

6-1-2022

BOOK REVIEW: The Mighty Roe Has Fallen (Probably): A Call to Action as an Antidote to Despair

Loreen Peritz

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/jlp>



Part of the [Constitutional Law Commons](#), [Fourteenth Amendment Commons](#), [Judges Commons](#), [Jurisprudence Commons](#), [Law and Politics Commons](#), [Law and Society Commons](#), [Sexuality and the Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Loreen Peritz, *BOOK REVIEW: The Mighty Roe Has Fallen (Probably): A Call to Action as an Antidote to Despair*, 30 J. L. & Pol'y 439 (2022).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol30/iss2/3>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Journal of Law and Policy by an authorized editor of BrooklynWorks.

BOOK REVIEW

THE MIGHTY *ROE* HAS FALLEN (PROBABLY): A CALL TO ACTION AS AN ANTIDOTE TO DESPAIR

*Loreen Peritz**

CONTROLLING WOMEN: WHAT WE MUST DO NOW TO SAVE REPRODUCTIVE FREEDOM. By Kathryn Kolbert & Julie Kay. New York, NY: Hachette Books, 2021. 304 pp., \$29.00

INTRODUCTION

On December 1, 2021, the Supreme Court heard oral arguments in *Dobbs v. Jackson Women's Health Organization*,¹ a case that will decide the constitutionality of pre-viability prohibitions on elective abortions. *Dobbs* is the first major abortion case for the Court following the swearing in of Justices Brett Kavanaugh and Amy Coney Barret, which likely fixed a reliable conservative majority on the Court for a generation. Those in the reproductive freedom community had their worst fears confirmed shortly after oral arguments began. In short, the conservative majority of the Court appears to be comfortable with an outright rejection of *Roe*, stare decisis be damned.

How did we get here? That is, why was Donald Trump, a single term President, the lucky recipient of three empty Court seats? The

* Reference Librarian & Adjunct Professor of Law, Brooklyn Law School. I would like to thank my mother, Barbara Schneider, for gifting me with a mighty, feminist voice, and I am grateful to my daughters, Kellien and Eryn, for ensuring that this voice remains undimmed.

¹ *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019), *cert. granted sub. nom.* 141 S. Ct. 2619 (U.S. May 17, 2021) (No. 19-1392).

answer, as is well known, is that it was hardly luck. The saga began on February 13, 2016, when conservative icon Justice Antonin Scalia died unexpectedly at a resort in West Texas.² Within hours of Scalia's death, Senate Majority Leader Mitch McConnell (R-KY) brazenly announced that the Senate would take no action on any Supreme Court appointee that President Obama might name until after the 2016 presidential election, an event that was still nine months away.³ McConnell's newly created "election day rule" was as unprecedented as it was unwarranted. Prior to the vacancy resulting from Scalia's death, "twenty-five occasions for Supreme Court nominations ar[ose] one way or another during the twelve calendar months preceding a presidential election."⁴ With respect to these nominations, there is categorically no evidence of a Senate tradition of first burying a nomination in committee and then dismissing the nomination without floor action, meaning McConnell's failure to even consider Obama's pick, Merrick Garland, for Scalia's seat was a historically extraordinary act.⁵

It seems, though, that fortune may favor the shameless, because McConnell succeeded in his ploy to thwart Obama from seating a third Justice on the Supreme Court. Instead, shortly after taking office in January 2017, Donald Trump nominated Neil Gorsuch, a conservative jurist, who "restore[d] the 5-4 split between conservatives and liberals on the Court, returning the swing vote to Justice Anthony M. Kennedy, whose rulings have fallen on both sides of the political spectrum."⁶ Little more than a year later,

² Adam Liptak, *Justice Scalia, Justice on the Supreme Court, Dies At 79*, N.Y. TIMES (Feb. 14, 2016), <https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html> [<https://perma.cc/CQ6F-WY56>].

