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### Domestic Violence Misdemeanor Prosecutions and the New Policing

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### 31. CRIMINAL LAW COMES HOME

JEANNIE SUK\*

The traditional reluctance of criminal law to enter the intimate space of the home is now seen as having long enabled state acquiescence in violence against women. During the decades in which the criminalization of domestic violence has been in the making, feminists have sought to recast as “public” matters previously considered “private.” The recognition of domestic violence (DV) as a public issue is manifest in law reform aimed at reshaping law enforcement response to treat DV as crime. DV remains a serious problem, with estimates of women in the United States who experience assault by intimate partners each year numbering in the millions. But it is no longer marginal to prevailing notions of what crime is. As law enforcement continues to embrace and amplify that development, the relation between the home and the criminal law is being remade in surprising ways that have gone largely unnoticed.

Here I describe the legal regime that has grown up around misdemeanor offenses associated with DV, emerging under the aegis of correcting the criminal justice system’s shameful past inaction, that seeks to do something meaningfully different from punishing violence. The home is becoming a space in which criminal law deliberately and coercively reorders and controls property and intimate relationships. I discuss two means by which the criminal law accomplishes this goal: protection-order criminalization and what I call “state-imposed de facto divorce.”

If a rhetoric of privacy has worked in our history to justify nonintervention in the home, the new regime relies on a rhetoric of publicness to envision the home as in need of public control, like the streets. The home, the archetype of private space, becomes a site of intense public investment, suitable for criminal law control.

Perhaps because of the urgency and magnitude of the problem of DV, much-needed law reform has been rapid and has resulted in novelties we do not yet fully understand. Here I try to make intelligible some important conceptual, practical, and normative consequences of that law reform. Realistic consideration of surprising aspects of the current landscape, including practices that may fly under the radar in prosecutors’ offices and criminal courts, can enable us to see how the characteristic logic, ideology, rhetoric, and momentum of a law-reform project can become conventional wisdom and be extended without reflection on their meaning. The stakes are particularly sensitive because of the unique and complex vulnerabilities, interests, rights, and freedoms that inhabit the home.

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\* Assistant Professor of Law, Harvard Law School. This core text is drawn from Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2 (2006).

**I. PROTECTION ORDER CRIMINALIZATION: PRESENCE AT HOME AS PROXY CRIME**

In most jurisdictions today, criminal courts, which always had the power to set conditions of pretrial release, issue protection orders at the prosecutor's request as a condition of pretrial release after a DV arrest. Many states have statutorily authorized or mandated issuance of the criminal protection order as a condition of bail or pretrial release. Criminal protection orders remain in effect while prosecution is pending and can become more permanent as part of a criminal sentence.

Whereas the civil protection order is sought voluntarily by the victim, the criminal protection order is sought and issued by the state in the public interest. The practice of criminal courts issuing protection orders—initiated, requested, and enforced by the state—shifts the decision to exclude an alleged abuser away from the victim and to the state. Moreover, the DV protection order criminalizes conduct that is not generally criminal—namely presence at home—in order to punish or prevent the target criminal conduct. Violating the order is a crime even if the conduct the order prohibits ordinarily is not. To prosecutors and courts, an abuser's presence in the home comes to seem interchangeable with DV. Presence at home is a proxy for DV.

The advantages of using presence at home as a proxy are evidentiary and preventive. The evidentiary problems with prosecuting DV are well known. Victims are typically unwilling, sometimes out of fear, to cooperate with the prosecution. Thus criminal cases are often weak and proof of guilt beyond a reasonable doubt elusive. Prosecutions for protection-order violations can enable circumvention of the burden of proof—a more efficient and effective means of convicting domestic abusers. A protection-order violation is far easier to prove than the target crime of DV. Victim testimony is less important. No physical injury need be shown. The existence of the protection order and the defendant's presence in the home, to which the arresting officer can usually testify, are sufficient. All that may need to be shown is that the defendant telephoned the protected party. Furthermore, using presence at home as a proxy is designed to prevent conduct that, though innocent itself, can lead to the target crime. Prohibiting a person's presence at home via the protection order may reduce his opportunity to engage in DV.

The protection order thus enables the creation of a crime out of the ordinarily innocent behavior of being at home. Through this tool, the criminal law gains a foothold for its supervisory presence in the home. Once the protection order is in effect, police presence is required in that space. That monitoring opens up a range of conduct in the home to criminal law control.

**II. DE FACTO DIVORCE**

When the state is in the home, how does it control intimate relationships through the criminal law? I turn to a leading jurisdiction, New York County (i.e., Manhattan),

that is considered to be “in the forefront of efforts to combat domestic violence,”<sup>1</sup> and that has seen significant changes in its enforcement approach in the last fifteen years.<sup>2</sup> A routine practice there in the prosecution of misdemeanor DV exemplifies the expanding criminal law control of the home: The prosecutorial use of criminal court protection orders to seek to end an intimate relationship. The use of such protection orders in the normal course of misdemeanor DV prosecution amounts in practice to state-imposed de facto divorce.

#### A. Temporary Orders of Protection

The Manhattan District Attorney’s Office (DA’s Office) defines DV as “any crime or violation committed . . . against . . . a member of [the defendant’s] family or household.”<sup>3</sup> The vast majority of DV cases involve charges of misdemeanor or lesser severity, which by definition do not allege serious physical injury. Many DV misdemeanor cases charged do not allege any physical harm.<sup>4</sup> Accordingly, my discussion here primarily concerns the enforcement of misdemeanor DV, for which serious physical injury is not at issue.

The DA’s Office considers DV to be a very serious and distinctive category of crime. Cases deemed to fall in the category of DV trigger a “mandatory domestic violence protocol” not applicable to other (even violent) crimes. Even as the “violence” of DV has been defined down to include cases with no physical violence, the mandatory protocol applies in all cases falling in the category, regardless of the seriousness or injuries in the particular case.

The use of a uniform mandatory protocol in every case represents the prosecutorial response to a paradigm story in which DV is a prelude to murder. In the oral culture of a prosecutor’s office, a misdemeanor DV defendant has the potential to turn out to be an O.J. Simpson. Rookie prosecutors are warned that their DV misdemeanor cases could get them negative media attention for failure to prevent something more serious. Thus prosecutors make decisions in the shadow of public oversight and have an enhanced incentive to use every means available to protect DV victims.

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1. Richard R. Peterson, N.Y. CITY CRIMINAL JUSTICE AGENCY, *THE IMPACT OF MANHATTAN’S SPECIALIZED DOMESTIC VIOLENCE COURT I* (2004).

2. For overviews and details of misdemeanor DV enforcement practice in New York City, see Chandra Gavin and Nora K. Puffett, *CTR. FOR COURT INNOVATION, CRIMINAL DOMESTIC VIOLENCE CASE PROCESSING: A CASE STUDY OF THE FIVE BOROUGHS OF NEW YORK CITY* (2005); Richard R. Peterson, N.Y. CITY CRIMINAL JUSTICE AGENCY, *COMBATING DOMESTIC VIOLENCE IN NEW YORK CITY: A STUDY OF DV CASES IN THE CRIMINAL COURTS* (2003); Richard R. Peterson, N.Y. CITY CRIMINAL JUSTICE AGENCY, *COMPARING THE PROCESSING OF DOMESTIC VIOLENCE CASES TO NON-DOMESTIC VIOLENCE CASES IN NEW YORK CITY CRIMINAL COURTS* (2001) [hereinafter Peterson, *COMPARING*]; Peterson, *supra* note 1.

3. 2004 Criminal Court Crimes Manual 18 (2004).

