


Alec Baldwin

with Mark Tabb

A **Promise**
TO
Ourselves

*A Journey Through
Fatherhood and Divorce*

ST. MARTIN'S PRESS  NEW YORK

A Trip to Cambridge

IN THE FALL OF 2007, I visited Harvard to speak to students enrolled in an acting program there, as well as visit with students at Kirkland House for a more general discussion. My host asked me if I wanted to avail myself of any of the university's other resources, and immediately I asked to be introduced to a professor at Harvard who taught family law. Thus I met Jeannie Suk, a law professor who is a rising star at Harvard Law School, where she teaches family law and criminal law.

When we met at her office, I told her that I was interested in discussing changes in the nature of family law in the United States over the past several years and how I believed men were being treated unfairly by the system. I wanted to know what experts in the field attribute those changes to and what is driving much of custody law today. Professor Suk and I spent ninety minutes talking nonstop, and then the idea emerged that I might come back to Harvard

so that she and I could conduct a discussion with her class regarding some of the legal issues that I was concerned with. During our many subsequent conversations, Jeannie taught me much about the evolution of laws pertaining to domestic violence, sexual harassment of women in the workplace, rape prosecutions, and divorce custody battles. Professor Suk's article in the October 2006 *Yale Law Journal*, entitled "Criminal Law Comes Home," is a fascinating and highly instructive overview of how criminal law procedures have moved into family law. Her next book, *At Home in the Law*, will argue that our legal system today views the home as a place of male violence, and that many areas of law are being reshaped in accordance with this image.

A few weeks later, I was with Jeannie in front of approximately eighty students, and the topic was the law's treatment of relationships between men and women, and the struggles between the sexes, from the Harvard campus, to the home, to the family law court, and everywhere in between. I introduced my ideas about child custody and fathers' rights. That led to a discussion in which some students seemed sympathetic, or at least interested, while a number of students were skeptical at best. The discussion quickly became lively and frank. I turned to the broader topic of whether women in marriages and relationships with men are normally threatened by potential violence. Here there was more consensus. I was surprised to hear a number of women and men—many more than I would have expected—say that women generally are at risk of male sexual violence. A few students, male and female, even thought that the law should view the sex act as subordinating of someone and should assume that sex is rape unless women explicitly and verbally give their consent.

I was fascinated to hear some of these law students talk about the world as though men inevitably have the upper hand in relationships and women's fear of sexual violence is prevalent and normal, not unusual. This picture was so interesting and so foreign to me. In my own experience, women have lots of power of various kinds, and sexual power works both ways.

I later told Jeannie that I knew of only one couple in my life who had ever confided in me that one had committed an act of domestic abuse. Furthermore, no woman that I knew personally had ever admitted to me that she had been a victim of sexual assault. Are domestic violence and sexual assault more prevalent today? Or do people simply feel safer discussing these issues because they believe the law will actually listen to and protect women and punish their attackers? Or do ideas about men and women that are currently expressed in the legal system shape the way students think about men and women?

MY INTERVIEW WITH PROFESSOR SUK is as follows:

AB: When first we met, we talked about how some of the issues fathers face in the family law system today might be related to other, broader developments in our legal system.

JS: Major changes in several important areas of law over the last thirty years reflect a series of hard-won victories by advocates for women. This is most visible in areas directly connected to relationships between men and women: domestic violence, acquaintance rape, and sexual harassment.

AB: How would you characterize the changes?

JS: You have to remember, for example, that until recently,

law enforcement really didn't treat domestic violence as a crime. It was considered a private family matter. Also, it was very difficult for a woman to prove she had been raped, because she had to show that she tried to physically fight off her attacker. If she was too afraid to resist, the law didn't treat the sexual act as a rape. A husband forcing his wife to have sex simply couldn't be rape. And the legal concept of sexual harassment didn't exist at all. So the legal treatment of important areas of life in which men and women interact, often regarding sex specifically, made for a very different world—and not a good one for women! A project of the feminist movement was to change the way the legal community and the public think about these situations. And it has had lots of success in several important legal realms.

AB: How so?

