

Michigan Law Review

Volume 109 | Issue 6

2011

Home is Where the Crime Is

I. Bennett Capers

Hofstra University School of Law

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Criminal Law Commons](#), [Law and Gender Commons](#), [Law and Society Commons](#), and the [Privacy Law Commons](#)

Recommended Citation

I. B. Capers, *Home is Where the Crime Is*, 109 MICH. L. REV. 979 (2011).

Available at: <https://repository.law.umich.edu/mlr/vol109/iss6/8>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

HOME IS WHERE THE CRIME IS†

I. Bennett Capers*

AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY. By *Jeannie Suk*. New Haven and London: Yale University Press. 2009. Pp. xi, 204. \$55.

INTRODUCTION

Think of home. Go on. Maybe not your parents' home, which for this reviewer would be enough to induce heavy breathing and general anxiety. Rather, think about the *concept* of home. Think about the *idea* of home. Think about Home with a capital letter. Think of home as in *The Wizard of Oz* and Dorothy's famous "There's no place like home." Think "home sweet home." Or "home is where the heart is." Go on.

Of course, there may be other associations that come to mind when one thinks of home. There's security. Safety. Control. Home rule. After all, in the conventional telling, a man's home is his castle (of course, in the conventional telling, it is always "a man"). And in the conventional telling, the master of the house is alone sovereign. Blackstone said as much,¹ as did Edward Coke.² He is entitled to defend the home from intrusion, and may even use deadly force if necessary. He can call upon the police so that his home remains secure. This is home then. Never mind reality. This is the home we tend to imagine. Warm. Safe. Home.

Except there is a new vision of home that is beginning to gain ascendance, at least from the point of view of legal actors and doctrine in the criminal justice system. Under this vision, home is not always, or even usually, sweet. Under this new vision, the home is not a safe haven, inviolate and inviolable except for, perhaps, a burglar. Under this new vision, the home is a place of violence. And not violence perpetrated by intruders, but by cohabitants. The home, notionally a site of security, a place "safe" from outside intervention, now functions as a place that enables abuse, assault, and rape. It is "the exemplary place of coercion" (p. 5). The home, in this re-vision, has metastasized into the scene of the crime. In short, home has become "where the crime is" (p. 6).

† Copyright © 2010 by I. Bennett Capers.

* Associate Professor of Law, Hofstra University School of Law. Thanks as always to my research assistants Jennifer Abreu and Charles Mileski.

1. 4 WILLIAM BLACKSTONE, COMMENTARIES *223 ("[T]he law of England has so particular and tender a regard to the immunity of a man's house, that it st[y]les it his castle, and will never suffer it to be violated with impunity . . .").

2. *Semayne's Case*, (1604) 77 Eng. Rep. 194, 195 (K.B.) ("[T]he house of every one is to him as his . . . castle and fortress, as well [as] his defence against injury and violence . . .").

This recent shift in how the criminal law conceives of the home—indeed, how *we* are beginning to conceive of the home—is the subject of Jeannie Suk’s³ provocative *At Home in the Law*. To be sure, the current shift in thinking about the home as a site that enables violence is not a settled one. Rather, it is a shift in progress, a “still developing legal regime” (p. 53), moving in fits and starts. Still, the direction of the shift is clear. The home is becoming a place where what occurs between “a man and wife” is no longer solely a private matter, but also a matter for the state. If the home marks both a “literal boundary between private and public space” and a “metaphorical boundary between private and public spheres” (pp. 2–3), the edifice on which that boundary rests is beginning to crumble. The boundary is becoming permeable.

What are we to make of this shift in how the law perceives the home, and how we perceive the home? What are the collateral consequences of this shift? Has anyone even taken notice? Suk has. And she implores us to as well.