4. See Peterson, *COMPARING*, *supra* note 2, at 30; Gavin and Puffett, *supra* note 2, at 35.

The enforcement protocol consists of the following practices. Police officers must arrest if there is reasonable cause to believe that a DV crime, including violation of a protection order, has been committed. Once a DV arrest is made, the DA's Office has a no-drop prosecution policy, wherein the decision to charge and prosecute does not hinge on the victim's willingness to cooperate. Prosecutors pursue cases in the face of victims' opposition and routinely inform them that the choice to prosecute belongs solely to the state. The mandatory practice in this area includes rules that do not generally apply in non-DV cases. One of them is that at the defendant's arraignment, prosecutors must request from the criminal court a temporary order of protection (TOP) that prohibits the defendant from contacting the victim and from going to her home, even if the defendant lives there.

At the arraignment of any defendant charged with a DV crime, the DA's Office's mandatory practice involves asking the criminal court to issue a TOP as a condition of bail or pretrial release. The TOP normally prohibits any contact whatsoever with the victim, including phone, e-mail, voice-mail, 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 defendant's home. Ascertaining that the victim wants the order is not part of the mandatory protocol. The prosecutor generally requests a full stay-away order even if the victim does not want it.

The criminal court routinely issues the TOP at arraignment, the defendant's first court appearance. The brief, formulaic, and compressed nature of arraignments in criminal court, which run around the clock to ensure that all defendants are arraigned within twenty-four hours of arrest, means that courts often issue orders with little detailed consideration of the particular facts. DV orders are generally requested and issued as a matter of course. When the TOP goes into effect, the defendant cannot go home or have any contact with the victim (usually his wife) and his children. If the defendant does go home or contact the protected parties, he could be arrested, prosecuted, and punished for violating the order—even if the victim initiates contact or invites the defendant to come home. Police officers then make routine unannounced visits to homes with a history of domestic violence. If a defendant subject to a protection order is present, he is arrested.

Thus even when a DV case is destined ultimately to end in dismissal because the victim is uncooperative and there is insufficient evidence for conviction, keeping the case active for as long as possible enables the prosecutor and the court to monitor the defendant for months prior to dismissal. A violation of the order can lead to arrest and punishment for the more easily proven criminal charge. But in addition to the prospect of punishment for the proxy conduct of being present at home, the protection order shifts the very goal of pursuing criminal charges away from punishment toward control over the intimate relationship in the home.

The common wisdom is that the criminal court protection order practice is meant to safeguard the integrity of criminal proceedings by protecting the victim

from violence and intimidation. But the practice of separating couples in DV cases by way of criminal protection orders extends beyond the needs of the judicial process. Court-ordered separation becomes a goal of prosecutors in bringing criminal charges—a substitute for, rather than a means of, increasing the likelihood of punishment. Punishment as a goal can be put on the backburner because separation is a more direct and achievable way to address or prevent violence. The practice that results amounts to what I term state-imposed *de facto* divorce, a phenomenon that is so routine in criminal court that it disappears in plain sight.

### **B. Final Orders of Protection**

The full and final order of protection formally transforms the TOP, issued at the defendant's arraignment and continually renewed while the case is pending, into a final order of lengthy duration. Of course prosecutors prefer to see criminal defendants tried, convicted, and punished with imprisonment. But the difficulty of trying DV cases because of the reluctance of victims to cooperate leads prosecutors to look to plea bargains imposing alternatives to imprisonment. The protection order is the most significant among these alternatives. Even if the defendant does not get jail time as part of the plea, at the very least, the protection order can provide the basis for new criminal liability on the more easily proven crime of violating the order.

Already in effect on a temporary basis since the defendant's arraignment, the protection order is deployed as follows: The prosecutor offers the defendant a plea bargain consisting of little or no jail time (or time served) and a reduction of the charge, or even an adjournment in contemplation of dismissal, in exchange for the defendant's acceptance of a final order of protection prohibiting his presence at home and contact with the victim. This offer presents the opportunity to dispose of the criminal case immediately with little or no jail time, and in some cases, no criminal conviction or record. The offer is particularly attractive for a defendant who has remained in jail since arraignment pending disposition of his case: If he agrees he will be released.

Depending on the terms of the plea bargain, the court issues the final protection order as part of the defendant's sentence pursuant to a guilty plea, or as a condition of an adjournment in contemplation of dismissal. In light of the evidentiary difficulties of obtaining a DV conviction at trial, especially when victims are uncooperative, many defendants do not take pleas, in anticipation of eventual acquittal or dismissal. But many do.

As the literature on plea bargaining increasingly recognizes, plea bargains are not struck narrowly in the shadow of the strength of the evidence and the likely results of trials. In the context of the final protection order, motives for defendants' acceptance of plea bargains may include defendants' desire to resolve cases quickly without much or any jail time, and defense attorneys' need to manage large case loads as repeat players in the criminal court. A defendant may

also be unwilling to wait the time leading to trial, and fear losing his job because of the days he must take off to make repeated court appearances. A plea bargain that ends the case, takes jail off the table, often reduces the charge down to a violation, and leaves no criminal record is similar enough to dismissal that defendants may readily accept. The idea that “law’s shadow may disappear altogether”<sup>5</sup> has particular resonance for misdemeanor DV, in which the final order of protection is so common that it is plausible to consider it a standard disposition sought by prosecutors.

### C. Consequences of De Facto Divorce

Protection orders enable the state to seek de facto divorce between DV defendants and their intimate partners. But de facto divorce is not de jure divorce. The order of protection does not have the effect of ending formal marriage. And many intimate partners affected by orders are not married. Spouses can surely remain legally married even as they obey all the prohibitions of the order, but cannot live or act in substance as if they are in an intimate relationship. Furthermore, the imposed separation is not accompanied by the family law divorce regime of property division, alimony, child custody, and child support, of which the order ordinarily makes no mention. A de facto divorce does not trigger the family law apparatus that surrounds de jure divorce. Apart from the fact that the criminal court does not have jurisdiction to enter new orders regarding child custody, visitation, or support, prosecutors have neither interest nor experience in dealing with family law.

But de facto divorce does entail de facto family arrangements—no custody, no visitation, and no support. Thus in the imposition of de facto divorce, criminal law becomes a new family law regime. But because it is criminal law regulation, the parties cannot contract around the result except by risking the arrest and punishment of one of them.

Indeed, the order goes much further than would ordinary divorce, prohibiting any contact, even by express permission of the protected party. It is super-divorce. Criminal law does not purport to give effect to private ordering, nor does it tolerate parties’ contracting around default rules; rather, it regulates individuals’ conduct through the threat of punishment to serve the public interest. Moreover, state-imposed de facto divorce is so class-contingent that it could be called poor man’s divorce. The initial arrest that sets the wheels in motion is much more likely to occur if people live in close quarters in buildings with thin walls, and neighbors can hear a disturbance and call the police. Those arraigned in New York County criminal court for DV crimes are by and large minorities who live in the poorest part of Manhattan.

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5. William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004).

In practice, some, perhaps many, couples do remain together in disobedience of the criminal protection order. They are in marriages or intimate relationships whose continuation is criminal—in the shadow of the potential arrest and criminal prosecution of the person subject to the order. The enforcement of the order does not depend solely on the victim's wishes, as the police do make surprise home visits and arrest people who are present in homes from which they are banned. This means that the victim is not simply the recipient of a strategic tool that shifts power to her. Many protected by protection orders lack sophistication about the operation of the enforcement protocol. They may not speak English well. They may be illegal immigrants for whom contact with government authorities is highly undesirable, frightening, and risky. Indeed some may believe that they themselves are subject to criminal sanction should they allow their partner to contact them. Under these conditions, the overall effect of the protection order is not to confer power on victims, but rather to impose an end to the intimate relationship without their consent.

### III. TENSIONS

A distinctive feature of the criminal law expansion described here is the invocation of the public interest to justify the control of home space and intimate relationships. This expansion, often on the basis of an alleged misdemeanor, takes place in a world in which “violence” is defined down to include incidents not causing physical injury. Through it, the state excludes people from their homes, reallocates property interests, reorders intimate relationships, and imposes de facto divorce.

