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Julie Suk, **After Misogyny: How the Law Fails Women and What to Do About It** (2023).

Julie Suk's ambitious book, *After Misogyny: How the Law Fails Women and What to Do About It*, contributes to a feminist literature on equality and care spanning centuries and national boundaries, yet offers timely diagnoses and prescriptions for the United States at a very particular moment. That "moment" includes being four years into the COVID-19 pandemic and over one year into the post-*Roe v. Wade* and *Planned Parenthood v. Casey* world wrought by Dobbs v. Jackson Women's Health Organization. That moment also includes a sense that transformative political and constitutional change are necessary but difficult because (as Suk and Kate Shaw recently noted) Americans have "lost the habit and muscle memory of seeking formal constitutional change" —and because of problems like polarization, gerrymandering, and restrictions on voting. Drawing on her expertise in comparative constitutional law and gender equality, Suk offers "comparative lessons" from feminist lawmaking and constitutionalism elsewhere to help move the U.S. to a democratic constitutionalism that is post-patriarchy and post-misogyny. (Pp. 212-14.) In this review, I explore some of those lessons concerning governmental commitments to supporting care *and* gender equality and to fostering reproductive justice.

First, some explanation about Professor Suk's title. "Misogyny" describes what "endures" after "patriarchy loses its force as law." (P. 2.) "Patriarchy," Suk explains, "was a set of legal rules that lost their validity when constitutional democracies committed to gender equality throughout the twentieth century." (P. 3.) In the U.S., such rules included coverture marriage. Patriarchy's demise, spurred by feminist advocacy, included the end of coverture as well as ratification of the Nineteenth Amendment, and other gains in formal equality. Misogyny, by contrast, is a "range of expectations and entitlements" that "maintain patriarchal gender relations." (P. 2.) Moving *beyond* misogyny requires "the transformation of a society's foundational norms and baseline entitlements," including how law "enforces expectations of female forbearance, sacrifice, and pain—especially in matters of reproduction and care—for the benefit of men and the society they control."

How can a polity move beyond misogyny? Family law and gender law scholars will likely find of interest *After Misogyny*'s inventory of 20th and 21st century feminist efforts in the U.S. and in other legal systems. (This review focuses on the comparative examples.) Feminist constitutional actors in other countries helped to develop constitutional clauses enshrining gender equality and the foundational role of the family—and marriage—and declaring the entitlement of mothers (as in Germany's Basic Law) to "the protection and care of the community." (P. 187.) These clauses and their continued evolution (e.g., in light of critiques of gender essentialism) show, Suk argues, how feminist efforts can dislodge norms of overentitlement and overempowerment of men by recognizing the work of "social reproduction"—the task of "raising" the "next generation of citizen-participants in the economy and polity"—as a proper "subject" of constitutional making. (P. 182.)

Gender Equality and Building a Care Infrastructure

The COVID-19 pandemic made more visible that the work of social reproduction is "largely women's

work." (P. 180.) Mothers disproportionately engage in caring for children, as compared with fathers (both as single parents and in different-sex households), and women are disproportionately among "essential workers." "As a society", Suk observes, "we have been unjustly enriched by the hardships undertaken by low-paid essential workers and working parents—mostly women." (P. 180.) Further, as Catherine Powell has observed, essential workers are also disproportionately women and men of color. Many feminist scholars and organizations have argued that the pandemic showed the urgent need for a care infrastructure that is attentive to gender and racial equality. Naomi Cahn and I argued that this should be a vital part of a feminist (or gender-equitable) recovery plan.

Building a care infrastructure, Suk argues, is part of the task of "building feminist infrastructures." (P. 180.) Why does the U.S. lag so far behind on such building? Suk suggests that one reason is the Equal Protection Clause in the U.S. Constitution. While the constitutions of other countries, including Germany, Italy, France, and Ireland, provide "special protection" of motherhood and the family, such clauses raise concerns in the U.S. because they seem directly in conflict with the formal equality and anti-stereotyping jurisprudence associated with the Equal Protection Clause. (P. 191.) On this point, I would observe that calls for a politics that embraces care and equality have sounded in the U.S. for decades. Many U.S. feminists (and here I include myself) have argued both that care is a public value that government has a responsibility to support and that gender equality is a constitutional commitment and public value that government has a responsibility to foster.