As Suk puts it, her book “is an exploration of home” (p. 4). Specifically, Suk examines the changing legal meanings of the home and how those meanings have impacted the law. Her work recalls Professor Carol Sanger’s blend of cultural studies and the law to examine the automobile as a gendered space.⁴ But Suk’s eye is sharper. Her work is more unsettling. And her range is broader. The subtitle of her book—“How the Domestic Violence Revolution Is Transforming Privacy”—is deceptive. She takes aim not only at domestic violence law. She also takes on cases as diverse as *Kelo v. City of New London*,⁵ in which the Supreme Court decided that an economic development taking did not violate the “public use” requirement of the Takings Clause; and *Lawrence v. Texas*,⁶ which struck down laws criminalizing same-sex intimacy.

Part I of this Review provides a fuller rendition of Suk’s project, focusing in particular on three of Suk’s five chapters. Part II begins the critique. Section II.A examines Suk’s failure to address some additional collateral effects of proxy domestic violence prosecutions. Section II.B continues the critique by switching lenses. As Suk puts it, her book is intended as an effort to “focus the lens so that we can begin to see what is necessary” to answer whether we, too, should be at home in the law (p. 7). But what happens if we switch lenses to look at a broader picture? Section II.B does so and reveals some of what Suk has missed. A repeating motif in Suk’s book is that the criminal law has now entered the home. In fact, the criminal law never left. Lastly, in Section II.C, I respond to Suk’s provocative question, reflected in the title of her final chapter: “Is Privacy a Woman?” I do not

3. Assistant Professor of Law, Harvard Law School.

4. Carol Sanger, *Girls and the Getaway: Cars, Culture, and the Predicament of Gendered Space*, 144 U. PA. L. REV. 705 (1995).

5. 545 U.S. 469 (2005).

6. 539 U.S. 558 (2003).

respond with an answer, but with my own question in the form of a critique: "Is there a woman in the house?"

I. PEERING INTO THE HOME

Suk notes in her introduction that the chapters in her book share a similar aim: to reveal the shifting meanings of the home, indeed the deployment of the home, in criminal law. In fact, her aim seems broader: to reveal how the conception of home has been deployed to advance certain interests, and how that deployment is "unsettled and unsettling" (p. 4). For one, feminist reforms predicated on this newer notion of the home as violent have ostensibly resulted in the protection of some women, but they have also led to a significant diminution of autonomy and privacy. In addition, Suk is interested in how the figure of the woman has been deployed to inform the meaning of privacy. These twin concerns of Suk's are addressed below.

A. *From Domestic Violence to State-Imposed De Facto Divorce*

Suk's strongest argument comes in her exploration of the criminalization of domestic violence and the legal regime "that has grown up around" domestic violence prosecutions (p. 10). Suk's argument is not so much that the home, once a zone of underenforcement of the criminal law, has been reconfigured as a zone of overenforcement. Rather, her argument is more nuanced. She contends that as a by-product of feminist efforts to reconceptualize the home as a place of violence in need of state intervention, the home is becoming "a space in which criminal law's goal is coercively to reorder and *control* intimate relationships" (p. 10). It is a bold claim, and Suk supports it.

Suk makes this argument by examining the trend to include, as part of the chain of events set in motion by a domestic violence arrest, an application for a protective order banning the arrestee from the home (pp. 14–16). Originally sought by victims in civil court, today's protective orders are more often secured by prosecutors as a condition of the defendant's pretrial release. The rub, Suk observes, is in the fact that the protective order has displaced the domestic violence arrest in terms of its significance and effect (pp. 16–19). The normal difficulties associated with domestic violence prosecutions—a reluctant or cowed witness and the Sixth Amendment right-of-confrontation issues invigorated by *Crawford v. Washington*⁷—are suddenly inconsequential and insignificant once a protective order has been violated. Rather than needing to prove beyond a reasonable doubt that the defendant engaged in physical abuse, the state need only prove that a valid order was issued barring the defendant from the home and that, after the issuance of the order, he was observed at or near the home. Rather than needing a victim to testify, the summoned police officer, or a neighbor, can now become the prime witness. Instead of going through the hassle of prosecuting a

7. 541 U.S. 36 (2004).

defendant for domestic abuse, that same defendant can now be prosecuted, at less cost to the victim and the state, for violating the protective order.