The expanding criminal law control of the home described above is in tension with the most powerful legal trend in the relationship between criminal law and the home over the last fifty years. Beginning with the fundamental right to marry and the right to privacy in personal sexual matters, the notion that the Constitution disfavors the criminalization of intimate relationships between consenting adults has gained ground. In the words of Justice Douglas in *Griswold v. Connecticut*, “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 marriage relationship.”<sup>6</sup> As Laurence Tribe famously stated, discussing *Bowers v. Hardwick*,<sup>7</sup> the question was not what Hardwick “was doing in the privacy of his bedroom, but what the State of Georgia was doing there.”<sup>8</sup> This logic has progressed to the holding in

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6. 381 U.S. 479, 485–86 (1965).

7. 478 U.S. 186 (1986).

8. Pet. for Reh'g of Resp. at 10, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140).



*Lawrence v. Texas*<sup>9</sup> that the criminal law may not prohibit private consensual sexual conduct between adults. This trend connects home privacy with individual autonomy in intimate relationships.

In *Lawrence*, Justice Kennedy relied on the concept of the home to mark off a private space of autonomy for intimate relationships. He spoke of the protected right as the right to engage in “intimate conduct with another person” that “can be but one element in a personal bond that is more enduring.”<sup>10</sup> The effect of this much-noticed move was to suggest that the state ought not prohibit the exercise of private choice of intimate partner—quite apart from state recognition of that choice in the form of marriage.

In the context of constitutional due process, the rising legal sensibility disfavors the idea of the state as an omnipresence regulating intimate choices in the home. Meanwhile, under the DV rubric, the criminal law actively prohibits some individuals’ choices to live as intimates, criminalizing most if not all practical aspects of sharing a life in common. To make good on the prohibition, the state must become a dominant presence in the home, with the police on the lookout for telltale signs of husbands. These two trends stand in tension at the intersection of criminal law and family law.

The simultaneous expansion and contraction of the criminal law in the home could of course be rationalized: consensual sex between adults in private space does not cause harm, whereas DV, a nonconsensual phenomenon, does. But it would be too simple to pigeonhole the competing developments as joint manifestations of the principles of harm and consent. State-imposed de facto divorce goes meaningfully beyond the prohibition and punishment of violence per se. It seeks to criminalize intimate relationships that adults have chosen for themselves and have not chosen to end. One would need to take a strong view of gendered coercion in intimate relationships generally to rationalize a world in which this kind of state control is regularly triggered by misdemeanor arrests not involving serious physical injury, particularly as the category of nonviolent conduct that constitutes DV expands.

The tension between protecting women from intimate violence and promoting their self-determination reflects underlying questions about women’s capacity generally to make autonomous judgments and decisions about their intimate relationships. While the academic debate continues, prosecutors, police, and courts operate in a world primarily motivated by the distinctive interests of the criminal law. In the language of the cases, the culture of police and prosecutors, and the structuring ideology of the criminal justice system, a powerful rhetoric of public interest informs reluctance to allow the particular desires of individual women to control. We can see a distinctive nexus between the objective of

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9. 539 U.S. 558 (2003).

10. *Id.* at 567.

state control backed by the public interest and the derogation of individual autonomy.

#### IV. CONCLUSION

My goal has been to interpret the moves of a still developing legal regime that has largely not been recognized. Prosecutors, police, and judges in many jurisdictions have at long last adopted a feminist theory of DV as a manifestation of gendered power inequality in the marital relationship. But the literalization of this theory has resulted in the practice of state-imposed de facto divorce: if the root of DV is marriage, end marriages that have signs of DV.

This solution to the DV problem need not inevitably follow from strong, consistent, even mandatory, enforcement of DV crimes. Of course, alternative approaches may create costs, namely that violent crime might go unprevented. I have not meant to offer a law reform proposal, but rather to give shape and texture to surprising novelties of the law reform we have had, in order to make visible the meanings and costs of a developing legal regime. We might well ultimately conclude that this regime is worth its costs. But my goal here, antecedent to that conclusion, has been to show the dramatic changes in how the criminal law is giving effect to a well-accepted antiviolence policy.

State-imposed de facto divorce may well be appropriate for truly violent and dangerous abusive relationships; in these cases, the state may more readily conclude that victims' autonomy and consent are already worn so thin that paternalism will best enhance them. But the extraordinary legal innovation wherein de facto divorce becomes a standard prosecutorial tool needs close interrogation before it becomes a uniform, mechanical solution for the large number of cases now coming into the criminal system under the rubric of DV that do not involve serious physical injury.

The expanding definition of violence, mandatory arrest, and no-drop policies, the prosecution of many more cases than can ultimately be proven, and the decreasing emphasis on punishment are all developments that contribute to making de facto divorce a de facto solution to DV. As de facto divorce becomes a more prevalent alternative to traditional punishment, it is likely to reinforce the expansion of the definition of DV crime and an increase in DV arrests and prosecutions for nonviolent conduct, as law enforcement personnel increasingly imagine the consequences of bringing such domestic incidents into the criminal system to be less draconian than incarceration. A wide range of nonviolent conduct in the domestic space then becomes subject to criminal law regulation, down to the existence of an intimate relationship itself.

The result would be a shift in emphasis from the goal of punishing violence to state control of intimate relationships in the home. This shift has not been completely accomplished, but it is underway. Of course, we must continue to

pursue remediation of the flawed criminal justice models of the past that simply accepted the distinction between private and public as unproblematic. But the ongoing change explored here creates an opportunity for critical reflection on the increasing subordination of individual autonomy in domestic space to state control in the public interest.

## COMMENTS

### THE PRIVATE LIFE OF CRIMINAL LAW

MELISSA MURRAY\*

Jeannie Suk makes an important contribution to our understanding of criminal law and the regulation of private life. By arguing that the use of criminal protective orders in domestic violence enforcement “deliberately and coercively reorders and controls”<sup>1</sup> private relationships, Suk builds on the work of others who have identified criminal law’s increasing role in shaping and controlling behavior in the public sphere. Of course, Suk’s claim is that criminal law’s tentacles not only have reached out to regulate more *public* terrain, they have turned inward to regulate the *private* sphere as well. This move, Suk makes clear, is wholly at odds with an inherited legal narrative that denotes marriage, family, and the home as “private,” and therefore insulated from criminal regulation.

I would argue, however, that criminal law’s regulation of private relationships is not a new development. Certainly, criminal law has resisted intervening in the home, as the history of domestic violence enforcement makes evident. However, despite this resistance, criminal law has been an important force in defining and regulating the content of private life. As I describe below, criminal law has worked in tandem with family law to police the normative contours of marriage and intimate life. With this history in mind, the developments that Suk identifies are even more troubling because they suggest that criminal law is moving beyond its already quite significant role in structuring the parameters of lawful intimacy to directly regulate within the private sphere.

It goes without saying that family law regulates the formation of families, in large part through the regulation of entry into and exit from marriage. Each jurisdiction sets forth a series of procedural and substantive requirements for entering into a valid union. Procedurally, lawful marriage requires compliance with the state’s licensing apparatus, through which the couple confirms to each other, and the overseeing state, their consent to marriage.

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1. Suk core text at 683.

Substantively, the state regulates who may and may not marry. Presently, all jurisdictions prohibit marriages between more than two people, between consanguineous relatives, and between parties either of whom is below the jurisdiction's age of consent. Historically, this litany of substantive restrictions was even more comprehensive. Until 1967, many Southern states prohibited interracial marriages, and until very recently, same-sex marriages were universally prohibited as well.