In Suk's account of feminist constitutional efforts in, e.g., Germany and Ireland, advocates insisted on governmental support of both care and equality. Suk also describes the evolution of constitutional motherhood clauses to embrace care *and* equality. Article 41.2 of the Irish Constitution (adopted in 1937) recognized that "by her life within the home, woman gives to the state a support without which the common good cannot be achieved;" accordingly, "the state shall, therefore, endeavor to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home." (Pp. 192-93.) Some women's groups criticized these provisions at the time because they seemed in tension with the constitutional guarantee of the privileges of citizenship to "every person, without distinction of sex;" one of the "women constitution makers" (Helena Concannon) countered that Article 41.2 recognized the sacrifices that women made in the home and obligated the state to support their "contribution;" this would not close doors to them in other spheres. (P. 192.)

By the early 21st century, Article 41.2's "woman in the home" language seemed "sexist on its face," reflecting "linguistic gender stereotyping and an appeal to a false universal notion of womanhood." (P. 199.) The Article entrenched "1937 assumptions" about the gendered roles of mothers and fathers in and outside of the home. (P. 199.) Nonetheless, while constitutional jurisprudence interpreting Article 41.2 in light of contemporary family roles suggested that it could apply—in a future case—to a "stay-at-home father," the courts have not yet "invoked Article 41.2 to protect a caregiving man." (P. 200.) A 2013 Constitutional Convention initiated debate about women's disproportionate responsibility for childcare and showed strong support for changing the language of Article 41.2 to be "gender neutral." (P. 201.) Article 41.2 was among the provisions taken up by the Citizens' Assembly on Gender Equality, which first convened at the beginning of the COVID-19 pandemic. The pandemic (as the Assembly recognized in its report) "shone a strong spotlight on care, its importance in our society, and the gendered nature of its provision." (P. 203.) A supermajority of the Assembly supported its proposal to replace 41.2 with "language that is not gender specific and obliges the State to take reasonable measures to support care within the home and wider community." (P. 203.) Other recommendations also integrated gender equality and care: the Assembly recommended policies to improve the terms and conditions of work for "paid carers" and to fund high quality and accessible childcare. (P. 204.) At this writing, there is to be a 2023 referendum on the Assembly's recommendations.

Suk praises the Citizens' Assembly revisiting Article 41.2 (as well as abortion law and policy) as a

constructive model for possible translating and transplanting in the U.S., even as she recognizes the "American resistance to constitutional change." (P. 230.)

Turning to legislative developments, as *After Misogyny* observes, the most robust public policies that would instantiate a care infrastructure and advance gender equality have often failed in Congress (particularly, in the Senate, due to the filibuster and other factors). An important victory, nonetheless, is the Pregnant Workers Fairness Act, signed by President Biden on December 29, 2022 and which (like many comparable state laws) requires "reasonable accommodation" and adopts the inclusive language of pregnant "workers." Models like the Citizens' Assembly may have more purchase within the U.S. at the state level, where state constitutions have more robust rights and protections (typically) that the U.S. Constitution and where a number of states, during the pandemic, adopted legislation better to support family caregivers and paid care workers.

Abortion Bans

I will briefly mention here Professor Suk's analysis of abortion bans in the U.S. as a form of "overentitlement." (Pp. 87-88.) *Dobbs* makes possible a landscape—in the many states that have either banned or severely restrict access to abortion—of compelled but uncompensated pregnancy and motherhood. (P. 88.) By comparison, Suk points to different legal regimes (e.g., Germany) in which there are restrictions on abortion to protect potential life (particularly after the first trimester), but also public funding of abortion and public policies that support pregnancy, childbirth, and parenthood.

Suk argues: "After the demise of *Roe*, the battle against misogyny should not resurrect privacy rights but rather pursue laws that fully recognize the public value of the sacrifices pregnant women endure for the benefit of others." As she notes, the *Casey* joint opinion aptly discussed the constitutional wrongness of compelled maternity in the language of the "sacrifices" that pregnancy entails; in his partial dissent, Justice Blackmun explicitly spoke about abortion bans as conscripting women's bodies into the state's "service," but with no "compensation." (P. 93.)

Post-*Dobbs,* states seem prepared to ask for quite a bit of sacrifice but with no obligation to provide any "compensation." It is hard to imagine a status quo more at odds with a vision of *reproductive justice*. States with the most restrictive abortion laws have some of the weakest laws and worst outcomes with respect to supporting pregnant persons, parents, and children.