While at first glance this may seem to be a good thing—it is a more efficient way to punish domestic abusers, for one—Suk alerts us to consequences that, if not readily apparent, should give us pause. We should be troubled, Suk thinks, by the fact that “part of the reason the order exists is to be violated” (p. 18). And we should be troubled, Suk thinks, because monitoring “opens up a range of conduct in the home to criminal law control” (p. 19).⁸

Suk notes another trend. A growing number of district attorney’s offices are also leveling burglary charges against men who violate protective orders, using the alleged abuser’s presence in the home as proof of unlawful entry *and* as proof of the intent to commit a crime once inside.⁹ The first result of this legal legerdemain is that the state, invoking its police power, can in effect often trump preexisting property rights—indeed, trump the law of property!—and reallocate property. The title might remain in place, but any right to habitation has been nullified. The second effect is that the state, invoking its police power, can *sua sponte* enter the home to enforce this reallocation. Domestic violence is thus transmogrified into a crime of home invasion. With a stroke of the court’s pen, the occupant of a home becomes a nonoccupant, and home becomes not home. “Home sweet home” is transformed into another familiar expression: “You can’t go home again.”

And there is more, according to Suk. In addition to using domestic violence arrests to reallocate property rights, a growing number of district attorney’s offices are also using them as a means to secure what Suk terms “state-imposed *de facto* divorce” (p. 35). Suk describes this phenomenon as so routine “that it disappears in plain sight” (p. 42).

If the front end is about using protective orders as a shortcut to proving domestic violence, the back end is about securing final orders of protection at sentencing, or as a condition of an adjournment in contemplation of dismissal, as the more direct and easier way to stop domestic violence (pp. 42–44). Prosecutors often use the order as a plea bargaining tool: agreeing to reduced charges or nonincarceratory sentences in exchange for the defendant’s consent to the final order. Prosecutors even obtain such orders

8. Of course, Suk strategically characterizes the protective order as a means to create a crime “out of the ordinarily innocent behavior of being at home.” P. 19. Suk’s focus on presence as “innocent itself” deliberately omits the initial domestic violence incident that served as the basis for the protective order. It is not just the “presence” of the abuser that triggers punishment. Rather, punishment is predicated on the violation of the protection order after a probable cause determination has been made that a domestic violence incident has occurred.

9. Pp. 25–35. Burglary is generally defined as unlawfully entering a dwelling of another with the specific intent of committing a crime therein. Under this definition, the fact that a defendant has entered his home in violation of a valid protective order satisfies the “unlawful entry” element of the burglary offense. At the same time, the fact that he has entered the home also establishes the intent to commit a crime element, since it can be inferred that his intent is to violate the protective order. Even in the face of anti-ousting statutes prohibiting one spouse from ousting the other from the marital home, and in the face of the common law rule that a person cannot be guilty of burglarizing his own home, the criminal law has been able to do what the spouses themselves often cannot: render one spouse a burglar in his own home.

when the victims object. The result is the imposition of de facto divorce, where the parties—whether legally married or not—are forbidden from cohabitating or even seeing one another for years after the case has been resolved. This court-ordered separation “becomes a goal of prosecutors in bringing criminal charges Punishment as a goal can be put on the backburner because separation is a more direct and easier way to stop or prevent violence” (p. 42). And this takes place not in family court, the locus of expertise in family matters, but in criminal court.

All of this underscores Suk’s larger point. The mostly successful efforts to reconceptualize the home as a place of violence—in fact to engage in governance feminism, to borrow from Professor Janet Halley¹⁰—have had consequences beyond protecting some women. As Suk puts it, “[t]he time is ripe to question seriously whether these developments advance women’s interests” (p. 7), especially since they have come at the cost of devaluing women’s privacy, autonomy, and agency. Feminists, in reconceptualizing the home, have perhaps removed one master of the house only to install another. This time the master is the state.