Together, these procedural requirements and substantive restrictions enunciate a normative ideal of what marriage should be. Until the twentieth century, this normative ideal specified that marriage was an intraracial, monogamous, exogamous, and heterosexual union between consenting adults. Today, marriage may be interracial or (more limitedly) between persons of the same sex, but it is still understood to be an exogamous, monogamous enterprise between consenting adults. However, because family law regulates only entry to and exit from marriage, its opportunities to police this normative vision of intimate life are limited. In order to advance its normative project, family law, historically and presently, has relied on criminal law's assistance.

In most—if not all—jurisdictions, family law's substantive marriage restrictions are reinforced by criminal bars on the same behavior. For example, not only was interracial marriage once prohibited as a civil matter, it also was subject to criminal penalties. Similarly, while marriage between consanguineous relatives is prohibited as a civil matter, sex (an essential incident of marriage) between such persons also is criminalized as incest. Through its substantive restrictions, family law says what marriage is and should be, and criminal law reinforces these norms by criminalizing behavior ineligible for marriage.

Criminal law goes even further in defining the normative content of intimate life. Although family law regulates entry into and exit from marriage, it does not regulate *inside* of intact marriages, and historically it did not regulate outside of marriage. Instead, criminal law—affirmatively and by omission—elaborates family law's normative vision of intimate life in critical ways. With respect to the regulation of sex outside of marriage, criminal law, through fornication laws and other morals legislation, prohibited out-of-wedlock sex, thereby underscoring marriage's position as the lawful site for sexual expression. Likewise, behavior deemed incompatible with marriage and its procreative purpose also was criminalized through laws prohibiting prostitution, adultery, contraception, and sodomy.

With respect to intact marriages, criminal law has further entrenched family law's normative understanding of marriage as a private enterprise by *refusing* to intervene in the interior of marital life. Until very recently, marriage was a defense to criminal liability for rape—an omission that expressly served family law's interest in promoting and maintaining family privacy in the face of state intrusion. And as Suk notes, criminal law rarely intervened to police domestic violence, reflecting the understanding of the marital home as a quintessentially private space.

Suk rightly observes that today, criminal law's reluctance to intercede in the home has eroded as new approaches to domestic violence enforcement permit criminal law to renegotiate property rights and personal relationships. But attention to these important developments should not obscure the fact that criminal law long has been a regulatory force in the legal construction of private life. Through its regulation of sexuality and its historic refusal to intervene inside the marital home, criminal law has played an important role in the regulation of marriage, family, and sexuality. It has been family law's "muscle," reinforcing and refining intimate norms. In this way, criminal law *always* has been at home—or at least on the porch with shotgun in hand—policing and protecting the boundaries of private life.

## WHOSE PRIVACY?

LAURA A. ROSENBURY\*

The state has long decided what conduct is sufficiently intimate to be protected by both common law and constitutional notions of family privacy. The state has consistently regulated who may marry, often with the assistance of criminal law. The state has also criminalized certain forms of sexual activity outside of marriage, as illustrated by the anti-sodomy statute at issue in *Lawrence v. Texas*.<sup>1</sup> Although the Supreme Court held that statute unconstitutional, the state continues to regulate sexual activity in various forms. In fact, some lower courts have refused to extend *Lawrence* to forms of sex perceived to be lacking the type of emotional intimacy celebrated by Justice Kennedy in *Lawrence*.<sup>2</sup> Private sexual and emotional conduct therefore remains a state concern, despite popular misconceptions about the state's grant of privacy to such relationships.

Why, then, might we view the criminal law's reach into the realm of domestic violence as new and uniquely problematic? I suspect that the alarm bells ring because the state is entering not just any home, but instead is often entering the marital home. The marital home has long been the organizing principle of family law, from the days when the field was called "domestic relations" and encompassed all the internal relationships found in a husband's household, to recent proposals to extend state recognition and benefits to any interdependent group of individuals sharing a home, regardless of conjugality. A home occupied by spouses (or, more recently, individuals in marriage-like relationships) is thus a crucial component of the state's very definition of family. And once that

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1. 539 U.S. 558 (2003).

2. See Laura A. Rosenbury and Jennifer E. Rothman, *Beyond Intimacy* (work in progress, on file with author).

definition is met, the state generally accords privacy to the family, meaning that the state typically will not intervene in the home.

Accordingly, when the state intervenes in the marital home, it seems to be reneging on a core aspect, and some would even say benefit, of being in a marriage or marriage-like relationship: being left alone by the state. Jeannie Suk therefore insightfully identifies the dissonance that can be created by aggressive domestic violence prosecution policies like those of New York County. However, this dissonance is solely the result of a putative privilege granted by the state in the first place, the privilege of family privacy that attaches to certain forms of intimacy but not others. We might want to be weary of the erosion of that privacy, as Suk urges, but we also might want to examine the interests served when the state limits that privacy in circumstances like those Suk describes.

Other scholars have written at length about the ways family privacy often reinforces the power of certain family members over others, particularly husbands over wives and parents over children.<sup>3</sup> That focus on private power, rather than state power, reveals the ways that privacy is not a monolithic good but instead can be experienced differently by different members of the same family. For example, family privacy may mean very little to children, who often find their lives controlled by parental directives. Similarly, women experiencing forms of intimidation and abuse by their partners often find their “individual autonomy in domestic space” subordinated by their partners’ desires, making the “increasing subordination” of the state described by Suk anything but subordinating.

So whose privacy should the state respect? Although I welcome Suk’s critical project, I fear that she reinforces the public/private distinction when she posits criminal law as the principle object of her concern, instead of also examining the ways that the state’s grant of privacy can also limit autonomy within the family. Criminal law may be oppressive for some family members, but for others it may serve as a potential route to increased autonomy, and even privacy, within the family home. Such intervention may very well transform intimacy, but no more so than when the state privileges marriage over other forms of relationship and permits private power to flourish under the rubric of family privacy.

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3. See, e.g., Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1174–80; Barbara Bennett Woodhouse, *The Dark Side of Family Privacy*, 67 GEO. WASH. L. REV. 1247, 1255 (1999).

**FROM NEOLIBERALISM TO LIBERTARIANISM: WHY  
NEITHER CRIMINALIZATION NOR PRIVACY IS THE  
ANSWER FOR BATTERED WOMEN**

AYA GRUBER\*

Jeannie Suk's thoughtful, somewhat "Lockean" (rights-based) criticism of domestic violence criminalization and forced separation is an important, timely contribution to feminist literature. Suk insightfully observes that state power, once invited into the home, easily becomes an unwanted long-term guest, resistant to giving up its supervisory authority over what it considers "disordered" homes and "damaged" women. Suk encourages feminists to reexamine where the movement has been, where it is going, and the benefits and drawbacks of continued investments in the criminal law.

Where I part ways with Suk is her singular focus on the importance of "privacy," denoted as the "negative" right to be free from police intervention. By locating marital privacy as the center of her critique, Suk adopts liberalism, a philosophy arguably consonant with gender hierarchy, as her normative position and fails to see domestic violence as a distributive phenomenon. Suk's privacy-based critique of domestic violence criminalization reinforces the false consciousness that there exists a neutral "private" sphere, unconstructed by law, whose maintenance has intrinsic value.

I agree that the overwhelming feminist effort to strengthen existing criminal laws and to create new ones is problematic, but not on the ground that state nonintervention is an end in itself. Critical scholars have long rejected the public/private distinction and the notion of an intimate realm untouched by law. The home is deeply ordered by existing legal arrangements. Moreover, a myriad of socio-economic conditions—some explicitly created by law, like immigration status, and others tolerated by the state, such as gender discrimination—enable abusive men and prevent victims from leaving. Thus, feminists were right to criticize the public/private distinction and object to the widespread mindset that "domestic violence is not my problem." It was important to highlight the ways in which privacy rhetoric was employed to cover the government and society's complicity in abused women's continued subordination.