³ McConnell said: "The American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new president." Adam Liptak & Sheryl Gay Stolberg, *Shadow of Merrick Garland Hangs Over the Next Supreme Court Fight*, N.Y. TIMES (Sept. 19, 2020), <https://www.nytimes.com/2020/09/19/us/ginsburg-vacancy-garland.html> [<https://perma.cc/WT6P-K3F2>].

⁴ J. Stephen Clark, *President-Shopping for A New Scalia: The Illegitimacy of "McConnell Majorities" in Supreme Court Decision-Making*, 80 ALB. L. REV. 743, 756 (2017).

⁵ *Id.* at 788.

⁶ Julie Hirschfeld Davis & Mark Landler, *Trump Nominates Neil Gorsuch to the Supreme Court*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017>

however, Justice Kennedy announced that he would retire, effective July 31, 2018.⁷ Kennedy's retirement was dreadful news for the reproductive rights community. Kennedy, a solid centrist, regularly partnered with the liberal Justices to protect abortion rights.⁸ Now, Trump, who made clear in his 2016 presidential campaign that he would work to see an end to *Roe*, was poised to select a second conservative, pro-life justice to the Court.⁹

He certainly made good on that promise. On July 9, 2018, Trump announced that he would nominate Brett Kavanaugh to fill

/01/31/us/politics/supreme-court-nominee-trump.html [https://perma.cc/B69Y-QJFB].

⁷ David G. Savage, *Justice Kennedy to Retire; Exit Opens Door for Trump to Make 2nd Pick, Shift Court Further to Right*, CHI. TRIB. (June 28, 2018), https://digitaledition.chicagotribune.com/tribune/article_popover.aspx?guid=149d68d7-9546-4bb8-ab9f-c33fbc8badac [https://perma.cc/EH9F-ULYL].

⁸ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). In *Casey*, Kennedy, writing with Justices O'Connor and Souter, held "[a]fter considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed." *Id.* at 845–46. The *Casey* triumvirate then made plain their full support for the principles articulated in *Roe*: "[i]t must be stated at the outset and with clarity that *Roe*'s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each." *Id.* at 846.

⁹ At the final Presidential debate in October 2016, Trump said "[i]f we put another two or perhaps three justices on, that's really what's going to be, that's what will happen." He continued, "[a]nd that will happen automatically in my opinion, because I am putting pro-life justices on the court." Sarah McCammon, *What Justice Kennedy's Retirement Means for Abortion Rights*, NPR (June 28, 2018, 3:02 PM), <https://www.npr.org/2018/06/28/624319208/what-justice-kennedy-s-retirement-means-for-abortion-rights> [https://perma.cc/NW4G-V2AE].

Kennedy's seat.¹⁰ After a boisterous confirmation hearing, and despite allegations of sexual assault and repeated interjections by Kavanaugh that he really "liked beer," Kavanaugh was sworn in as the 114th Justice of the Supreme Court on October 6, 2018.¹¹ Conservatives rejoiced, as the addition of first Gorsuch, and now Kavanaugh, resulted in a hard shift to the right for the Court. Both Kavanaugh and Gorsuch will likely be reliable originalist voices on the Court for decades to come, particularly on hotly contested social issues such as reproductive rights.¹²

So now we reach the closing chapter in our tale of how we got here—that is, how was Donald Trump, a single-term President, able to wholly reshape the ideological balance of the Court in less than four years? What happened next utterly crushed the pro-choice movement—Justice Ruth Bader Ginsburg, feminist icon, died on September 18, 2020. Adding salt to the wound, on September 26, 2020, a mere eight days after Ginsburg's death, Trump announced that he would nominate Amy Coney Barrett to take Ginsburg's seat.¹³ Mitch McConnell, who had devised the "election year rule"

¹⁰ Robert Costa et al., *Brett Kavanaugh is Nominated by Trump to Succeed Supreme Court Justice Anthony M. Kennedy*, WASH. POST (July 9, 2018), https://www.washingtonpost.com/politics/trump-supreme-court-pick/2018/07/09/afa8ae36-83a0-11e8-8f6c-46cb43e3f306_story.html [https://perma.cc/F7M4-YEK8].