B. *Privacy and the Imaginary Woman*

The last chapter of Suk’s book takes a different approach, and operates more as a rumination on the figure of the woman in the home in the legal imagination than as a sustained argument. The shift in approach is jarring, but not surprising. In her introduction, Suk alerts the reader that this is not a typical law book. After all, she is working “at the crossroads of legal studies and the humanities” (p. 8), taking as her object of study the cultural discourse of the law. This interdisciplinary approach is at full throttle in her last chapter, provocatively titled “Is Privacy a Woman?” In this chapter, Suk moves effortlessly from references to the poet Wallace Stevens to European painting to the James Bond movie *The World is Not Enough*.¹¹ But these references serve merely as a backdrop for her close readings of such cases as *Kyllo v. United States*,¹² *Georgia v. Randolph*,¹³ *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁴ and *Lawrence v. Texas*.¹⁵ Still, notwithstanding the seemingly discursive structure of the chapter—its structure suggests jazz—a theme does emerge: that the figure of the woman in the home has been deployed in a number of ways, resulting in an impact far beyond the criminalization of domestic violence. For example, the specter of the abused woman in the home has informed the Court’s thinking about whether a husband notification provision in abortion cases imposes an

10. See generally JANET HALLEY, *SPLIT DECISIONS* 20–22 (2006); Janet Halley, in Round Table Discussion, *Subversive Legal Moments?*, 12 *TEX. J. WOMEN & L.* 197, 224–34 (2003).

11. *THE WORLD IS NOT ENOUGH* (Eon Productions et al. 1999).

12. 533 U.S. 27 (2001).

13. 547 U.S. 103 (2006).

14. 505 U.S. 833 (1992).

15. 539 U.S. 558 (2003).

undue burden on a woman's right to choose.¹⁶ It has informed the Court's thinking about what consent-to-search means—when one spouse consents and the other refuses consent—in the Fourth Amendment context.¹⁷

Suk bookends the chapter with cases deploying other figurations of the woman at home. In the first case, *Kyllo v. United States*, Justice Scalia anachronistically invokes the figure of “the lady of the house tak[ing] her daily sauna and bath” to buttress his conclusion that the use of a thermal imaging device to detect heat emanating from a house is a search requiring a warrant under the Fourth Amendment.¹⁸ (Following the home as a castle metaphor, one wonders why Justice Scalia did not simply invoke the figure of the master sitting on the proverbial throne.) The last case is *Lawrence v. Texas*, in which Justice Kennedy, to reach his conclusion that two men have a right to engage in “the most private human conduct, sexual behavior, and in the most private of places, the home,”¹⁹ essentially heterosexualizes and domesticates them, effectively substituting a woman for one of the men, writing about them as if they were virtually a heterosexual couple. Professor Laurence Tribe, writing about an earlier sodomy case, queried what the state was doing in the bedroom.²⁰ Suk echoes Tribe with a difference, asking not what the state was doing in Lawrence's bed, “but what a *woman* was doing there” (p. 130).

Considering all of these cases, each of which involved the Court imagining some hypothetical woman, Suk observes:

Privacy is the lady of the house in her bath, the lady at home receiving callers, the battered wife in the disordered home. She embodies the sweet mystery of life, the imaginative essence of privacy. At home in the law, she is the wife of ambiguous virtue, the matron of bourgeois society, the victim of domestic violence. She represents ambivalent contestation over the meanings and consequences of privacy in our legal tradition and evolving legal present. (pp. 130–31)

Suk's book, which opens with an examination of the shifting meanings of the home, from a place inviolate to a place in need of state intervention, thus ends by examining another shifting figure: that of the woman inside the home. If the home is being redefined as a means to an end, so is the figure of the woman.

16. *Casey*, 505 U.S. at 897.