In such circumstances, Suk's readers may wonder whether a legal regime that combines a "robust conception of the state's positive duties, not only to the unborn fetus, but to women facing unwanted pregnancies" (P. 95) is more attractive than in a pre-*Dobbs* world. Even so, I have concerns about employing rhetoric about pregnancy and childbirth as being a sacrifice that is for the "common good."

Consider Suk's example of Germany. She traces how constitutional commitments both to a right to life and to the right to "free development" of one's "personality" eventually led to a regulatory scheme that, in effect, considers how much a pregnant women may be expected to sacrifice and what the state required to do to relieve the costs and burdens of pregnancy and parenthood. Mary Ann Glendon's Abortion and Divorce in Western Law, published in 1987, also praised the German approach, contrasting the supposed "abortion on demand" model that *Roe v. Wade* initiated in the U.S.. (P. 22.) In discussing the decision of the Federal Constitutional Court of West Germany that the 1974 West German (permissive) abortion law was unconstitutional, Glendon quotes a striking passage:

"For all the State's duty to furnish protection [of life], one may not lose sight of the fact that the developing life has, first of all, been entrusted by nature to the protection of the mother. *It should be the most eminent purpose of government efforts on behalf of the protection of life to reawaken and, if*

necessary, strengthen the maternal protective will [in cases] where it has been lost." (P. 27, emphasis added.)

This reference to the lost "maternal protective will" resembles arguments used to justify restrictive abortion laws: that pregnant women inevitably should become mothers and that no woman who understood what abortion was would have one because it goes against their nature. To be fair, Suk's account ends with the more recent iteration of German abortion law, post reunification, that protects life "by supporting mothers and gender equality." In a 1993 decision, the Constitutional Court expanded its discussion of the state's duty to protect life to link it both to the constitutional entitlement of "mothers to the special protection and care of the community" and to the guarantee of "equal rights between men and women." (P. 99.) The Court also stressed the futility of "criminal sanctions," compared to "preventative means" to help a pregnant woman "overcome her conflict and meet her responsibility to the unborn." (P. 101.) The Court offered a more robust idea (than previously) of the "care" the community owed to mothers (and parents), by addressing "problems and difficulties" that a pregnant person would encounter during pregnancy and creating a "child-friendly society" that reduces material hardships and disadvantages from becoming a parent. (P. 101.) However, the underlying premise is still of a woman's "responsibility" to continue the pregnancy.

It is not entirely clear how Suk thinks the German example could inform the U.S. post-*Dobbs* landscape. In response to an earlier critique that I offered of *After Misogyny*'s about the risks of the rhetoric of sacrifice, Suk clarified that "a world without misogyny is one in which society is no longer entitled to women's sacrifices, pain, and forbearance for the common good." She added: "If law ensures that those sacrifices are properly valued, whether through takings doctrine or through fully public policies fully absorbing the costs of reproduction that women disproportionately bear (free contraception and childcare, paid parental leave, maternal healthcare to significantly reduce maternal mortality, for instance), the expectation that women become mothers would be far less oppressive than it is presently"—and would no longer be a "collective overentitlement to women's sacrifice."

In critiquing "privacy" as a foundation for abortion rights, Suk stresses the public dimension of human reproduction (as well as public duties to support such reproduction). Unlike Suk, I believe that privacy, better understood as *autonomy* with respect to significant personal decisions*,* is a critical constitutional value. Post-*Dobbs,* state constitutional jurisprudence may be the better forum in which to vindicate such autonomy in the context of other rights, including a pregnant person's right to life. Amending state constitutions is both more frequent and less onerous than the federal amendment process, and some recent developments show that such change is possible.

However, I agree that it is critical to argue about the public dimension of human reproduction and the wrong of unjustly conscripting the bodies of, and demanding sacrifices from, pregnant persons. This hinders rather than furthers the "common good." Whether or not comparative constitutional models make those arguments more persuasive or reinforce notions about women's natural responsibilities remains to be seen. In the meantime, After Misogyny offers a set of innovative arguments and concepts aimed at ending misogyny and advancing care and equality.

Note: This review draws on Professor McClain's contribution to the book symposium on *After Misogyny* on Balkinization, *Care and Equality (and Abortion), Redux: Constructing a Feminist Common Good Constitutionalism*.

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