Unfortunately, instead of focusing on state distributive remedies as the counter to abuse-enabling privacy, feminist domestic violence reformers made the misguided choice to juxtapose privacy solely with state police power. In doing so, they became unwittingly complicit in a neoliberal program whose philosophy runs directly counter to feminist ideology. The "that's-not-our-problem" attitude

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toward social injustice is a product of a distinct neoliberal economic and social agenda that reached its pinnacle during the Reagan'80s. According to this philosophy, society was not responsible for social ills, which were due only to individual failings. Poor women were, at best, too lazy to get real jobs, and at worst, welfare queens leeching off of hard-working folk. The one area of government intervention permissible was criminalization, precisely because it entrenched the position that crimes, like battering, were problems of individually deviant "bad guys," who had "no excuse" for what they did. The genius of this neoliberal move is that recognizing battering as "our problem" entailed no more than putting men, mostly Black and poor men, in jail because of individual fault.

Feminist reformers fell in line by advocating incarceration as the response to social indifference to battering. Conservatives were more than willing to "throw the book" at batterers and dismantle "worthless" relationships, rather than focusing on the inequities giving rise to battering. Concentrating on separating dangerous batterers and "threatened, irrational" women who stayed with them obscured the racial, socio-economic, and other conditions underlying battering. In addition, the criminalization and separation models caused numerous harms to individual women, as Suk duly notes.

Although Suk's general stance against police intervention has great appeal to those who, like me, characterize the criminal justice system as a deeply flawed consequentialist failure, her effort to revitalize the public/private distinction and forge a stand-alone objection to state intercession is troubling. Suk moves away from the neoliberal criminal paradigm toward a libertarian model equally at odds with feminism's antistatist agenda. The problem with domestic violence criminalization is not that it gives the government a role in combating battering, but that the myopic focus on criminal law solutions is part of a larger program of denying the state's obligation to provide "positive" rights to poor, abused, and immigrant women, or otherwise remedy the socio-economic conditions precedent to battering. In fact, casting domestic violence as a public problem is one of the few positive aspects of criminalization. Suk's emphasis on privacy suggests that the state ought to be less involved in domestic violence, when what is really needed is more involvement, albeit the right kind of involvement. Turning the focus away from criminalization does not mean that the state should once again put on privacy blinders and ignore its role in the maintenance of abuse.



## CRIMINAL LAW COMES HOME TO A FAMILY

JENNIFER COLLINS\*

Jeannie Suk raises provocative questions about the new ways in which the criminal law “deliberately and coercively reorders and controls property and intimate relationships.”<sup>1</sup> Drawing on New York City’s treatment of domestic violence cases, she suggests that the willingness of criminal courts to impose protection or “stay-away” orders, even against a victim’s wishes, amounts to state imposition of “de facto divorce” upon parties in abusive relationships. Suk ultimately refrains from offering normative proposals; she is instead identifying some previously hidden consequences of a law reform movement in the domestic violence arena.

My concerns with Suk’s arguments are two-fold: First, it is critically important to recognize that New York City’s aggressive approach to domestic violence cases is simply not representative of many—if not most—jurisdictions in this country. For example, in another major metropolitan area, prosecutors typically do not ask for, and judges do not impose, stay-away or no-contact orders at the time of sentencing if the victim objects.<sup>2</sup> The defendant probably will be subject to an order directing him not to assault or harass the victim, but surely that kind of order does not result in the imposition of a “de facto divorce.” In addition, even if a more aggressive stay-away order were to be imposed, it would not be enforced absent the cooperation of the victim, because the police simply do not have the time, resources, or inclination to make the kind of random, unannounced visits to the home that Suk describes. As a result, contempt charges would only be filed if the victim herself contacted the police to complain that the defendant violated the terms of a protection order.

Suk also suggests that these protection orders are especially troublesome because they are issued even in misdemeanor cases, “which by definition do not allege serious physical injury.”<sup>3</sup> However, we must recognize that serious physical injury is often involved even in cases that a prosecutor charges as a misdemeanor rather than as a felony. The reason prosecutors elect to proceed with a misdemeanor charge even when faced with brutal injuries is plain: misdemeanor defendants facing a sentence of six months or less are not entitled to a jury trial. If the state must try a domestic violence case without the cooperation of the victim, as often happens, many prosecutors believe that it is easier to explain the

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1. Suk core text at 683.

2. This description is based on conversations with both a judge who sat on a domestic violence calendar and a prosecutor in charge of her office’s domestic violence unit in a major metropolitan area.

3. Suk core text at 685.

victim's absence, and the dynamics of abusive relationships, to a judge rather than to a jury. It is important to understand that the nature of the charge may not necessarily correspond with the seriousness of the particular offense being tried or the pattern and history of abuse in the relationship generally; use of protection orders in misdemeanor cases does not therefore by itself raise a normative red flag.

My second major concern is that we must recognize that domestic violence is often a *family* problem, and not just a problem between intimate partners. Domestic violence directly impacts any children of the couple, who, through no choice of their own, live in a home filled with violence. The potential impact upon children is two-fold: Children may themselves be the victims of abuse and, even if they are not direct targets of violence, they are unquestionably harmed by witnessing the violence inflicted upon their mother. It is important to recognize that the state retains a special obligation to protect children from harm in situations where their parents cannot. Stay-away orders may be imposed in part to protect the children of the relationship, and we cannot assess the validity of a legal regime that relies upon them without considering the needs and interests of both a mother and her children.

Indeed, the real threat to women's autonomy in domestic violence cases is not state-imposed protection orders; it is instead the problem that mothers often face impossible choices when deciding whether to leave abusive relationships. For example, should she stay in her home with her abuser, or flee and risk rendering her children homeless? Thus, more aggressive use of the criminal justice system cannot happen in a vacuum. We cannot truly ensure women's autonomy to make decisions about their intimate relationships until we provide them with workable alternatives to staying in abusive ones. Women need meaningful access to housing, jobs, child care, transportation, and the like before they can decide whether their interests are better served by continuing their relationship with their abuser, and trying to improve it, or by leaving the relationship altogether and requesting the assistance of a protection order, enforceable through the use of criminal contempt charges, to help effectuate that decision. Criminal law can be a powerful weapon in the fight against domestic violence, but it cannot be the only one.

**BECAUSE BREAKING UP IS HARD TO DO**

CHERYL HANNA\*

Just about everyone has been in a romantic relationship that, in hindsight, should have ended sooner than it did. Why do people stay? Hope, or commitment, or because they share a lease or she owns the car. Life and love are complicated, and as Neil Sedaka sang, "Breaking up is hard to do." That's true even for those who are abused by their partners.

It's within this context that we ask the criminal law to respond aggressively to domestic violence while respecting the victim's unique situation. As Jeannie Suk describes, prosecutors in a few jurisdictions have begun to pursue these sometimes conflicting goals by routinely requesting that the court grant a protective order before releasing defendants charged with a domestic offense. Protective orders can forbid the defendant from contacting the victim and can include an order to vacate the home. This practice is part of a larger strategy to treat intimate violence as a public crime rather than a private family matter.

What apparently troubles Suk is that defendants can face criminal misdemeanor charges for nothing more than going home. In her view, the state is exerting too much control of the home and undermining people's decisions to live as intimate partners.

Enabling autonomy is indeed a paramount objective, but what troubles me about this argument is its near obsession with basing law and policy on what victims want. Most folks, at some point in our lives, will experience a less-than-perfect relationship and will struggle with whether or not to end it. To ask someone who has recently experienced trauma to be clear and decisive about the future of their relationship is to ask more of the victim than we can often ask of ourselves. Who among us could possibly comprehend or embrace the difficult choices we face while in a courthouse, just hours after a violent incident, talking to a DA we've never met? To base any legal doctrine or policy on autonomy compromised by violence is misguided and will likely undermine the progress that has been made in protecting intimate partners from abuse.

