such, home is more than the sum of its parts. Home is never at rest; its meanings to us change throughout our lives as they have changed throughout history. Yet as one of the first ideas we learn as children, home is among the most enduring concepts of our lives.

Professor Jeannie Suk’s analyses draw back the curtains obscuring conflicts among the many theories and values at play in American case law, statutory law and culture that inscribe the home as an idea and as a place. These theories of home circle and collide, shaping and revising our views of what is public and what is private; what is masculine and feminine; and, ultimately, what is acceptable and unacceptable. Home is, in turn, shaped by those values. Suk’s discussion reveals connections between the unintended legislative and legal consequences that frustrate seemingly aligned goals and enable agendas otherwise opposed. Indeed, the author’s own analysis is occasionally conflicted by the temptation to make these strands coherent where coherence may not (currently) exist. Fortunately, her work consistently provides the bases for further analysis that may reveal not only the preoccupations which our laws, the actors in our legal system, and everyone else grapples with, but also a glimpse into where this may all lead.

Suk describes her “aim is to reveal the ideas of the home that are being translated and engrained into legal culture and their consequences” by “juxtapos[ing] case studies on the developing relationship between the home and the police.” Rather than discuss the book chapter by chapter, I will recount and engage the most powerful themes reappearing throughout.

The author sees “[a]t least two related visions provid[ing] a foundation on which the legal architecture of the home rests,” which she articulates as differing views of the “home as a castle.” One theory views the “home-castle” as providing...
security from others, safeguarded by the police. The other views the home-castle as “the exemplary site of personal liberty from state intrusion and control,” with state authority “stop[ping] at the threshold.” The author posits that the first vision of home articulated—site of state-secured protection from violence—is “working its way into the space of the second,” conveyed by “[t]he image of the home as the exemplary place of coercion and abuse . . . gaining cultural ascendance.” Her analysis, largely based on discussion of the ongoing development of the domestic violence protective order (“DVPO”) system, strongly supports that conclusion, though that conclusion and her characterizations describing it are also complicated (or possibly contradicted by) her analysis of self-defense inside and outside the home.

It is worth noting that the author is not seeking to cover all possible meanings of “home” but to illuminate legal meaning and the “preoccupations of our legal culture.” Perhaps most important in understanding the work is Suk’s “fascination with what the law as a cultural product might tell us about the distinctive ideas through which we are governing ourselves . . . .” Suk’s view of the law as both cultural product and cultural input is generally well-served, though there are at least a few notable omissions and contradictions that I will attempt to address after recounting and critiquing the substance and reasoning of her work. Section II lays out Suk’s foundational description of a DVPO system’s goals and methodology. Section III introduces and critiques aspects of the author’s analysis and her characterization of some consequences of the DVPO regime, that she terms the “superstranger” and “state-imposed de facto divorce.” Section IV moves further into my critique by examining a recurrent theme of the book, a putative “erosion” of the public/private distinction. Finally, Section V concludes my analysis by briefly engaging another recurrent thread, the idea and one’s experience of “the uncanny.”

---

5 Id.
6 Id.
7 Id.
8 Id.
9 See id. at 14–16. Currently, domestic violence allegations are initially addressed through the imposition of a temporary protective order, which bars contact between the parties. A temporary civil order sought by a victim is usually issued ex parte, and may be made permanent by a subsequent adversarial hearing. When sought by prosecutors, often without the support of the victim, such an order is a criminal protective order. Either type of protective order, if violated, can lead to criminal sanctions for contempt of a court order. The threat of criminal sanction for violating a protective order is the means to prevent further violence.
10 See Section III.A infra, regarding New Castle Doctrine.
11 SUK, supra note 1, at 7–8.
12 Id. at 8.
13 Id.
I. THE NUTS AND BOLTS OF DVPOs

Professor Suk makes a strong descriptive case that domestic violence ("DV") law and process are not particularly concerned with punishment as their objective, but rather with coercion and control of the abuser. Achieving that control not only requires evidence supporting even the temporary imposition of a protective order ("PO"); it must prevent subsequent violence to have practical meaning. The law already bars such attacks, whether a PO is in place or not, whether preceded by another violent act or not. The DVPO, therefore, punishes an abuser’s presence in the home as a proxy for future violence, rather than punishing an act of violence occurring after a PO is entered. Punishing the proxy, however, relies on three "assumptions. [1] The person is a domestic abuser. [2] His marriage or domestic relationship is abusive. [3] His presence makes the home a dangerous place for the family." Use of a PO links those assumptions and acts on them, buttressed by theories of behavior and psychology in DV relationships.

By ordering an abuser out and away from the home, a DVPO makes the abuser a stranger from, and in, his home by criminalizing his subsequent presence there. Additionally, that order becomes the legal foothold for police presence in the home itself, enabling unannounced visits, and arrest of the barred abuser on sight. “That monitoring opens up a range of conduct in the home to criminal law control,” with lower evidentiary and procedural hurdles required for such state actions than would be the case without such an order.

Implementation of this DVPO regime is made efficient and effective by statutorily classifying violations and misdemeanors (rather than felonies) as triggers for DVPOs (which can be civil or criminal). This provides the state the means to: prevent further violence; shift the burden of proof in favor of the state; and enforce the court-ordered expulsion.