17. *Randolph*, 547 U.S. at 118; *id.* at 125–26 (Breyer, J., concurring); *id.* at 139 (Roberts, C.J., dissenting).

18. 533 U.S. 27, 38 (2001).

19. 539 U.S. at 567.

20. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-21, at 1428 (2d ed. 1988).

II. REVISITING THE HOME

Suk's *At Home in the Law* joins a growing body of work by young scholars exploring the hidden intersections between criminal and family law,²¹ and her contribution is undeniable. But Suk's book also presents challenges that Suk may not have anticipated. I take up these challenges below.

A. *The Effect on Domestic Violence*

Suk tells us why her observations are important: "State-imposed de facto divorce accomplished by criminal protection orders, for example, is of concern not merely because it disrupts inherited conceptions of private relationships and private space, but because it actually shifts decisional power from individual women to state actors such as prosecutors" (pp. 132–33). She is right, of course. But in reading her book, questions kept insisting themselves. Significantly, Suk takes something that many criminal law scholars might think of as mundane—misdemeanor domestic violence arrests—and teases out larger effects. But conspicuously absent is something much more immediate. Suk tells us that when the state uses protective orders and burglary arrests to circumvent the hurdles in proving domestic violence crimes, this strategy has an effect on property, intimate relationships, and individual autonomy. But what effect does it have on domestic violence?

Really, I am asking several questions. First, what does it mean to us as a society to know that one collateral effect of recent trends in domestic violence prosecutions is that domestic violence is not being prosecuted? Instead of prosecuting alleged abusers for engaging in domestic violence, prosecutors are taking the easier route by instead prosecuting them for violating a protective order, or for burglarizing their own homes. But one consequence of this sleight of hand is the frustration of retributive justice, to say nothing of the frustration of the expression of moral condemnation.

Even more pressing is what effect these proxy prosecutions have on the occurrence of domestic violence. We have known for some time that perceptions of legitimacy play a critical role in voluntary compliance with the law, and in reducing rates of offending.²² Does the abuser who is convicted not of domestic violence, but of burglary or violating a protective order simply for reentering his own home, come away with increased respect for the law, or less? Is he less likely to reoffend, or more? Studying individuals accused of domestic violence, Lawrence Sherman found that offenders who felt the police treated them unfairly were 36 percent more likely to be reported for

21. See, e.g., Dan Markel et al., *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147; Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253 (2009).

22. See I. Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835 (2008). See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

subsequent acts of violence against the same victim.²³ What does this mean for accused abusers recast as burglars of their own homes?

On the other hand, to the extent that proxy prosecutions result in nonincarceratory or reduced sentences (perhaps because the defendant has consented to a full and final order of protection), what are the benefits to society? At a time when our prisons are overcrowded and incarceration is expensive, might the advantages to proxy prosecutions outweigh the costs of their collateral effects? To the extent Suk's concern is with the victim's autonomy, isn't that autonomy equally circumscribed whether the state elects to incarcerate her abuser for domestic abuse or instead chooses to secure a final protection order? Either way, the defendant is removed from his home. Either way, the result is akin to *de facto* divorce.²⁴ Anticipating this question, Suk argues that incarceration is less disruptive to intimate relationships because of the availability of visits, even conjugal visits (p. 49). But this again looks at things too narrowly. Although such visits exist in theory, in reality they usually prove to be impractical because of costs, both economic and personal. Perhaps more importantly, when separation orders are imposed in lieu of imprisonment, willing couples still manage to see each other in violation of the order. The effect is thus the same.

That Suk addresses certain effects of these proxy domestic violence cases—which she rightly traces to the reconceptualization of the home as a place of violence—without even touching on the effects on domestic violence is a shortcoming indeed.

B. *Switching Lenses*

My larger concern is with Suk's lens. As noted earlier, Suk describes her book as an effort to "focus the lens so that we can begin to see what is necessary" to determine whether we, too, should be at home in the law (p. 7). But what happens when we switch lenses, or pan back to reveal a larger picture? Is it possible that Suk's narrow focus obscures too much? In fact, when we switch lenses, what emerges is not just a larger picture; it is a different one.