Rather than ask what a victim wants, let's ask what she or he doesn't want. None of us want violence, or the threat of violence, to dictate how we live our lives. Criminal protection orders achieve this simply by providing some breathing room to make decisions about one's future uninhibited by the constant threat of violence. The fact that criminal law comes home today to promote autonomy, rather than to affirm a husband's right to punish his wife as it did in centuries past, should be a welcome development.

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Furthermore, domestic violence prosecutors understand that victims and defendants often reunite after cases end, if not before. So when they obtain criminal protection orders, their goal is not to separate couples permanently. Misdemeanor domestic cases rarely result in much, if any, jail time. Even in New York City, one of the country's most aggressive jurisdictions, only one-third of those arrested for domestic violence are convicted, and of those, fewer than 20 percent are sentenced to prison. Seventy-two percent receive a conditional discharge, which can include participation in a batterer treatment program or drug and alcohol counseling—interventions intended to help abusers and their partners have nonviolent relationships.<sup>1</sup>

Based on this data, I am more concerned about the underenforcement of domestic violence laws throughout the country than the overenforcement that troubles Suk. The number of domestic homicides in the United States has decreased significantly since the 1970s, and one reason for that decline is our decision to treat domestic violence as a crime against the community.<sup>2</sup> Underenforcement nonetheless remains prevalent across the country. It can be incredibly difficult to get the criminal law to respond—even when a victim is clear and consistent about what she wants. I fear that contrary arguments like Suk's will undo the progress we've made.

That's not to say that the law can't do better. We should always rethink our strategies and avoid one-size-fits-all approaches. The criminalization of domestic violence is still in its infancy, and we have much to learn about what works best and for whom. As Suk notes, we need to be especially concerned about the impact of our policies on poor and minority communities, for whom the criminal law has often been an adversary rather than an ally. The goal, then, is to refine our practices, but not to return to a time when the law and its officers were unable or unwilling to intervene when abuse happened behind closed doors.

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1. Ryan R. Peterson, N.Y. CITY CRIMINAL JUSTICE AGENCY, *COMBATING DOMESTIC VIOLENCE IN NEW YORK CITY: A STUDY OF D.V. CASES IN CRIMINAL COURT* (2003).

2. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *HOMICIDE TRENDS IN THE UNITED STATES: INTIMATE HOMICIDES* (June 29, 2006).

## THE CRIME OF DOMESTIC VIOLENCE

EMILY J. SACK\*

Battered women's advocates have long debated whether criminal justice responses to domestic violence offer the most effective path to safety and autonomy for survivors. Jeannie Suk makes an important contribution to this debate, arguing that criminalization has had unintended negative consequences on privacy. I would argue that in practice, her concerns are overstated, and in theory, alternative policies present greater risks to battered women.

The widespread use of criminal protection orders is relatively rare outside of New York, in which criminal orders are used largely because of the limited jurisdiction of its Family Court, in which only a petitioner related by blood, marriage, or with a child by the respondent can obtain a civil order. In most states, civil orders are available more broadly and are more widely used, even when criminal charges are pending.

But even assuming their widespread use, criminal orders do not constitute any novel incursion into individual privacy. These orders serve as nothing more than bail or pretrial release conditions. In criminal cases generally, conditions such as geographic restrictions frequently control the defendant's conduct. The court is able to make otherwise legal actions illegal because the defendant has been criminally charged. Moreover, bail conditions often prohibit victim contact. In a domestic violence case, when the defendant lives with the victim, this condition is designed not to punish the defendant by banning him from the home, but to prevent victim contact.

Suk is concerned that the use of criminal orders conflicts with the respect for privacy reflected in the line of cases from *Griswold v. Connecticut*<sup>1</sup> to *Lawrence v. Texas*.<sup>2</sup> However, it is not domestic violence criminalization, but the concept of privacy in constitutional law, that can be problematic. Grounding substantive due process rights in privacy has ignored the way in which it served historically as the legal concept that shielded domestic violence from public view. This is one reason, for example, that many feminist scholars have argued that equality, not privacy, should provide the foundation for protection of reproductive rights.

Suk also underestimates the seriousness of domestic violence offenses. The typical misdemeanor domestic violence charge in New York is third-degree assault, which requires physical injury. Such cases often plead out to attempted assault or harassment, which can involve stalking or other acts causing fear of injury. These are crimes of violence. Domestic violence's repetitive nature and targeting of a specific victim makes the likelihood of further violence high. The defendant's

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1. 381 U.S. 479 (1965).

2. 539 U.S. 558 (2003).

presence in the home is not a “proxy” for violence; contact with the victim itself is dangerous and promotes violence. Sometimes a defendant poses such danger that the state must argue for a stay-away order, even when the complainant objects.

In addition, the distinction between civil and criminal orders is less significant than Suk suggests. Rather than blanket imposition of final stay-away orders, judges frequently consider each victim individually, often in consultation with an advocate, to ascertain her true wishes. If reassured that she is not being coerced, and the situation does not pose great danger, the judge often will grant a victim’s request for a “limited” order, permitting contact. Conversely, judges often will not routinely dismiss a civil order upon the petitioner’s request, but will undertake a similar process. More generally, the criminal justice system’s response to domestic violence has become more nuanced in recent years. Revised policies and trainings have addressed flaws in initial efforts, and the development of Family Justice Centers and other programs linking victims to civil legal assistance and additional services demonstrate that a criminal case can provide survivors with access to an array of resources.

Finally, Suk argues that criminal orders permit *de facto* divorces without providing the rights women would obtain in a formal divorce. But it is not a protection order that permits a batterer to walk away without paying child support or other obligations. On the contrary, bringing a domestic violence prosecution increases the chances that survivors will access resources to hold the abuser financially responsible and ensure a safe custody plan. Moreover, in many jurisdictions, child support and custody terms can be incorporated directly into a criminal protection order.

Suk certainly would not support policies condoning or ignoring domestic violence. But if we believe in state intervention at all, we must confront the real conflicts between this intervention and survivors’ autonomy. The solution is neither to abandon state involvement nor to ignore survivors’ legitimate concerns, but rather to continue refining criminal justice approaches, while expanding the resources available to battered women and their children. It is underenforcement—failure to arrest and prosecute aggressively, reluctance to issue protection orders and enforce them consistently—that remains the most serious concern in domestic violence criminalization. With over a thousand women killed by intimate partners annually and millions more injured, the real question is why we are permitting violence against women to continue with impunity.

## DOMESTICATING CRIMINAL LAW: A NORMATIVE DEFENSE

DEBORAH TUERKHEIMER\*

Without purporting to advocate a normative position, Jeannie Suk describes what she views as stark and surprising features of the legal landscape of misdemeanor domestic violence prosecution. In this recounting, the status quo represents a dramatic departure from an established criminal law regime, implicitly calling for justification. Yet each practice Suk discusses can be understood not as a move away from traditional legal tenets but rather as an imperfect adaptation of these tenets to a context characterized by an abuser's power and control over his victim. So conceptualized, the changes Suk describes are less surprising, less dramatic, and certainly less threatening to meaningful notions of autonomy than what might first appear to be the case.

What justifies a criminal contempt charge when a defendant violates an order of protection (OP) requiring him to stay away from the victim and her home? Although the evidentiary and preventative advantages that Suk points to are certainly real, the more fundamental reason for keeping an abuser away from his victim is that the abuser's mere presence is itself harmful. Even in the absence of overt violence, his presence has meaning that can only be appreciated if the culture of battering is taken into account. Many of the cases that I handled as a domestic violence prosecutor in Manhattan reflected this reality. In one, the victim, whom I'll call Ana, had endured years of abuse involving ongoing, patterned conduct. When Ana finally called the police for the first time after a typical beating, the defendant was arrested, arraigned, and charged with a misdemeanor. He was released and a full OP issued. Ana came home that evening to find that he had left her flowers. Fully grasping the significance of this gesture, she was as terrified as any witness I have encountered. This harm was worthy of separate redress, as the law finally recognizes.