Manhattan, for example, employs a no-drop policy: the city will prosecute a DV case with or without victim participation. This policy is buttressed by

---

14 Id. at 10.
15 Id. at 16.
16 Id. at 18.
17 Id. The underpinning dynamic assumed to animate all DV relationships means that "the [PO] marks the relationship as not only abusive but also immutable in the absence of state intervention." Id.
18 Id. at 19; e.g., Fourth Amendment protections requiring warrant, or probable cause, are stripped or satisfied, as the PO provides probable cause for the duration of the PO. See U.S. CONST. amend. IV.
19 The author uses the practices of the Manhattan police as an illustrative case study. See Suk, supra note 1, at 35–54 (Ch. 2, “Criminal Law Comes Home”).
20 As mentioned in infra note 22, the act triggering a PO can be a non-violent violation, leading to a PO enabling the removal of Fourth Amendment restrictions on search and seizure.
21 Suk, supra note 1, at 35–37. This is a response to a common dynamic in DV relationships, wherein the victim does not wish to have her abuser barred from the home for a variety of practical and psychological reasons. In Manhattan, 80% of victims recant or
department rules designed to gather evidence for prosecution in cases where the victim refuses to assist or later drops out. Critically, a request for a temporary PO is mandatory for every police visit responding to alleged DV in Manhattan, including those triggered by a violation-level incident, and incidents where neighbors summon police without the knowledge of the parties involved. Manhattan courts operate twenty-four hours per day to allow timely arraignment of all such charges brought, enabling maximum use of DVPOs while minimizing procedural and resource roadblocks that ordinarily might prevent such orders in response to alleged DV incidents (which occur around the clock). Temporary POs are “routinely” issued at these round-the-clock arraignments as a condition of bail or pre-trial release. They are generally full no-contact orders, covering the adult victim and all children in the household, barring any means of contact, including mail, telephone, voicemail, email, and third-party contact.

The stated goal of prosecutors and court personnel for criminal charges and the resultant initial, temporary PO (particularly for weak cases) is not punishment; rather, it is “control over the intimate relationship in the home.” To that end, a temporary PO is violated even if the victim initiates contact or invites the defendant into her home. Temporary POs generally last as long as a case is open, providing prosecutors and police the maximum number of unannounced visits (and the power to control) before the PO is rescinded or extinguishes.

---

22 Id. at 10 n.12 (citing Tom Lininger, Bearing of the Cross, 74 FORDHAM L. REV. 1353, 1363 (2005)).
23 Id. at 37.
24 Id. at 35 (“[A]ny crime or violation committed by a defendant against . . . a member of his or her same family or household,” including “people living together or who formerly lived together as a domestic unit.” (quoting 2004 CRIMINAL COURT CRIMES MANUAL 18 (2004) (emphasis in original)).
25 Id. at 47.
26 Id. at 38.
27 Id.
28 Id. at 39 & n.38 (citing Richard R. Peterson, N.Y. City Criminal Justice Agency, Combating Domestic Violence in New York City: A Study of DV Cases in Criminal Courts, 10 (2003)) (the goal in weak cases is “gain control over the defendant’s behavior for a period of time”).
29 Id. at 38.
30 Id. at 38–39.
31 Id. at 38. Fourteenth amendment challenges regarding lack of evidentiary hearings as a violation of procedural due process have failed. Courts see the exclusion of the defendant from the home as “necessary” to a state need to control the home, itself an extension of a “traditional” need to control the defendant post-arrest. Id. at 40–41 (citing People v. Forman, 546 N.Y.S.2d 755, 765 (N.Y. Crim. Ct. 1989)).
II. CONSEQUENCES: INTENDED AND OTHERWISE

While acknowledging the widespread and urgent need for administrable protective measures, Suk questions the collateral effects of these policies: in practical terms for the parties involved; in other areas of law; in the legal/rhetorical requirements for implementing and justifying the DVPO regime; and how those effects and rhetoric, in turn, change public policy.

A. Genesis of the Superstranger

The author convincingly characterizes an abuser barred from his former home by a DVPO as a “superstranger”: a person having less right to enter his former home than an actual stranger, as the superstranger is barred even from invited entry to the home. Further, the PO not only makes presence a proxy crime for violence, it can also provide the basis for more serious charges than the initial DV misdemeanor or violation. One example explored is burglary, which is charged upon violation of a PO with increasing frequency. While I acknowledge the great prevalence and severity of DV and share the author’s desire to address it, Suk’s description of how burglary charges are facilitated against the superstranger (as yet not convicted of any pre-PO act) seems disturbingly at odds with consistently applied due process and punishment.

In some jurisdictions, violating a DVPO via presence in the home satisfies the burglary elements of “remaining” in the dwelling of another, and supplies the intent to commit another felony (i.e. intending to violate a PO via “substituted intent”). Thus, a barred abuser present in the home becomes a burglar where a stranger could not be. As a serious felony, burglary becomes a “magnified proxy crime,” allowing even more severe punishment than violation of the original PO alone, or many DV crimes which trigger a PO.