This is particularly evident with respect to one of the central tenets of the book: that one consequence of our reconceptualization of the home as a site of violence is that we now allow state intervention in the home. Hence, Suk describes the protective order in domestic violence cases as a device by which "the criminal law gains a foothold for its supervisory presence in the

23. Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 *LAW & SOC'Y REV.* 163, 176–82 (1997); Lawrence W. Sherman, *Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction*, 30 *J. RES. CRIME & DELINQ.* 445, 463 (1993) (citing study).

24. In focusing on the cost to the victim's autonomy and agency, Suk conveniently sidesteps issues relating to the autonomy of the defendant and to any children. For the defendant, proxy prosecutions would seem to result in greater autonomy, not less. As for any children, society's interest in protecting them from having an abuser in the home, even if they are not the target of that abuse, would seem to outweigh our concern for the victim's autonomy.

home” (p. 19). She follows up, in a chapter titled “Criminal Law Comes Home,” by asking, “When the state is in the home, what does it do there?” (p. 35).

But Suk’s thesis that the criminal law is now in the home makes sense only when one looks at domestic violence prosecutions narrowly, or in isolation. Change lenses, step back, look at the larger picture, and it becomes apparent that criminal law has not come home. Rather, the criminal law has always been there. The criminal law may have operated from the periphery, its presence may have been barely perceptible, but it has been there nonetheless, just as it is there now.

For those living at the margins, the presence of the criminal law has always been painfully obvious. In very real ways, it has been the criminal law that has policed what constitutes a home. One has only to think of *Loving v. Virginia*,²⁵ the case invalidating our three-hundred-year history of prohibiting interracial marriage, to realize this. After all, the case began with an arrest, with a sheriff and two officers raiding Richard and Mildred Loving’s home early one morning and confronting them in bed.²⁶ Under the criminal law, because Richard was white and Mildred was black, their home was an unlawful home. Alternatively, think of our history of criminal laws prohibiting lewd cohabitation or adultery or polygamy to see criminal law’s tidy work in the home.²⁷ Or of the criminal law’s continuing role, through the criminal enforcement of immigration laws, in splitting apart the families of undocumented aliens.²⁸

In her close reading of *Lawrence v. Texas*, Suk notes that Justice Kennedy heterosexualized the two men at the center of the case and inserted, at least figuratively, a woman. Justice Kennedy also removed a black man. *Lawrence v. Texas* begins with the police showing up at Lawrence’s house in response to a 911 call that a black man had entered Lawrence’s apartment.²⁹ The case starts this way because the criminal law had already eliminated the possibility of a black man being Lawrence’s spouse and had already reduced

25. 388 U.S. 1 (1967).

26. David Margolick, *A Mixed Marriage’s 25th Anniversary of Legality*, N.Y. TIMES, June 12, 1992, at B20.

27. One of Justice Scalia’s fears in *Lawrence*—or at least the fear he articulated to support his slippery slope argument—was that the majority’s decision permitting same-sex intimacy would be the death knell of “laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, [and] fornication.” *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting). In short, that *Lawrence* would amount to a “massive disruption of the current social order.” *Id.* at 591. Whether *Lawrence* will be the death knell of such laws remains to be seen. See generally Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27.

28. See Sandra Guerra Thompson, *Immigration Law and Long-Term Residents: A Missing Chapter in American Criminal Law*, 5 OHIO ST. J. CRIM. L. 645 (2008); Sandra Guerra Thompson, *Latinas and Their Families in Detention: The Growing Intersection of Immigration Law and Criminal Law*, 14 WM. & MARY J. OF WOMEN & L. 225 (2008).

29. Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 MICH. L. REV. 1464, 1479–81 (2004) (quoting from the probable cause affidavit).

the likelihood of a black man being a cohabitant, and had positively criminalized the possibility of the two men being sexually intimate.