JS: Well, the first area is domestic violence. Most people today would agree that domestic violence should be a crime. It's clearly a matter of public concern. We get outraged when we hear about law enforcement failure to punish men at the earliest signs of abuse. O. J. Simpson was an important cultural symbol of this, among other things. This understanding is now reflected in our law. In the majority of states, we have "mandatory arrest" laws requiring the police to make an arrest when there is probable cause to believe a domestic violence crime has been committed. This aims to take away police discretion, since a perceived problem was that the police did not take domestic violence seriously and left couples in domestic incidents to settle things themselves. Mandatory arrest laws command police to treat domestic violence as crime, and to respond to it with arrest—the police are not

allowed to use discretion and decide not to arrest in a particular case. Many prosecutors' offices now have similar policies that require prosecutors, even in misdemeanor cases, to bring criminal charges, even if the victim wants the charges dropped and indeed refuses to cooperate with the prosecution.

AB: But taking away discretion from police and prosecutors has consequences, especially in situations where wives are conflicted about having their husbands arrested.

JS: Many people now believe that a victim of domestic violence is not in a good position to judge what is best for her, because her will is surely dominated by her husband or boyfriend, on whom she may be financially dependent. Also, since domestic violence is seen as a public matter, prosecutors see the decision as theirs to make on behalf of the public rather than the victim. They are sometimes required, by office policy, to prosecute even if particular victims explicitly ask them not to.

AB: Are there times when the loss of such discretion doesn't lead to the best outcome?

JS: There has developed a tendency toward the uniform and the mandatory in domestic violence legal practice, because of the prevailing theory that men subordinate women in the home, and that violence is a manifestation of that subordination. Law can be a blunt instrument. When you have a broad public acceptance of this kind of theory about relationships between men and women, coming out of an important strand of feminism, that theory can overshadow particular circumstances, including the desires of the private parties involved.

AB: And you think the legal system operates on this theory of men typically subordinating women in the home?

JS: In many areas, I believe it does. The legal theorist Janet Halley, my colleague at Harvard Law School, calls this phenomenon “governance feminism.” It’s the idea that feminism, which once criticized the law from the outside, is today actually in charge in many places in the law—among police, prosecutors, lawmakers, judges, and other legal actors. The feminism that often “governs” today is that strand developed by the legal scholar Catharine MacKinnon and that focuses on the subordination of women by men, particularly in intimate and sexual relationships. Her influence on our legal system’s understandings of men and women cannot be overstated. If you talk to police, prosecutors, lawmakers, and judges about domestic violence, perhaps they have not read MacKinnon, but they often subscribe to the premise that men subordinate women through sex and violence.

AB: And what are some of the results of that?

JS: The rise of this powerful theory has been accompanied by the legal embrace of uniformity, mandatory protocols, and the disfavoring of discretion. You have to keep in mind that the overwhelming majority of domestic violence arrests are for misdemeanor crimes, which, by definition, do not involve serious physical injury. Some domestic violence misdemeanors don’t even involve physical contact. If the police are called after a man throws an alarm clock on the ground, he may be arrested. The definition of violence itself has expanded to include a lot of conduct that is not physical violence. The working definition of domestic vio-

lence today includes conduct like damaging property and stealing from one’s spouse, and the harm alleged can be psychological and financial rather than physical. The theory of subordination makes it likely that any man/woman pair who comes into the criminal system will be viewed in these terms. So even for misdemeanors with no physical injury, we tend to think that a woman is being subordinated, and the man who is subordinating her should be punished. In some places, an arrest leads to the issuance of a protection order banning the husband from the family home. Even if the wife says she does not want that, a protection order makes his presence at home a crime for which he can be arrested.

AB: Do you think rape and sexual harassment reflect these changes as well?

JS: Those areas have been part of the same broad process of legal change. We used to think of rape as making a woman have sex by force or threat of force. Just as the definition of violence has expanded beyond physically violent conduct, we now no longer think of coercion in sex as something that necessarily has to happen with the threat of force. In some states, the force element of rape has been eliminated, so that rape is sex without consent. No showing of force or threat of force is required. In the past, coercion might have been viewed as a threat of bodily harm. Today coercion is often understood as a dynamic of unequal power. Simply put, a woman feels she cannot say no. This sense of coercion reflects the belief that power between men and women is almost always unequal, especially in sexual matters. This understanding of sexual subordination also underlies our sexual harassment law. The

point is that in many areas that involve relationships between men and women, subordination is now a dominant theory to which our legal system gives effect.

AB: What about family law? Does feminism “govern” in family law?

JS: Family law is an area where we’ve seen feminist developments that prefer wives over husbands and mothers over fathers. In that process, the legal practices and understandings that we have developed around domestic violence have affected how legal actors view marriage and the family today. What I’m suggesting is that the legal vision of the home has increasingly become that of a man being violent toward his wife. And family law reflects that understanding as well.