The author notes that many courts do not allow the conflation of entry in the home with the felonious specific intent required for burglary. Instead, many POs in these jurisdictions specifically bar both the acts of entry and various, specified forms of contact. This allows the specific intent to initiate an expressly barred form of contact to be inferred upon entry to the home, thus allowing the PO to be the

---

33 See generally Suk, supra note 1, at 25–27.
34 Id. at 33.
35 Some states allow substituted intent, others do not. Id. at 31–32 (citing State v. Colvin, 645 N.W.2d 449, 453–54 (Minn. 2002) (entry in violation of a PO could not both satisfy the burglary element requiring presence in the home of another and supply the burglary intent to commit another felony therein)).
complete basis for a burglary charge without relying mere general intent supplied by violating a no-contact order lacking those other conditions.\textsuperscript{36}

\textbf{B. State-Imposed De Facto Divorce}

The practical difficulty of short-circuiting a cycle of violence in an intimate relationship, and the burden of proof required to do so legally, make the use of a proxy crime understandable, or possibly historically necessary.\textsuperscript{37} Suk painstakingly articulates how DVPOs by design institute what she terms “state-imposed de facto divorce” upon the parties in a DV relationship,\textsuperscript{38} often regardless of the seriousness of the underlying act triggering DV procedure.

This practical divorce is particularly complete upon conviction of a DV crime. Using the author’s example, violating a temporary PO in Manhattan results in up to two years of complete no-contact for a “violation” conviction (for a felony, a final PO can be up to eight years; for a class A misdemeanor, five years; and for other offenses, up to two years).\textsuperscript{39} Alternatively, the state can obtain a final, year-long PO as part of a plea bargain, absent any conviction.\textsuperscript{40}

These restraining orders frequently end the relationship between the abuser and victim. In fact, they are more restrictive of contact and communication than are prison sentences, which allow for face-to-face meetings, phone calls, and mail.\textsuperscript{41} POs also prohibit unmarried couples from marrying during the term of the PO.\textsuperscript{42} Marriage is not merely allowed for persons in prison, but is a fundamental right protected by the Constitution.\textsuperscript{43}

The DVPO regime, however, does not bring any of the other state apparatus or contractual arrangements that accompany de jure divorce (e.g., alimony, child support, custody, visitation, etc.).\textsuperscript{44} Further, the entire DVPO process is class and race contingent, occurring far more in the poorest neighborhoods, where neighbors live in close proximity (neighbors who can call the police about domestic violence).\textsuperscript{45}

\textsuperscript{36} Id. at 32–33.
\textsuperscript{37} Persistent societal and legal views which long considered DV acceptable, and later courts that resisted simply granting rights of self-defense to women from their spouses in the home, formed the backdrop for the development and implementation of DV theory and the PO solution. See, e.g., infra note 58 (discussing State v. Shaw, 441 A.2d 561 (Conn. 1981)).
\textsuperscript{38} Suk, supra note 1, at 42.
\textsuperscript{39} Id. at 48 & nn.55 & 91.
\textsuperscript{40} Id. at 42–43.
\textsuperscript{41} Id. at 49.
\textsuperscript{42} Id. at 48–49 (citing State v. Ross, 1996 WL 524116 (Wash. Ct. App. Sept. 16, 1996)).
\textsuperscript{43} Id. at 49–50 (citing Turner v. Safley, 482 U.S. 78, 97, 99 (1987) (abrogating prison regulation restricting female prisoner’s right to marry as not “reasonably related to legitimate penological objectives”; in that, the argued objective was protecting women from men) (internal quotations omitted)).
\textsuperscript{44} Id. at 44.
disturbances without the knowledge of persons involved). Many victims and PO defendants do not understand the scope of a no-contact order, mandatory arrest provisions, or the distinctions between civil and criminal POs due to impediments of education, language, and immigration status.

In its most extreme form, the state’s interest in monitoring the subject of a PO to prevent further violence has been held to be so great as to bar contact with any woman without notifying the accused’s parole officer within twelve hours. As Suk pointedly asks, “Does this kind of regulation simply represent a logical next step in the march to combat women’s subordination through the criminal law?”

In light of the preceding comparison to imprisonment, the severity and appropriateness of the de facto divorce solution is certainly debatable. In no-drop jurisdictions, mandatory no-contact orders are extremely disruptive to the daily life of all parties involved, from the first moment of a court’s order. That disruption is the goal of the PO after all—to short-circuit the cycle, patterns, and miseries of a DV relationship, for the duration of the PO (and beyond).

The difficulty lies in the discretionless and not particularized nature of many steps in the process (particularly in jurisdictions requiring mandatory PO requests) and in the effects of that total separation. The damage to relationships which are not clearly abusive, or not properly called abusive at all, is left as some sort of unavoidable collateral damage in the fight against DV. Based on statistics from the Manhattan example, relationships not meriting a no-contact final PO comprised 257 of 945 final POs entered in 2005. Thus, over 27% of the final orders issued were for acts not ultimately deemed serious enough to merit a full de facto divorce (or where proof of that proposition was lacking). Further, the cases meriting a final no-contact PO were only a small fraction, just 10.3% of those that actually received an initial, temporary PO.

While this small percentage of relationships required or justified a final, no-contact PO as part of a plea or a judgment, particularized review, once applied,

---

45 Id. at 45 & n.77 (in 2005, more than 80% of DV charges in Manhattan were brought against blacks and Hispanics).
46 Id. at 47.
47 Id. at 50 (citing United States v. Brandenburg, 157 Fed.Appx. 875, 876 (6th Cir. 2005)).
48 Id.
49 For example, for POs sought without prosecutorial evaluation of the factual basis for sub-misdemeanor violations not involving physical violence, called in by third parties without detailed knowledge of a shouting match beyond the walls of a neighboring home or apartment or the identity of the first aggressor; the presumption of a uniform interpersonal and violent dynamic in all situations of alleged DV, etc.
50 Calculated from statistics provided by the author; see Suk, supra note 1, at 43 n.61; e-mail from Karen Kane, N.Y. State Office of Court Admin., to author (Sept. 15, 2006, 16:29:56 EST) (on file with author).
51 Suk, supra note 1, at 38 n.31. In 2005, 6,660 temporary DV orders were issued in Manhattan criminal courts, of which 5,469 (82.1%) were full no-contact orders. E-mail from Karen Kane, N.Y. State Office of Court Admin., to author (Sept. 15, 2006, 16:29:56 EST) (on file with author)).
indicated that a full no-contact order was inappropriate in the vast majority of cases.\textsuperscript{52} The DV regime, however, assumes at the outset (when the temporary, no-contact PO is requested) that any DV act is more harmful than any positive effects of an abuser’s continued presence and participation in the household.