Lastly, think of the role the criminal law has played in inferring familial duties in the home, such as a duty of care. Even where family law would not recognize parental obligations, the criminal law has felt free to impose them. Consider *State v. Miranda*,³⁰ in which a twenty-one-year-old defendant was deemed criminally responsible for failing to shield his girlfriend's four-month-old daughter from abuse. Though he had been living with his girlfriend for only four months, the criminal law treated him as if he were married, and as if the four-month-old were his adopted child. In other words, the state imposed de facto marriage, with family in tow.

The criminal law has been in the home in more subtle ways as well. The criminal law expressively communicates which homes are appropriate.³¹ Stable, monogamous, heterosexual, married homes exist not outside of the criminal law, but under the aegis of it. The criminal law shapes norms. It marks illicit conduct of which it disapproves. It also indirectly marks other conduct as licit. For example, a law that criminalizes same-sex sex almost by definition gives its imprimatur to heterosexual sex, contributing to what Adrienne Rich long ago termed "compulsory heterosexuality."³² A law that penalizes adultery not only condemns sex outside of marriage, but concomitantly privileges sexual fidelity within marriage. A rule that protects marital communications and insulates spouses from compelled testimony in criminal cases by definition deems other intimate relationships as less worthy of societal protection. In short, the criminal law has always played favorites, both outside of the home and inside the home.

None of this undermines Suk's argument that it is time, indeed past time, to take stock of the collateral effects of the reconceptualization of the home as a place of violence. But it does suggest that there are other possible narratives that her story obscures. It also suggests that the criminal law has been more visible in certain contexts than in others. The criminal law has always had a heavy hand when it comes to policing legal outsiders. Suk acknowledges some of this, but one wishes she had discussed this further. For example, while Justice Scalia invoked the figure of "the lady of the house tak[ing] her daily sauna and bath"³³ to rule that thermal imaging of a home requires a search warrant, the Court has been largely indifferent to searches of the homes of the poor.³⁴ One wishes Suk had discussed these cases.

Suk's focus also excludes another narrative. It is not just that the home has been reconceptualized as a place of violence. Switch lenses, and what

30. 715 A.2d 680 (Conn. 1998).

31. For an insightful discussion of the role criminal law has played in establishing an official family model, see Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236 (2010).

32. Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631 (1980).

33. *Kyllo v. United States*, 533 U.S. 27, 38 (2001).

34. See, e.g., *Wyman v. James*, 400 U.S. 309 (1971); *Sanchez v. Cnty. of San Diego*, 464 F.3d 916 (9th Cir. 2006), *reh'g en banc denied*, 483 F.3d 965 (9th Cir. 2007).

becomes evident is that we have reconceptualized every place as a place of violence. We think of schools as places where the Columbine or the Virginia Tech shootings could occur. We think of the Catholic Church and Boy Scouts jamborees as places where our sons might be molested. We think of nursing homes as places where our parents might be abused. We think of planes and subways as places where we might be terrorized. We have let ourselves slip into a culture of fear, and as a result we have a culture of control.³⁵ We respond by governing through crime.³⁶ And we want—no, we *demand*—guns to defend ourselves. At the same time, the line between public and private has never been so porous. We blog and tweet our most intimate secrets. We invite the public into our homes and call it reality television. As Professor Christopher Slobogin has observed, we have fast become a surveillance state.³⁷ The police are not just in the home. They are everywhere. We have let them be everywhere.

C. Is There a Woman in the House?

All of this brings me to my final criticism. I think Suk would not object if I described her project as decidedly feminist. Her argument, after all, is that feminist reconceptualizations of the home as a site of violence have resulted in the protection of some women, but at a cost that ultimately may not advance “women’s interest” (p. 7). The state, by policing violence in the home, is able to police the home itself, reallocating property as it chooses, and ending “bad” relationships as it sees fit. But ending “bad” relationships sounds perilously close to ending non-state-approved relationships. And when this is done without the consent of the “victim” in the relationship, it begins to sound perilously close to “the state knows better.” It sounds paternalistic. Although, since the reforms Suk discusses owe their genesis to feminists, it might be more appropriate to say it sounds maternalistic. Father knows best is now mother knows best. In this telling, the woman victim is victimized twice: first by her abuser, and second, by a criminal justice system that devalues her autonomy.