¹¹ Alex Lockie, *Kavanaugh Mentions Liking Beer an Astounding Amount While Denying a Drunken Sexual Assault*, BUS. INSIDER (Sept. 28, 2018, 7:11 AM), <https://www.businessinsider.com/kavanaugh-repeatedly-embraces-beer-drinking-in-sex-assault-defense-2018-9> [https://perma.cc/8JQA-WWH2].

¹² Emma Green, *Brett Kavanaugh Has GOP Bona Fides—and a Controversial Record*, ATLANTIC (July 9, 2018), <https://www.theatlantic.com/politics/archive/2018/07/brett-kavanaugh-trump-supreme-court-pick/564629/> [https://perma.cc/Q2RS-LHX7]. Indeed, both Gorsuch and Kavanaugh have already signaled which side they are likely to favor on a direct challenge to *Roe*. In *June Medical Services v. Russo*, the Court, by a 5-4 vote, held a Louisiana statute unconstitutional because the statute would have ended most abortions in the state. *June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103 (2019). Both Kavanaugh and Gorsuch dissented, and, with that, signaled their openness to overturning *Roe*. *Id.*

¹³ Brendan Williams, *Contempt of Courts? President Trump's Transformation of the Judiciary*, 98 DENV. L. REV. FORUM 1, 29 (2020). Incidentally, the Coney nomination took place "in a Rose Garden ceremony that later became notable for being a COVID-19 'super-spreader' event . . ." *Id.*

in order to block Merrick Garland's Senate confirmation hearing, now hustled Coney Barrett's confirmation through, even though election day was less than a month away. Cries of hypocrisy mushroomed, but McConnell blithely responded by concocting an impromptu addendum to his election rule. Now, according to McConnell, the election year rule would apply only when different parties controlled the White House and Senate.¹⁴ Relying on this comfortable theory, and recognizing that the White House and the Senate were safely in Republican hands, McConnell greenlighted Coney Barrett's confirmation hearing. Then, less than two hours after her confirmation by the Senate, and a little more than a month after Ginsburg's death, Barrett was sworn in as a member of the Court.¹⁵ And, with that, the path to a reproductive rights apocalypse was complete. The hard truth is, more than likely, *Roe* will fall in the Court's 2021-2022 term.¹⁶ The conservatives now hold a definitive 6-3 majority on the Court and there is ample evidence that the newest members of the Court—Gorsuch, Kavanaugh, and Coney Barrett—personally oppose abortion.¹⁷

¹⁴ See Marianne Levine, *McConnell Fends Off Accusations of Hypocrisy Over Holding Supreme Court Vote*, POLITICO (Sept. 21, 2020), <https://www.politico.com/news/2020/09/21/mcconnell-pushes-back-hypocrisy-supreme-court-419569> [<https://perma.cc/DQA4-QKEB>].

¹⁵ Matt Stieb, *Amy Coney Barrett Sworn in as Supreme Court Justice*, N.Y. MAG. (Oct. 26, 2020), <https://nymag.com/intelligencer/2020/10/amy-coney-barrett-sworn-in-as-supreme-court-justice.html> [<https://perma.cc/SND9-REU3>].

¹⁶ See Lyz Lenz, *Why Must Women Wait for the Supreme Court to Decide What We Can Do with Our Bodies?*, TIME (June 24, 2021, 10:52 AM), <https://time.com/6074553/abortion-supreme-court-limbo/> [<https://perma.cc/9YC4-GYTF>].