While DV is a recognizable, patterned behavior, each family dynamic and situation is unique, and the seriousness, frequency, and means of DV in each family is unique as well. The one-size-fits-all “superstranger” solution is likely effective, but the unparticularized means of control for preventing further DV may cause as many problems as it solves in the significant number of homes where the means, support, and understanding needed to compensate for an absent abuser are lacking.

III. THE PUBLIC/PRIVATE DISTINCTION

The home, rather than the DVPO regime, lies at the core of this book. The author explores how the home is defined by, and defines, many American legal and cultural concepts. Distinctions between public and private, why those lines were drawn in a particular fashion in the past, and why and how those lines are changing now, recur throughout, laying the base for a recurring theme. Generally, Suk views the public/private distinction, particularly regarding the home, as “eroding.” While I view changes in a public/private distinction as having been in flux throughout American history, neither eroding nor coalescing,\textsuperscript{53} the effects of those shifts (however they are properly characterized) are well vetted throughout.

\textsuperscript{52} Unfortunately, the author (and I) have no data on the other results of those initial, temporary POs: how many of the underlying trigger crimes yielded convictions or pleas; whether an increasing the use of mandatory initial POs has resulted in decreasing recurrence of DV in those relationships; or how many couples subject to those temporary orders split up permanently, or reunited upon cessation of an order. To further complicate the analysis, the missing information on that cohort can be interpreted, in absentia, as supporting either the appropriateness of the DVPO regime or the magnitude of its deficiencies. For the former view, the data could indicate the central difficulty in gathering evidence to prosecute genuine DV, which occurs in many forms, between parties usually uncooperative with the state. For the latter, a 90% rate of “failure” (where “successes” are final no-contact orders that are ultimately adjudicated, or agreed to, as appropriate or acceptable) indicates that the data support using situational, particularized discretion from the outset, which would likely inflict less collateral damage on families, while also conserving state assets and focusing state efforts regarding crime more generally.

This is beyond the scope of my review, but would be one key factor for evaluating of the efficacy of mandatory DVPO regimes.

\textsuperscript{53} Except, possibly, when limited to a specific doctrinal arena, though this would seem to defeat the purpose of the author’s analysis as a whole: to examine the current preoccupations of law centering on the concept, and the physical space, of the home. An alternative interpretation of the “erosion” of the distinction would be to suggest a putatively once-clear distinction is now muddied. See Section III.B, infra, for my critique of this alternate meaning of “erosion” of distinction between public and private.
I have divided my discussion of public/private distinctions in three parts. I look first at conceptions of a public/private distinction outside the home, focusing primarily on the author’s analysis of public self-defense. Second, I return to a public/private distinction within the home, and examine the author’s discussion of self-defense within the home. Third, I summarize the difficulty posed by situating public and private securely and exclusively in distinct spaces by arguing for characterizations opposed to the author’s, suggesting that the home may be made super-private by police/state presence, rather than super-public.

A. A Public/Private Line Outside the Home

An ongoing “epochal transformation”\(^{54}\) in self-defense law described by Suk is undeniable. Her analysis focuses on three turning points in the development of self-defense law.\(^{55}\)

First, in the late nineteenth century, the U.S. abandoned the “English rule” (requiring retreat when attacked in public) in favor of the “American rule” (no such duty of retreat in public places), thereby extending “castle doctrine” outside the home.\(^{56}\) This change was described and justified in law as reasonably allowing the distinctly American “true man” to defend himself “wherever he had a right to be,” just as he could protect himself and his family at home.\(^{57}\)

Second, a “battered woman” theory could have provided equal protection for women from DV in their homes (both literally and as a matter of law), but did not succeed because of gender-based legal distinctions. As part of such a theory, Courts could have simply applied castle doctrine to women in their homes, allowing women to defend themselves from their abusers in their shared home as courts had previously allowed men with “equal possessory rights” to do.\(^{58}\) Courts declined to adopt this equally protective option, seeing that as requiring law to “sanction the reenactment of the climactic scene from ‘High Noon’ in . . . familial kitchens . . . ,”\(^{59}\) specifically wanting to avoid sanctioning family violence\(^{60}\) in light

---

\(^{54}\) Suk, supra note 1, at 55.

\(^{55}\) Id. at 55–57 (summarizing the evolution traced in Chapter 3, “Scenes of Self-Defense”).

\(^{56}\) Id. at 55–56.

\(^{57}\) Id. at 56.

\(^{58}\) Id. at 63–64 (citing, e.g., Jones v. State, 76 Ala. 8 (Ala. 1884) (regarding a mutually owned place of business as a “residence,” for purposes of self defense); People v. Tomlins, 107 N.E. 496, 497 (N.Y. 1914) (applying castle doctrine to male cohabitants of a home as not negating of the right of either to remain and self-defend)).