Temporary orders of protection (TOPs) are issued as a matter of course at arraignments and typically remain in effect until the case is resolved. The obvious rationale for the practice—protecting the integrity of the proceedings—is compelling. No other category of crime raises the prospect of prolonged contact of an intimate nature between the accused and the key witness for the prosecution. The victim must decide whether to cooperate with prosecutors and, if so, to what extent. Moreover, she has the option of expressing her preferences regarding case disposition—preferences which, even in a “no drop” office like Manhattan's, are always taken into account and frequently honored. Whether, in a context of abuse, the victim's wishes can be made “freely” is a question that can be (and has

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been) debated. But what should be evident is that contact with the defendant while a criminal case is pending inevitably impacts a complainant's ability to exercise choices that are in her best interest. When defendants violate TOPs, their conduct almost always functions to (re)align the victim with the defendant, thus undermining the state's interest in prosecution. The practice of issuing TOPs is thus justified by accepted criminal justice norms.

Final orders of protection (FOPs), issued when a case is resolved, are a standard disposition in domestic violence cases. However, in my experience prosecuting and supervising these cases, the final order of protection is often "limited" (FLOP), rather than "full" (FFOP). A FLOP, unlike a FFOP, does not require the defendant to stay away from the victim. It only prohibits the defendant from engaging in conduct that is itself criminal. FLOPs are typically requested when a victim has indicated her desire to pursue a relationship with the defendant.

So, in the vast majority of cases in which a FFOP is entered, the victim wants the order because the defendant has subjected her to a course of conduct (involving at least one criminal act) resulting in an extreme power imbalance that has made it difficult for her to extricate herself from the relationship.<sup>1</sup> FFOPs are routinely marked "subject to modification by family court order," evidencing full awareness that criminal court is not the place to resolve questions of custody, visitation, or support. As for a defendant's "right" to choose to continue the relationship, any such right is properly subordinated to the victim's right to escape it. In some intimate relationships, violence is endemic. It cannot end without the relationship ending.

To the extent that the world of misdemeanor domestic violence prosecution looks different from what came before, then, what we see is progress.

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1. In Manhattan, as in many jurisdictions, domestic violence victims are most often women of color who are poor and, along a number of dimensions, socially oppressed. The subordination resulting from battering exacerbates and is exacerbated by the many obstacles that these women must confront.

## **DOMESTIC VIOLENCE MISDEMEANOR PROSECUTIONS AND THE NEW POLICING**

ALAFAIR BURKE\*

Jeannie Suk's descriptive project raises interesting normative questions (which Suk herself cautiously eschews). But she could have raised still more—and more troubling—questions had she contrasted contemporary domestic violence (DV) prosecutions not only with traditional criminal punishment but also with the

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increasingly common approach of “new” policing.<sup>1</sup> Criminal law’s willingness to dispense with traditional punishment in favor of nontraditional prevention mechanisms is not limited to DV misdemeanor cases. As a prosecutor ten years ago, I was transferred from DV misdemeanors into our office’s community-based prosecution unit. My new supervisor warned that my job would focus not on convictions and sentences, but on solving problems. As I became indoctrinated into this new style of law enforcement, I learned to retell a favorite tale: After drug unit officers struggled for months to disrupt chronic drug dealing in a local park, a Neighborhood DA solved the problem by asking the Parks Department to run the sprinklers during prime dealing hours.

DV would appear to have little in common with the crimes that new policing is intended to address. Whereas new policing uses an expanded harm principle to justify enforcement of victimless, low-level nuisance crimes in the name of affected communities, DV cases involve actual or threatened violence and have identifiable and immediate victims. Nevertheless, the trends in DV remediation that concern Suk reflect trends in new policing: Sprinklers serve to separate dealer and buyer and thereby prevent future drug transactions; trespass laws serve to separate prostitute and john and thereby prevent future vice offenses; and no-contact orders separate batterer and victim (and husband and wife) and thereby prevent future domestic violence offenses. Had Suk compared DV prosecutions to other forms of new policing, she may have unearthed two troubling sets of questions, the first asking why law enforcement resorts to new policing in DV cases but not other crimes of violence, the second asking why law enforcement does not fully respect common tenets of new policing in the DV context.

In non-DV crimes of violence, the victims’ rights movement calls for victim participation in the prosecution, while sentencing reforms require harsh mandatory minimum sentences. So why in DV cases do we ignore the agency of victims and readily waive away jail sentences in favor of no-contact orders? Perhaps DV misdemeanors reflect a philosophy designed for victimless nuisance offenses because law enforcement has come to see DV as precisely that. Mandatory arrest laws force officers to arrest over the victim’s objections and when they know the case cannot be proven. Internal charging policies require prosecutors to pursue cases that cannot be won. Perhaps cops and prosecutors come to see the marriage itself as the source of these nuisances, and as with a bad neighborhood bar with more than its fair share of call-outs, they shut it down. The choice to disrupt

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1. Several schools of policing fall under the “new” policing umbrella. For a general overview of the new policing models, see Tracey L. Meares and Dan M. Kahan, *URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES* (1999); Philip B. Heymann, *The New Policing*, 28 *FORDHAM URB. L.J.* 407, 420 (2000); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 *COLUM. L. REV.* 551, 565–73 (1997); Richard C. Schragger, *The Limits of Localism*, 100 *MICH. L. REV.* 371, 377 (2001).

the relationship places blame not only on the offender, but also silently on the victim and the relationship itself. It treats the offender's violence as situational, triggered by this particular woman. It treats both victim and offender as part of the problem, guilty parties to be separated from transacting—like drug dealer and seller, prostitute and john.

Moreover, although contemporary DV policing unleashes the new policing in troubling ways, it does not fully respect aspects of new policing that would otherwise result in increased empowerment of DV victims. The new policing purports to be primarily utilitarian, seeking to prevent future offenses and dispensing with retributive punishment. A utilitarian evaluation of criminal law's intervention into the home would value not only the decreased violence within the relationship, but also the costs of the intervention, such as the victim's loss of financial and parenting support, the separation of joint children from their father, and the interference into a marriage that existed apart from the violence. The new policing also professes to be community-oriented as it looks to affected constituencies both to identify the problems that need to be solved and to evaluate the success of the solutions. But in DV cases, the constituencies most affected by criminal law's intervention have little voice.

## REPLY

JEANNIE SUK

The purpose of my core text was to draw attention to the home as a space in which criminal law *controls* intimate relationships by effectively prohibiting their continuation. This is distinct from the *punishment* of violence between intimates. The distinction between punishment and control is the reason I focus on prosecutorial mechanisms for coercing an end to a relationship through the law of misdemeanor DV. Assuming that we all favor the criminal punishment of DV, I urge reflection on the distinctive consequences for women's autonomy of rising techniques of control in the home—*before* they become standard practices taken for granted in many more jurisdictions. The reflection required is simply not identical to that provoked by the (now largely uncontroversial) criminal punishment of DV.

The comments cluster around two broad reactions. One points to the shaping role that criminal law as family law has traditionally played in the "private" sphere of the family. The other argues that the primary problem in DV is still underenforcement.

Emphasizing the historical role of criminal law in private life, Melissa Murray notes that state regulation of who may marry or have sex, in what manner, and with whom has been reinforced by criminal prohibitions. As Murray would agree, these traditional criminal prohibitions have limited the autonomy of

individuals to make intimate choices. In this way, the mechanism of state-imposed de facto divorce without consent of either party could be understood to be continuous with traditional criminal regulation of intimate sexual conduct. The comparison thus puts into relief tensions between derogation of autonomy in the DV regime I describe and the increasing legal recognition of the value of autonomy in intimate choices.