Perhaps it is strange then that I find myself thinking about Suk’s concern for autonomy in the context of her final chapter, “Is Privacy a Woman?” Suk argues that in a range of cases dealing with privacy as it relates to searches under the Fourth Amendment, or to a woman’s right to choose, or to the right of adults to choose with whom to engage in intimate relationships, the Court has summoned the figure of the woman in the house as a means to an end, to buttress arguments, and to make conclusions sound inevitable.

35. See DAVID GARLAND, *THE CULTURE OF CONTROL* (2001).

36. See JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007). As Professor Simon observes, much of governance in America today is in response to the fear of crime. This fear has resulted not only in increases in police power vis-à-vis the individual; it has also shaped other areas of the law, from the right to bear arms, to immigration policy, to public education and charter schools, to land use and zoning.

37. See CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK* (2007).

Again, she is right. But there is something discomfoting about her analysis. Her question, “Is Privacy a Woman?” prompts another: “Is there a woman in the house?”

For if the Court has summoned the figure of the woman in the house as a means to an end, has not Suk done the same? Perhaps this is inevitable. Perhaps not. But after reading and rereading her book, I am left wondering: is Suk not guilty of some variation of the same paternalism/maternalism that the state has exercised? Throughout her discussion of the trend to prosecute domestic abusers for violating protective orders or for burglary, and throughout her discussion of the state securing *de facto* divorces through final orders of protection, what comes across is that these proxy prosecutions devalue the autonomy of women. But nowhere in Suk’s book does she discuss, or even contemplate, what women might want. To put it another way, in Suk’s book about collateral harms to women, women are oddly absent.

To a certain extent, this is Suk’s point, of course. But through her discussion of how women in the abstract might be harmed by state interventions in the home, one wishes that she had included some of the narratives of women. She tells the reader the stories of numerous men through her discussion of various state and federal cases. But what of the women? In Suk’s book, they do not even have the benefit of having a case name.

And what of the real women at the center of so many seminal cases? If privacy is a woman, what did it mean for Dollree Mapp, the real woman at the center of *Mapp v. Ohio*,³⁸ the case that ushered in the Fourth Amendment’s exclusionary rule? What did it mean to Sylvia Mendenhall, the woman at the center of *United States v. Mendenhall*,³⁹ the case that brought about the Fourth’s Amendment’s “free to leave” test? What did it mean to Savana Redding, the eighth grader at the center of the Court’s recent strip-search case, *Safford Unified School District No. 1 v. Redding*?⁴⁰ And for that matter, what of the real women on the Court—Justices Ginsburg, Sotomayor, and Kagan—who have a say in shaping privacy?

So allow me to ask the question again: “Is there a woman in the house?”

CONCLUSION

My Review of *At Home in the Law* has been critical. And as reviews go, sometimes criticisms have a way of overshadowing praise. I hope that is not the case in this one. In fact, I admire the book terribly. Suk is on to something. Her book sheds a light on the shifting meanings of the home, and how those meanings have informed the law, in a way that gets us thinking. For those of us who care about gender and crime, or about the cultural study of the law, or about the often-invisible intersection between family and crimi-

38. 367 U.S. 643 (1961).

39. 446 U.S. 544 (1980).

40. 129 S. Ct. 2633 (2009).

nal law, the book is significant indeed. Don't get me wrong. At parts, the book is maddening, frustrating. At times, I wanted to hurl the book across the room. But looking back, even these were good times. My interests overlap so much with Suk's that we were bound to disagree sometimes. But at the end of the day, it's the admiration that stood out. It's the admiration that stands out still.