\(^{59}\) Id. at 65 (citing State v. Shaw, 441 A.2d 561, 566 (Conn. 1981) (holding no right of lethal force in the home against cohabitants despite statute creating a no-retreat exemption in the home)). In discussing self-defense cases, and cases throughout the book, the author deftly explores the law’s reliance on rhetorical imagery (including, but hardly limited to, the kitchen) evoking the home as the realm of women to skirt, or sanction, DV throughout most of American history (and to support other legal goals or values which were or could be related to privacy).

\(^{60}\) Id. (citing Shaw, 441 A.2d at 566).
of understanding that the “great majority of homicides” occur among relatives or acquaintances.\(^6\) Instead, courts created retreat exceptions for DV self-defense, based on DV theory of the psychological dynamic which would defeat a victim’s ability to choose retreat, a dynamic presumed to uniformly exist in all DV relationships.\(^6\)

Third and finally, the ongoing epochal change begun in 2005 with passage of “New Castle Doctrine” laws, developed and shepherded by the NRA, which create a statutorily presumptive fear of serious injury or death at home and in public.\(^6\) Some of these laws also treat a cohabitant as an intruder if a DVPO is in place.\(^6\) Suk analyzes this as a doctrinal fusion of the “true man,” who need never retreat from attack in a “place where he . . . has a right to be,”\(^6\) with the “subordinated woman,” who is successfully protected only by the DVPO regime, creating what Suk dubs “the New True Woman.”\(^6\) The New True Woman may defend herself in public, and more importantly for this analysis, at home, from a partner-abuser barred by a PO, without any need to retreat.

I agree that the New True Woman represents a sea change, and I would argue this enables and harmonizes at least three concepts of self-defense not previously available to women. First, women may self-defend outside the home, without the need to retreat, as has been the case for men in true man doctrine jurisdictions for the last century.\(^6\) Second, New Castle Doctrine laws place abusers on notice that victim-partners need not leave the home to protect themselves, and that DV inflicted on cohabitants may now be taken as seriously as violence inflicted by a stranger in the home or in public.\(^6\) Third, these laws shift the burden of proof regarding home-located violence from the victim to the first aggressor, via a statutory presumption of fear required for valid self-defense. That should frequently change the dispositive issue in DV self-defense to the identity of the first aggressor, and away from surmounting the problematic evidentiary burdens of showing a history of DV with causal nexus to the particular situation.

These shifts place American public and private violence, and subsequent acts of self-defense, on more even footing than ever before.\(^6\)


\(^6\) Id. at 72–77.

\(^6\) Id. at 80.

\(^6\) Id. at 75.

\(^6\) Id. at 82 (capitalization added).

\(^6\) Id. at 62 (citing Beard v. United States, 158 U.S. 550, 561–62 (1895)).

\(^6\) I agree that the New True Woman represents a sea change, and I would argue this enables and harmonizes at least three concepts of self-defense not previously available to women. First, women may self-defend outside the home, without the need to retreat, as has been the case for men in true man doctrine jurisdictions for the last century. Second, New Castle Doctrine laws place abusers on notice that victim-partners need not leave the home to protect themselves, and that DV inflicted on cohabitants may now be taken as seriously as violence inflicted by a stranger in the home or in public. Third, these laws shift the burden of proof regarding home-located violence from the victim to the first aggressor, via a statutory presumption of fear required for valid self-defense. That should frequently change the dispositive issue in DV self-defense to the identity of the first aggressor, and away from surmounting the problematic evidentiary burdens of showing a history of DV with causal nexus to the particular situation.

These shifts place American public and private violence, and subsequent acts of self-defense, on more even footing than ever before.
B. A Public/Private Line Inside the Home

The author views DVPO regimes as running against the “most powerful legal trend” in the relationship between criminal law, home privacy, and public interest over the last fifty years—the Griswold/Lawrence line. Suk also sees the emergence of the DVPO regime, and the intrusion of the state into both the home and the relationship it shelters, as the “erosion” of the public/private distinction. This view of erosion is problematic. The details marshaled to trace the evolution of state intrusion into the home, culminating in the DVPO regime, simply reveal that the public/private line has been contested in American thought since before the founding of the country, and that it has been subject to periodic revision and redefinition since that time. The author acknowledges as much, discussing justifications for the use of force in the home in response to burglary employed by Blackstone in direct contrast to the views of, for example, John Locke.

For Blackstone, a home was the site of a “right of habitation,” providing special sanction of the use of force otherwise reserved to the regent. He considered this right of lethal self-defense to be acquired “even in a state of nature.” Blackstone’s views, importantly, differ from both Locke’s (and Hobbes’) on how the home might stand apart “even in a state of nature,” thus becoming a site of different laws, norms, expectations, and conduct. This debate (engaged by Blackstone more than a century after Hobbes’ explicated his theories of the state of nature and the social contract) regarding the use of force outside and inside the home is indicative of the longstanding, persistent readjustment of public and acceptable violence (respectively), I would argue it more accurately indicates a further de-gendering of space (inside and outside the home). This interpretation accords to, and is supported by, slow but persistent progress toward the realization of legal and de facto sex/gender equality.

70 Suk, supra note 1, at 51 (quoting, e.g., Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (“Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marital relationship.”)). The author summarizes the current reach of this trend toward privacy in the home in Lawrence v. Texas, 539 U.S. 558 (2003), which held “that the criminal law may not prohibit private consensual sexual conduct between adults” in the home. Suk, supra note 1, at 51.