¹⁷ While on the faculty of Notre Dame, Coney Barrett delivered a lecture to a Right to Life club, she joined an anti-abortion faculty group, and she signed a letter criticizing *Roe*'s "barbaric legacy." See Emma Green, *No One Likes Amy Coney Barrett's Abortion Answer*, ATLANTIC (Oct. 13, 2020), <https://www.theatlantic.com/politics/archive/2020/10/amy-coney-barrett-roe-v-wade/616702/> [<https://perma.cc/V9BN-66EK>]; see also Mark Sherman & Jessica Gresko, *Justice's Views on Abortion in Their Own Words and Votes*, AP NEWS (Nov. 29, 2021), <https://apnews.com/article/abortion-us-supreme-court-health-voting-rights-john-roberts-32d2ff1e016c8f72012c49a4ed2bf2e1> [<https://perma.cc/JX2M-LHMV>] (describing prior Gorsuch and Kavanaugh opinions favoring limiting or eliminating abortion rights).

We won't have to wait too long to find out *Roe's* fate. On May 17, 2021, the Court announced that it would hear *Dobbs* to settle a challenge to a Mississippi law banning almost all abortions after fifteen weeks.¹⁸ The statute in *Dobbs* is a patent challenge to *Roe*, as a fetus is not viable at that point in a pregnancy.¹⁹ The Court held oral arguments for *Dobbs* on December 1, 2021 and, once again, the news for the reproductive rights community was grim.²⁰ Justice Kavanaugh openly signaled that he is open to overturning *Roe*. He expressed his thoughts on the principal of stare decisis with respect to *Roe* and *Casey* by asking “[s]o the question on stare decisis is why, if—and I know you disagree with what about I’m about to say in the ‘if’—if we think that the prior precedents are seriously wrong, if that, why then doesn’t the history of this Court’s practice with respect to [other cases overturned by the Court] tell us that the right answer is actually a return to the position of neutrality and—and not stick with those precedents in the same way that all those other cases didn’t?”²¹ Coney Barrett took a different approach, suggesting that abortion is no longer necessary because safe haven laws allow parents to relinquish their parental rights:

[i]n all 50 states, you can terminate parental rights by relinquishing a child after [birth] It seems to me, seen in that light—both *Roe* and *Casey* emphasize the burdens of parenting, and insofar as you and many of your amici focus on the ways in which forced parenting, forced motherhood, would hinder women’s access to the workplace, and to equal opportunities, it’s also focused on the consequences

¹⁸ *Dobbs v. Jackson Women’s Health Org.*, 141 S. Ct. 2619 (2021).

¹⁹ See Lenz, *supra* note 16. In *Dobbs*, the Court will consider the constitutionality of a Mississippi statute that bans abortions after 15 weeks “except in medical emergency and in cases of severe fetal abnormality.” MISS. CODE ANN. § 41-41-191(4).

²⁰ Amy Howe, *Majority of Court Appears Poised to Roll Back Abortion Rights*, SCOTUSBLOG (Dec. 1, 2021, 1:04 PM), <https://www.scotusblog.com/2021/12/majority-of-court-appears-poised-to-uphold-mississippi-ban-on-most-abortions-after-15-weeks/> [<https://perma.cc/3Z88-4BR8>].

²¹ Transcript of Oral Argument at 80, *Dobbs v. Jackson Women’s Health Org.*, 141 S. Ct. 2619 (Dec. 1, 2021) (No. 19-1392), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/19-1392_4425.pdf [<https://perma.cc/S3HL-QDRR>].

of parenting and the obligations of motherhood that flow from pregnancy. Why don't the safe haven laws take care of that problem?²²

In addition to *Dobbs*, the Court also tipped its hand when considering issues relating to a Texas law banning almost all abortions after six weeks.²³ The Texas law, deliberately crafted to evade *Roe*, deputizes private citizens to sue anybody who performs or aids a prohibited abortion. If the suit is successful, the vigilante plaintiff collects a cash judgment of at least \$10,000 in “statutory damages” for each forbidden abortion, plus legal fees, from those they sue. Reproductive rights advocates hoped the Court would order swift action in the case challenging the constitutionality of the Texas law but, by a 6-3 vote, the Court refused to take such action, and the Texas law, which, for all practical purposes is an abortion ban, continues to stand.²⁴