Laura Rosenbury seems to think that I object broadly to criminal law being in the home, when in fact I am concerned with what specifically criminal law is doing in the emerging regime. Surely one may generally favor criminal punishment of DV—as I do—and also criticize various modes of criminal-law intervention in the home that may occur under the DV rubric. But she hints that one who is troubled about the regime I describe might be motivated by an unspoken commitment to traditional notions of marital privacy that would justify keeping criminal law out.

Precisely because, as Rosenbury notes, marriage is the paradigm of intimacy in our law, and because the idea of husbands' power over wives has become so familiar to legal actors, the DV regime seems to have difficulty perceiving an intimate relationship that enters its radar as anything other than violent subordination of one partner by another. Thus, much conduct between intimates is forced to fit the paradigm of abusive marriage. That sweep includes people who are unmarried, homosexual, or in relationships that are not marriage-like or abusive. The DV regime I describe is equalizing insofar as it treats intimate relationships in its purview as ones the state may aim to end even against the wishes of the parties. The dissonance between state control of intimate relationships and individual autonomy is not "solely the result of a putative privilege granted by the state"<sup>1</sup> to marriage-like intimacy. It is also the result of the critique of the marriage paradigm—one that would value women's intimate choices to partake in relationships that they deem suitable.

Aya Gruber writes that I "fail[] to see domestic violence as a distributive phenomenon" and that I reinforce the notion "that there exists a neutral 'private' sphere unconstructed by law."<sup>2</sup> If so, this is unfortunate because my purpose was to show the distributive effects of the DV regime, which transfers authority to end relationships away from participants in those relationships—often poor minorities—to the state. Undoubtedly, social, economic, and legal forces play a role in why people begin, end, or continue relationships. It requires no commitment to some mythical neutral private sphere to observe that the DV regime alters the distribution of control over intimate choices in the direction of the state and away from the victim whom it is supposed to empower.

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1. Rosenbury comment at 695.

2. Gruber comment at 696.

The point I wish to make in light of this first set of comments, then, is that a concern for autonomy is not a celebration of a traditional notion of privacy. State control through the regime I describe substantially curtails women's autonomy, even as DV reform has aimed to increase their autonomy. This is true even if we agree that law already constructs the private sphere, that intimate choices are never made in a vacuum, or that the autonomy of women who are abused and poor is more constrained than that of women who are not. The critical perspective should sharpen our conceptions of freedom, not make them slip away.

The second group of responses worries that it is underenforcement that remains the problem in the DV context. In this vein, Jennifer Collins points out that not all the practices I describe are common in all jurisdictions. Examination of a leading jurisdiction that has extended DV reform further than others puts into relief the gravitational pull exerted by the potent combination of prosecutorial imperatives and the push to reform. The unevenness of reform makes the contours of a set of practices more visible for examination.

Collins notes, for example, that prosecutors sometimes charge misdemeanors even in cases of serious physical injury to avoid a jury trial without victim cooperation. I have no doubt that is true at the very same time that in some places rigid and routine mandatory protocols for DV crime are invoked in the absence of serious physical injury. Collins is right that "the use of protection orders in misdemeanor cases does not . . . by itself raise a normative red flag."<sup>3</sup> My critique is based not on their use per se but on their use by the state to criminalize relationships without victim consent, as "domestic violence" is increasingly defined down to encompass conduct that may not involve serious or any physical injury, or even physical contact. This means that more conduct and more people can come to be treated as having relationships that the state ought to end. The juxtaposition of this state of affairs with the one Collins describes, in which serious crimes that should be felonies are charged as misdemeanors, underscores the difficulties endemic to this area of criminal regulation.

Cheryl Hanna criticizes my focus on women's autonomy rather than their protection. Indeed, she describes my concern about the state ending intimate relationships through misdemeanor criminal law as "near obsession with basing law and policy on what victims want."<sup>4</sup> Her criticism must draw on the classic trope of false consciousness, according to which certain adults—perhaps in part because of material disadvantages—cannot be deemed to know what is in their interests even when they seem to think they do. Rather, Hanna thinks we should systematically trust a prosecutor who has just met the victim, and may be subject to an invariant policy, to make the decision to end a relationship about which he or she knows little.

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3. Collins comment at 699.

4. Hanna comment at 700.

The reason we punish violence is that violence derogates the autonomy of its victims. Autonomy is the value behind protection. Even when a relationship has led to a DV arrest, a woman's consideration of whether to continue a relationship is a better measure of autonomy than what advocates believe women ought to want. From the concern that violence is not sufficiently deterred in general it does not necessarily follow that the state should override what particular women want in the name of what they are supposed to want in theory but may inconveniently deny in practice. When typically the women in question are poor minorities, and DV advocates and prosecutors are middle class and White, state imposition of de facto divorce without regard to what victims want is troubling.

A further version of the concern about underenforcement is that "privacy" is a dirty word. The idea is that because the concept of privacy has traditionally worked to justify shielding DV from public intervention, the valuing of privacy must be code for allowing certain members of the family to subordinate the less powerful. Emily Sack suggests that my emphasis on autonomy has this effect. She says that underenforcement remains the most serious concern, and implies that concern about simultaneous overenforcement would work against the goal of addressing such underenforcement. Similarly, Hanna fears that arguments like mine "will undo the progress we've made."<sup>5</sup>

To this second group of comments, I respond that unevenness of reform poses a major challenge in critically evaluating the reform we have had. Persistent underenforcement in some areas is not itself reason to dismiss the costs of overenforcement where they exist. We need to be able to evaluate critically the effects of criminal law reforms that have been successfully introduced. The alternative would be adherence to DV reform, wherever it may take us.

This alternative, perhaps embodied in Deborah Tuerkheimer's comment, is the worldview of which my core text is critical. She first says the purpose of the protection-order practice is to protect the integrity of the proceedings. But that is difficult to maintain if the orders are routinely in place after proceedings have ended. Next she states that the violation of an order "almost always functions to (re)align the victim with the defendant,"<sup>6</sup> which is at odds with her claim that in the vast majority of cases, the victim wants an order.

Most poignantly, Tuerkheimer tells the story of the victim who discovers that her abusive partner has left her flowers. In Tuerkheimer's telling, the flowers are like chilling a scene from a horror movie. The possibility that the flowers might have a nonviolent meaning that is common in our culture—a pathetically inadequate apology—is not exactly a live one within the DV culture we have. The story is exemplary because it captures the world in which legal actors' interpretations flow from ideological commitment, anecdote governs analysis, and assumptions

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5. Hanna comment at 701.

6. Tuerkheimer comment at 705.

stand in for argument. The tendency in DV prosecution to proceed in this manner in, say, arresting people for sending flowers, is part of what I was attempting to reveal. Tuerkheimer captures this ethos better than I could.

Alafair Burke's comment deepens my analysis by juxtaposing DV enforcement and "new policing." Her suggestion that the DV regime I describe reflects the trend and philosophy of the enforcement of victimless nuisance offenses is intriguing, as is her observation that state imposed de facto divorce blames the victim and the relationship sub silentio. It is no coincidence that the effects of both new policing techniques and aggressive DV enforcement policies are predominantly on poor minority communities. The point I would add to Burke's contribution is that, while partaking of technologies of state control, DV discourse speaks a full-throated language of moral blame and victimhood that can clearly be seen in several of the comments. The emerging DV regime so powerfully combines an ideology that divides the world morally, into perpetrator and victim, with techniques of control that have become increasingly common in criminal justice. This formidable combination raises autonomy consequences that we need to take seriously.