71 See, e.g., Suk, supra note 1, at 6–7.

72 Id. at 19.

73 Id. (citing 4 William Blackstone, Commentaries *223).

74 See, e.g., id. at 59.

75 See, e.g., THOMAS HOBBES, LEVIATHAN (A.R. Waller ed., Cambridge Univ. Press 1904) (1651) (describing, among many other things, his vision of the social contract (Id. at Part I, Chap. 14–15), including rights of the sovereign (Id. at Part II, Chap. 18) and the liberty of those in contract with the sovereign (Id. at Part II, Chap. 21), who yield certain rights for the creation and sustenance of a Commonwealth, which provides shelter from the vicissitudes of an existence without law or justice).
private to define other values and the material world itself, and of public and private being defined by them in turn.

My view that public and private are rebalanced periodically to serve and define not only the home but other concepts and goals, is also evident in the author’s examination of the piecemeal disaggregation of women’s rights from men’s. This becomes still more apparent when other historically coincident revisions of legal rights and public policies are placed in view alongside those discussed in the book. From property rights changes (the end of coverture and the anti-ousting response), through suffrage movements (not addressed in this book), to the privacy-based rights of contraception and abortion in the Griswold/Lawrence line (as well as through the evolution of DV regimes brought into clearer focus here), a public/private distinction is in multi-polar flux throughout. Public and private each express, and are each an expression of, other values and rights at issue, being neither eroded nor fortified. Concepts so encompassing are not capable of meaningful isolation so specific as that.

For example, there is a long American tradition in Fourth Amendment jurisprudence regarding search and seizure that some expectation of privacy accompanies an individual outside the home. Indeed, Suk’s own thesis regarding the invasion of the state into the home for DV needs and goals is no more an “erosion” of a public/private distinction than her tracing of the expansion of the right of lethal self-defense without retreat beyond the home would be an “erosion” of a public/private distinction outside the home. Each is simply the latest in a series of changes to what is private, and what is public, in the context of other values and concepts.

It may be that the author’s sense of “erosion” simply means a less clear, simple, or coherent distinction than existed at law in an era now past. This view, in

76 Suk, supra note 1, at 22–25.

77 Id.

78 I consider this “multipolar,” as a public/private distinction is articulated in separate legal doctrines (such as property law, family law, federal and state constitutional law, criminal law, etc.). Any distinction of public and private is therefore performed simultaneously, and changes contemporaneously, in different theaters of law in a way much more complex than any aggregate public/private distinction is capable of meaningful articulation or use. Additionally, any public/private distinctions are affected by and affect various political and extralegal constituencies, thereby affecting the legal-rhetorical and cultural views which shape the terms and scope of the author’s work.

79 See Ybarra v. Illinois, 444 U.S. 85, 91, 96 (1979) (holding that patron of tavern had an “expectation of privacy” from unreasonable search while visiting a tavern for which police had a search warrant).

80 The author devotes an entire chapter (Chapter 3) to the differentiation of American law from English law regarding public self-defense in the nineteenth and twentieth centuries; how that evolution could have been applied to DV, but was not; and how a new surge in self-defense laws (“New Castle Doctrine”) now changes acceptable responses to DV in the home inflicted by cohabitants (as well as by strangers in public) in jurisdictions adopting those statutes. See supra Section III for my corresponding analysis of parts of that chapter.
my opinion, is also inapt and contradicted by Suk’s analysis taken as a whole. For example, the emergence of a right of self-defense in public which mirrors a right of self-defense in the home does not change the clarity of what is public or private, unless one uses self-defense as the sole term to define the distinction.

It can be argued that this change in acceptable self-defense clarifies what is private or public. It may, alternatively, altogether remove self-defense as a characteristic or concept having or yielding any public or private character, thus clarifying what other factors or values hold present sway. While this begs the question of what does subsequently distinguish public from private, one cannot assume that removing the need to retreat in self-defense in a particular location makes a public/private distinction somehow “less,” or “eroded.” It would require further evaluation of the many ways in which public and private are constituted and reconstituted, the sort of analysis explored elsewhere in this book; or even such an exploration of self-defense, itself a single, non-exclusive public/private characteristic (and which is, itself, similarly complex in definition and use).

Last, this leads us to the author’s pointed references to pre-feminist views of the home as strictly private—views which reinforced that violence in the home was private and beyond the reach of criminal law. Whether or not that era’s “preoccupations” defined a more “distinct” or un-eroded public/private conception than our own, I cannot lament what I would call the partial disaggregation and shifts of that era’s intertwined lines of gender, home, and violence, which sanctioned and enabled generations of DV without consequence.

While privacy may be strongly coincident with the home, it is neither synonymous nor synchronous with it.

C. Too Fine a Line: Public in Private and Private in Public

The author characterizes the home under the DV regime as public, subject to policing for crime like the streets. The public interest in preventing further family violence wielded by the DVPO regime to make the home itself public is so great as to bar the defendant from his (now) former home in a way that he is not barred from other public areas.