That brings us to today, and where we are now on reproductive rights. As detailed above, we are on a precipice. The Court agreed to hear *Dobbs*, and it allowed the Texas law to stand, when it should have been clear that the Mississippi and Texas statutes both flagrantly violate the principles set forth in *Roe*. Moreover, several justices signaled in the *Dobbs* oral argument that they are not wedded to principals of stare decisis so long as it means that they can reshape the Court's jurisprudence in a way that reflects their own conservative ideologies. So, if we have lost the Court as the last bastion in the battle to guarantee a woman the right to determine her own reproductive choices, and *Roe* falls, well, then, we are going to have to turn elsewhere to ensure that women retain full agency over their own bodies. But where? Authors Kathryn Kolbert and Julie F. Kay have written a compelling new book to help us answer this question.

In *Controlling Women: What We Must Do Now to Save Reproductive Freedom*, Kathryn Kolbert and Julie Kay provide us with a blueprint for circumventing the Court to protect reproductive

²² *Id.* at 56.

²³ See TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–171.212 (2021).

²⁴ See Nina Totenberg, *The Supreme Court for a Third Time Allows Texas to Bar Abortions After 6 Weeks*, NPR (Jan. 20, 2022, 5:30 PM), <https://www.npr.org/2022/01/20/1074534980/supreme-court-for-third-time-allows-texas-to-bar-abortions-after-six-weeks> [<https://perma.cc/9BGL-FYMC>].

choice. The authors explain that they wrote the book “because we both knew the Supreme Court was not the place to go to protect, never mind expand, abortion rights. We were tired of our movement repeatedly banging its head against the Court’s marble walls and sought to strategize an affirmative path forward.”²⁵ Kolbert and Kay are well-qualified to act as the architects of a new legal-political strategy to secure women’s reproductive rights as both women have been defending abortion rights for decades. Kolbert co-founded The Center for Reproductive Rights and, in 1992, argued *Planned Parenthood v. Casey*²⁶ before the Court, the case credited with saving *Roe* (for a time anyway). Kay argued for abortion rights before the European Court of Human Rights, spurring liberalization of Ireland’s abortion law.²⁷

In their book, the authors first propose a series of goals that they acknowledge are “long-term moon shots.”²⁸ These “big hairy audacious goals” include a Gender Equity Amendment to the Constitution.²⁹ Kolbert and Kay do not provide us with the text of this Amendment but say that it will

broadly and clearly protect personal and private decision making from governmental interference. The rights to choose or refuse contraception, pregnancy, childbirth, and parenthood and to voluntarily engage in sex and make important decisions about marriage and family life would be explicitly protected as would equal access to governmental benefits based on these protected rights.³⁰

²⁵ KATHRYN KOLBERT & JULIE F. KAY, *CONTROLLING WOMEN: WHAT WE MUST DO NOW TO SAVE REPRODUCTIVE FREEDOM*, 130 (Hachette Brook Group, 2021).

²⁶ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

²⁷ See Robin Abcarian, *We Can’t Count on the Supreme Court to Save Abortion Rights. We’ll Have to Do it Ourselves*, L.A. TIMES (Oct. 31, 2021, 3:05 AM), <https://www.latimes.com/opinion/story/2021-10-31/abortion-rights-supreme-court> [<https://perma.cc/4P7F-ZNZC>].

²⁸ KOLBERT & KAY, *supra* note 25, at 168.

²⁹ *Id.* at 168–69.

³⁰ *Id.* at 176.

The authors acknowledge that enacting the Amendment will not be easy given the constitutional requirement of a two-thirds vote of Congress and a ratification by three-quarters of the states.³¹ Even so, and even if it takes a decade or more, they say it's time to get started.³² In the end, the authors are probably overoptimistic about the chance their Gender Equity Amendment has to survive in the current political climate. After all, if Congress and the state legislatures were in any way inclined to respect reproductive freedoms, why would they persist in passing ever-more highly restrictive and intrusive anti-abortion laws?³³

In the next section of their book, the authors are more realistic as they unveil a new framework for evaluating reproductive freedoms—placing abortion in a human rights context, alongside issues such as racial justice, LGBT rights, economic equity, and healthcare disparities. According to Kolbert and Kay:

[s]ome activists argue that widening the reproductive rights agenda to include issues beyond abortion will dilute the struggle to protect abortion rights. We disagree. Abortion rights are inextricably intertwined with other important decisions about one's body, health care, and life. It is why abortion matters. To freely choose abortion, you need to be able to consider all your options, including whether having and raising a child is feasible and right for you. Will you have access to prenatal, maternity, and well-

³¹ U.S. CONST. art. V.