AB: How do you mean?

JS: One example would be in divorce. The domestic violence protection orders I mentioned can be obtained without a criminal charge ever being filed. A woman can ask a court to issue an order excluding her husband from the home based on her claim that he has harmed or threatened her, often without the husband having the opportunity to present his side. Of course, in principle, this process could be a good thing if the woman is in danger. But inevitably, some divorce lawyers advise women clients to apply for domestic violence protection orders because it can be used as a powerful tool in the divorce proceeding. Given the expansion of the definition of violence that I mentioned, it really doesn’t take that much to show that a threat of violence exists and that a woman needs a protection order. It is not uncommon for domestic violence issues to come into a divorce case in

this way. Designed on the assumption of male subordination of women in the home that I’ve described, the legal system has little means to distinguish orders that actually protect endangered women from those sought for strategic reasons. It is considered dangerous for judges not to issue protection orders when they are requested.

AB: I think masculinity is stigmatized in our courts today. Is it possible that what’s happened in the push to reform a sexist legal system that historically treated women unfairly is the rise of a system that now stigmatizes masculinity?

JS: I wouldn’t put it that way. But certain behavior like losing one’s temper, yelling, throwing things on the ground, or punching an object, say, can now be perceived as sufficient to trigger some extreme results—like being legally banned from your own home and arrested if you return. More men than women find themselves on the wrong side of such situations. And the background for this development is indeed a feminist reform movement that has sought to protect women from violence. Within that paradigm, some things men do in the home when they are frustrated or angry can be put on par with violent acts such as beating their wives or worse. From the idea that husbands who abuse their wives might come to kill them (think O. J. Simpson), it’s not a far step to the idea that men whose conduct frightens their wives also might come to do them physical harm. By a chain of association then, it becomes possible to imagine that a man who behaves angrily should be treated like a domestic abuser. It’s not that masculinity is stigmatized, but rather that the law is far less tolerant of violence,

the definition of domestic and sexual violence has expanded, and a man is viewed as more likely to engage in behavior that falls under that expanded definition. Therefore, the state should do something, like ban his contact with his wife and children.

AB: Do you think that this informs the way courts see divorcing spouses in child custody disputes?

JS: As I mentioned it can be advantageous for the mother to allege conduct that suggests that the father seeking custody might be abusive. In the last fifteen years our courts have come to see domestic violence as a crucial issue in child custody decisions. Many states rightly have a presumption against awarding custody to parents who have engaged in domestic violence. The problem is the relative ease with which legal actors today seem able to view husbands as violent or potentially violent, since the definition of violence has expanded so much. Given that ease, it would be quite surprising if child custody disputes didn't often involve some allegation of violence.

AB: Are fathers disadvantaged in custody disputes in our courts?

JS: Courts used to presume that a young child was better off with the mother. That presumption has largely been abandoned because the legal preference for the mother was based on gender stereotypes. Instead, today a key consideration in custody decisions is who the child's primary caretaker is, and that is a gender-neutral inquiry. Even though courts don't explicitly prefer the mother over the father, the vast majority of primary caretakers are mothers, so the re-

sult is not very different from a maternal preference. Fathers who want custody and have not been the primary caretakers of their children have a hard time getting custody.

AB: What do you think of my proposal that there should be a default presumption of joint custody where both parents argue over custody? This presumption could be overcome if one parent is unfit, such as where a father has been abusive?

JS: Parents who want any kind of custody should show that they cared for their children during the marriage. An interesting proposal along those lines is the American Law Institute's proposal, adopted by West Virginia, which aims to allocate custodial responsibility to approximate the time each parent spent caring for the child before the separation. I agree that true abuse should lead to no custody. However, the increasing routineness of violence allegations to claim that a parent is unfit can detract from the effectiveness and fairness of whatever rule one adopts. We need to look more closely at this.

AB: Do you find it surprising that where feminism is in charge, it puts women's interests ahead of men's, the same way that in the past, the legal system put men's interests ahead of women's?

JS: There's no doubt about the violence that feminism sought to address. Perhaps the disadvantages to men are the costs of designing a system that will actually protect women. Surely some women may use the system to serve their interests. Some might say this cost is worth bearing to protect the truly vulnerable. But is it surprising that feminism wields

power? No. People have worked hard for feminist legal reform. We're in a tricky phase now where it is essential that we assess the unintended or surprising consequences—for women, men, and children—and ask hard questions about whether this is exactly where we want to be.