The home-as-public analogy, or home as super-public, may mischaracterize the situation in an important way. I view the home as more appropriately termed “super-private,” as the abuser is barred from the home in a way he is not barred from other private places, and is subject to arrest and punishment even when invited in by the victim-occupant. This is not the case with an invitation to any other home-space by any other person. Nor is the state permitted to arrest any other

81 See Suk, supra note 1, at 13–16 (“For much of our history, DV was generally outside the reach of the criminal law. Indeed, wife beating, as a form of chastisement and discipline of wives, was overtly approved and reserved as a right of the man of the house.” (footnote citations omitted)).
82 Id. at 11.
person in the victim’s home merely for their consented presence there, absent a PO against him or her.  

In addition, members of the public do not have free, unannounced entry to the victim’s home. The public nature of a space is not only shown by the presence of the state but by free access or invitation of the public generally. Other spaces barred to public entry by the active presence of the state, such as prisons, military installations, government lands, etc., are not considered public. The author later refers to the home as “so subject to the public interest” as to be “maybe more public than the public streets.” In context of the express balancing of interests by the Kelo and Castle Rock courts, which placed public interests hierarchically and analytically superior to private interests, could be an expression of the home as super-public.

This difficulty of terminology crystallizes some of the problems of the very concept of a “line” between public and private.

IV. CONTRADICTIONS AND OMISSIONS

There are a few contradictory arguments to be found during this wide-ranging stroll through the legal thicket, but they do not undermine the work as a whole. One example is the author’s description of the modern legal setting as one of “ever expanding” criminal law. This is a common view, not without support. Yet the author’s own analyses on self-defense and New Castle Doctrine provide a strong, directly contradictory thesis not articulated by the author herself. Since 2005, states have broadly decriminalized the use of guns in the home and in public spaces for self-defense, without the need to retreat. Further, since this book was published, states have legalized or pursued legalizing public carrying of concealed weapons. This more recent legislative drive for concealed-carry neatly fits Suk’s analysis regarding the expansion of New Castle doctrine and the right to self-defense without retreat, as the basis for those laws is strongly premised

83 Or some other criminalized act or status crime, along with proper warrant for entry, search and seizure, etc.
85 SUK, supra note 1, at 104 (discussing the primacy of the public interest in both Kelo v. City of New London, 545 U.S. 469 (2005) (sanctioning eminent domain taking of a home in the public interest) and Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005) (rejecting a takings claim arising from the failed enforcement of a DVPO)).
86 Id. at 9.
88 From a “slim majority” of states allowing lethal self-defense without retreat in public or in the home (as of 2004), at least fifteen additional states shifted position to follow the tide of New Castle Doctrine laws by mid-2006. SUK, supra note 1, at 72 & nn. 120–21.
on the author’s idea of the New True Woman, and my characterization of the
superprivate (i.e. the expansion of the locus of the private, and the defense of the
private, into previously public space, carrying with it the policies and laws
governing the private: defense of the home and family). Suk’s generalization about
the state of criminal law does not, however, undermine her descriptive analysis. At
most, it undermines her characterization of public and private, of the scope
criminality and legality, and the binaries those characterizations imply.

Second, Suk may overreach in her interpretation of courts’ interest-balancing
regarding victims, abusers, and the public in regard to possessory interests in the
home.90 The author explores the tension between DV law advocates seeking
practical means to protect women via protective orders, and those favoring self-
protection (who believe that DV victims have the capacity and means to self-
defend, as any other persons are assumed to have). State justification for the
DVPO regime has marshaled the public interest to achieve practical protection, in
light of courts’ consistent reluctance through the 1980s and 1990s to allow DV
victims to self-protect, based on courts’ underlying assumption91 that DV victims
are not capable of leaving and/or self-protecting without the relationship being
short-circuited via a PO. The author asserts that this implies (or means) that “[s]o
strong is public interest in supervision of home space that it outweighed the
defendant’s private interest in his home—indeed, his interest in having a home.”92

This may overreach in a narrow but important way. Court justification of
DVPOs can also be read as viewing the public’s interests outweighing a
defendant’s interest in having that home. I find no indication that courts regard a
temporary or final PO as obviating entry to any other home; just the home the
abuser shared with the victim. My interpretation, however, still assumes a DVPO
regime’s obviation of particularized inquiry per defendant. Moreover, some
observers93 would regard my distinction as immaterial due to a lack of
particularized inquiry regarding the only home that matters—the home from which
the alleged abuser (who may still own the home) is now barred by a PO sought
without full review of the evidence by prosecution and courts.94

There are, however, more serious gaps in the discussion. One persistent
problem is an implication that intrusion of the state into intimate relationships

90 Or courts overreach in espousing this extreme view of public interest.
91 See Weiand v. State, 732 So.2d 1044, 1052–53 (Fla. 1999) (“It is now widely
recognized that domestic violence attacks are ‘often repeated over time, and escape from
the home is rarely possible without the threat of great personal violence or death.’”)
(quoting State v. Thomas, 673 N.E.2d 1339, 1343 (Ohio 1997)).
92 Suk, supra note 1, at 41 (characterizing the strength of the public interest found by
the court in People v. Forman, 546 N.Y.S.2d 755 (Crim. Ct. 1989)).
93 This would likely include Justice O’Connor, whose views on the taking of a home
are discussed in detail. See id. at 89–96.
94 Weiand, 732 So.2d at 1055 (expressing the strong presumption of DV relationship
dynamics exhibited in many states that also animates and justifies judges in granting initial,
temporary POs).
made by law enforcement personnel and courts was unexpected\textsuperscript{95} and is not broadly or democratically supported. This ignores that the DV statutes forming the basis of the DVPO regime are the decades-long product\textsuperscript{96} of democratically elected legislatures responding to broadly-held desires to address DV. While emphasizing the feminist theoretical roots of the DVPO regime, Suk strongly implies a disconnect between feminist ideas and goals;\textsuperscript{97} democratic process and majority views on what might be the proper ability of the state to intrude in situations involving family and violence; and what appears to be unchecked government power.