³² KOLBERT & KAY, *supra* note 25, at 175.

³³ Elizabeth Nash & Lauren Cross, *26 States Are Certain or Likely to Ban Abortion Without Roe: Here's Which Ones and Why*, GUTTMACHER INST. (Oct. 28, 2021), <https://www.guttmacher.org/article/2021/10/26-states-are-certain-or-likely-ban-abortion-without-roe-heres-which-ones-and-why> [<https://perma.cc/WD5N-H7Z8>]. As for Congress, the chances of securing the two-thirds vote necessary to ratify a Constitutional Amendment codifying *Roe* is currently little more than a fairy tale. On February 28, 2022, the Senate blocked consideration of a bill that would protect the right to abortion nationwide, with all present Democrats, except Senator Manchin (D-WV), voting in favor of the bill and all Republicans voting against. *See also* Caroline Kitchener, *Senate Republicans, Manchin Block Bill to Protect the Right to Abortion*, WASH. POST (Feb. 28, 2022, 7:10 PM), <https://www.washingtonpost.com/politics/2022/02/28/abortion-senate-vote/> [<https://perma.cc/K4PS-K9QN>].

baby care? Will you have food, affordable housing, quality child care, and educational access to raise a child in safety and shelter? Having a full range of options when facing an unintended pregnancy is what makes a choice genuine, not just deciding from the best of a bad lot.³⁴

Kolbert and Kay reason that reframing the abortion rights movement as a human rights issue is not only the right thing to do, but also politically savvy. They say “[i]f we are ever to win abortion rights, we must widen our base or risk becoming an isolated fringe movement.”³⁵ The authors make a convincing case for building strong, mutually dependent coalitions that will aid the goals of all groups joining in the struggle. For pro-choice advocates, this tactic is particularly appealing as many intersectional issues, such as race and equality, have broader public support than the pro-choice movement.³⁶ Directly connecting abortion rights to these issues may well move the needle toward greater public support for reproductive freedoms.³⁷ With that in mind, and using this broad, inclusive lens, the authors set forth a ten-step plan that reproductive rights advocates can follow in order to achieve the goal of bringing reproductive freedoms under the human rights umbrella.

1. HEALTH CARE FOR ALL

After acknowledging that it is easier said than done, Kolbert and Kay argue that advocates must fight to implement a system that provides universal cradle-to-grave health care for every American. They explain that “[w]omen are free to make a wide range of procreative decisions only if they have the ability to obtain safe,

³⁴ KOLBERT & KAY, *supra* note 25, at 201.

³⁵ *Id.*

³⁶ See *The Generation Gap in American Politics: Wide and Growing Divides in Views of Racial Discrimination*, PEW RSCH. CTR. (Mar. 1, 2018), <https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2018/03/03-01-18-Generations-release2.pdf> [<https://perma.cc/7Y92-AN89>] (polling data indicating that American opinion has shifted over time on issues such as racial equality, LGBT rights, and immigration while opinion on abortion has remained relatively flat).