This contradiction is compounded once the author elicits precisely the opposite vision of the broad acceptance of multiple feminist theories, painted in her final chapter analysis of \textit{Georgia v. Randolph}.\textsuperscript{98} \textit{Randolph} explored issues surrounding a search consented to by one cohabitant (the wife) and not consented to by the other (the husband).\textsuperscript{99} The author suggests that feminist views are so broadly supported (or engrained) in our views of DV that the opposing and overlapping views of Justice Scalia and Chief Justice Roberts are performances of two differing, but wholly feminist views.\textsuperscript{100} While ‘feminist,’ as a term of identity, is not broadly adopted by Americans today,\textsuperscript{101} the author thus lays strong foundation for the basic premise that, at least on some axes, all our Supreme Court members are now post-feminist actors. This is powerful currency; it would be difficult to argue that feminist theory has won the larger debate for hearts and

\textsuperscript{95} Suk, \textit{supra} note 1, at 53. The author “suspect[s] most feminist advocates did not expect . . .” that “[t]he solution” to DV would be the practice of “state-imposed de facto divorce.” The author characterizes that practice as “the literalization” of a “feminist theory of DV as a manifestation of gendered subordination in the marital relationship.” The author then summarizes that literalization of theory into practice thusly: “if the root of DV is marriage, end marriages that have signs of DV.” \textit{Id.} at 124. Justice Scalia, “not to be outdone,” disagreed with Stevens in focusing on home privacy not “as the right to exclude outsiders, but on the equal right to override the other spouse’s privacy.” \textit{Id.} at 120. That “the most common practical effect of today’s decision, insofar as the contest between the sexes is concerned, is to give men the power to stop women from allowing police into their homes” during domestic attacks. \textit{Randolph}, 545 U.S. at 145.

\textsuperscript{96} Id. at 14 (noting that the first civil protection statute was passed in Pennsylvania in 1976).

\textsuperscript{97} For example, that domestic violence is bad and needs to be addressed as violence, not as some acceptable side of family life and an acceptable part of our definition of sex, gender, and family roles.

\textsuperscript{98} 547 U.S. 103 (2006).

\textsuperscript{99} Suk, \textit{supra} note 1, at 112–13.

\textsuperscript{100} “The formal egalitarian view [espoused by Justice Stevens] that each spouse should have a right to exclude is mocked by Chief Justice Roberts’ subordination feminism, in which the home is ground zero of male domination, a space that the state must enter to protect a woman from the master of the house.” \textit{Id.} at 124. Justice Scalia, “not to be outdone,” disagreed with Stevens in focusing on home privacy not “as the right to exclude outsiders, but on the equal right to override the other spouse’s privacy.” \textit{Id.} at 119–20. Further, Suk sees Scalia as “parroting a view worthy of Catherine McKinnon,” \textit{Id.} at 120, that “the most common practical effect of today’s decision, insofar as the contest between the sexes is concerned, is to give men the power to stop women from allowing police into their homes” during domestic attacks. \textit{Randolph}, 545 U.S. at 145.

minds on the Supreme Court regarding the scope of the acceptable and the unacceptable for men and women, but not those of the general public.102

Finally, there is a distinct lack of comment on important public and political pressures involved in many of the dynamics discussed. For example, electing prosecutors to office exerts powerful pressure to be viewed as “tough on crime.” This surely plays a part in the ongoing adoption and use of no-drop policies in DVPO regimes and will make changing those policies more difficult, even if they are empirically shown to have serious consequences which mitigate their usefulness in addressing DV or create other undesirable consequences counterbalancing their positive effects. While the author makes strong use of public reaction to the Kelo decision, detailing an attempt to apply the post-Kelo eminent domain power to a property owned by Justice Souter, this is the only substantive example of such considerations. As Suk’s work attempts to reveal the “preoccupations” of our legal culture, leaving democratic process and political pressures out of the development and revision of changes to those preoccupations leaves a significant gap.

V. CONCLUSION

Suk reverse-engineers the home, deconstructing and reassembling the idea of home in a way that, in turn, makes the home newly strange and strangely familiar. The author investigates the powerful feeling elicited by these simultaneous but contradictory emotions: the “uncanny.”103

The uncanny appears and reappears at seemingly every turn, including several of the author’s explorations not addressed in this Note, and in my own critical contributions: in the superstranger; the superpublic; the superprivate; the transformation of home to house; and centrally, and possibly most uncannily, the home as violence.104 While the uncanny is powerfully descriptive of the feelings of parties involved, and a rhetorical device of the law and its actors, the uncanny also applies to the experience of reading the book itself. Professor Jeannie Suk’s work is an unsettling, thought-provoking, and cannily revealing series of looks at the preoccupations of the law, the home, and all of us, their physical and cultural inhabitants and creators.

---

102 Especially when the author dissects the anachronistic language used by those same justices in several opinions, serving many views. See, e.g., Kyllo v. United States, 533 U.S. 27, 38 (2001) (Scalia, J.) (“at what hour of each night the lady of the house takes her daily sauna and bath.”); cf. supra note 100.

103 See Suk, supra note 1, at 2.

104 Id. at 7.