³⁷ KOLBERT & KAY, *supra* note 25, at 201.

quality health care, including abortion, maternity care, and full reproductive health services throughout their lifespans without interruption.”³⁸ Kolbert and Kay reason that the best model to realize this goal is a national public healthcare system, such as found in Canada.³⁹ They acknowledge that this may be a bridge too far for the United States and direct advocates to take smaller bites. The first steps should be convincing the states to expand Medicaid, lobbying Congress to open Medicare to all who want to enroll, and, as far as reproductive health, fighting for contraception and abortion coverage to be covered under every insurance plan.⁴⁰

2. SAVE LIVES: REDUCE MATERNAL AND INFANT DEATHS AND COMPLICATIONS

Here, Kolbert and Kay dispense a few personal vignettes, and some frankly shocking statistics, to show the pervasiveness of structural racism in our healthcare system. The authors charge advocates of the universal healthcare movement to ensure, as part of their movement, that these racial disparities are acknowledged and eliminated. To bolster their argument, Kolbert and Kay supply statistics demonstrating across-the-board higher neonatal and maternal mortality rates for Black women and their babies. For example, regardless of the education or income of the mom, Black women are three times as likely to die in childbirth, as compared to White women.⁴¹ Black babies die almost twice as often as White babies.⁴² The only explanation, the authors say, is that structural racism is so deeply embedded in our health care system that it blocks Black patients from receiving care that is equal to White patients in identical medical situations. The authors suggest using devices already in place, such as hospital maternal mortality review commissions, to shine a hard light to uncover evidence of racial disparities in the delivery of healthcare.⁴³ Other ideas, like anti-bias

³⁸ *Id.* at 202.

³⁹ *See id.* at 204.

⁴⁰ *Id.*

⁴¹ *Id.* at 205.

⁴² *Id.*

⁴³ *See id.* at 206–07.

training for medical personnel, uniform hospital protocols for pregnant patients, and expanding Medicaid to cover various maternal health measures, might also help, according to Kolbert and Kay.⁴⁴ In the end, the authors find “[s]weeping reforms at the federal, state, and local level are urgently needed to stop the racial and gender discrimination in maternal health care that endangers the lives of Black women and infants during childbirth and the year thereafter.”⁴⁵

3. PREGNANT BY CHOICE, PART 1: WIDEN AVAILABILITY OF CONTRACEPTION

Next, Kolbert and Kay highlight that, while over one hundred countries (“from Afghanistan to Zambia”) make oral contraceptives available over-the-counter, women in the United States must still obtain a prescription to obtain birth control pills.⁴⁶ This is so important, they explain, because the doctor’s visit necessary to get a prescription creates another hurdle and—for some women, teens especially—may act as a complete barrier to obtaining contraception.⁴⁷ Furthermore, making the pill available over-the-counter will reduce cost, benefitting women without insurance, including, disproportionately, women of color.⁴⁸ Also ripe for advocates to take up the cause, Kolbert and Kay say, is lobbying for state laws mandating coverage for the full range of contraceptive methods, at no cost to the patient. Other measures worth getting behind include allowing doctors to use telemedicine to prescribe contraception, enabling pharmacists to prescribe contraception, and increasing access to highly effective long-acting reversible methods of contraception.⁴⁹

⁴⁴ *Id.* at 206.

⁴⁵ *Id.* at 207.

⁴⁶ *Id.* at 207–08.

⁴⁷ *Id.* at 208.

⁴⁸ *Id.*

⁴⁹ *Id.* at 208–09.

4. PREGNANT BY CHOICE, PART 2: REDUCE INFERTILITY

The authors next turn to infertility and its obscenely expensive (and often not covered by insurance) treatments, such as in vitro fertilization. They note that insurance companies regularly classify fertility treatments as “voluntary medical care” and then use this definition as an excuse to deny coverage. U.S. conversations about reproductive freedoms regularly neglect the topic of infertility, but about 10% of American women have infertility issues.⁵⁰ Time to change that, say Kolbert and Kay. They urge us to advocate in the states for across-the-board health insurance coverage for fertility treatments. We must also look more critically at the environmental factors causing infertility, and, finally, we need to craft policies ensuring LGBT couples and unmarried people are not disadvantaged when seeking fertility treatments.⁵¹

5. ACCURATE, ENGAGING AND FUN SEX EDUCATION

Kolbert and Kay laughingly tell us that talking about the birds n’ bees with their own children is A-W-K-W-A-R-D. That’s okay, they say, because parents probably shouldn’t be doing this job. Parents aren’t very good at it, and comprehensive, good quality, sex education takes expertise that few parents can claim to have. The schools aren’t delivering right now either, they say. The good news is that the #MeToo movement spurred seventeen states to pass laws to improve sex education, covering issues such as consent, sexual assault, dating violence, and child exploitation.⁵² What’s still missing, the authors say, is a frank discussion about pleasure and desire, rather than the traditional characterization of sex as a problem behavior leading to negative consequences. Here, the authors suggest applying pressure at the local level, advocating in the counties, towns, and school boards to build sex education

⁵⁰ *Id.* at 210.

⁵¹ *Id.*

⁵² *Id.* at 211.

programs that will protect children's well-being and set them on a path for a lifetime of healthy relationships.⁵³

6. AFFORDABLE CHILD CARE AND PRE-K EDUCATION

This section begins with Kolbert musing that, in her family, they spent more money on childcare than they did on putting Kolbert's wife through law school.⁵⁴ Childcare is inextricably linked to reproductive freedom, according to the authors, because the availability of affordable, quality childcare is one of the most important factors families must consider when deciding to have a child.⁵⁵ This burden again falls disproportionately on low-income families where childcare expenses can eat up more than 30% of the family budget. Kolbert and Kay say that our current national policies are in deep denial that "young children need caretakers year-round and full day."⁵⁶ They urge advocates to fight for a national program guaranteeing low-income women subsidies to fund their child-care expenses. They end the section by pointing out that this type of subsidy would have a dual benefit—low-income parents could obtain good quality childcare, and the low-income women who provide this care would be guaranteed a living wage for the critically important work that they do.⁵⁷

⁵³ *See id.* at 212. Of course, all of this is easier said than done. Efforts to improve sex education in the schools may be legislatively dead in the water in some states. To take one example, Florida recently enacted a statute dubbed by opponents as "Don't Say Gay." The statute prohibits classroom instruction on sexual orientation or gender identity for students in kindergarten through grade 3 or in a manner that is not age-appropriate or developmentally appropriate. 2022 Fla Sess. Law Serv. ch. 2022-22 (2022). Even when a legislative bar does not exist, working with the school boards to enhance sex education curriculums is likely to become progressively more impractical as polarization solidifies and zealous parents battle over issues such as transgender students on sports teams, COVID masking protocols, and Critical Race Theory.

⁵⁴ *See id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 213.

⁵⁷ *Id.* Unfortunately, federal childcare subsidies are probably less likely now than they were when Kolbert and Kay wrote about them in their book. President Biden's Build Back Better domestic policy legislation would have dramatically expanded the number of families eligible for a childcare subsidy. The bill failed,

7. FAMILY FRIENDLY BENEFITS IN THE WORKPLACE

Kolbert and Kay say that, unlike developed countries worldwide, the U.S. shortchanges its children because of its failure to implement a comprehensive paid parental leave policy for working parents. Currently, the only federal leave statute providing some relief for parents is The Family and Medical Leave Act (“FMLA”), but FMLA mandates only unpaid leaves—once again disproportionately burdening low-income families.⁵⁸ The authors suggest advocates work hard to form broad coalitions comprised of low-wage workers, unions, people of color, faith leaders, and small business owners that can act to influence both Congress and the state legislatures to enact comprehensive paid parental leave programs. They acknowledge that divided legislatures may lead advocates to throw their hands up and give up the cause, but they tell an encouraging story from a Colorado legislator about “losing forward,” proving that building coalitions, and introducing parental leave legislation each and every session over a course of years, often bears fruit, even in a divided legislature.⁵⁹

8. FAIRNESS FOR PREGNANT WORKERS

According to Kolbert and Kay, a pregnant worker is “a fly in their soup” to most U.S. employers and the law has done little to protect pregnant workers from losing their jobs.⁶⁰ The authors acknowledge that the federal Pregnancy Discrimination Act⁶¹ went a long way toward preventing the most blatant discrimination against pregnant workers, but, they say, pregnant women in low paying and physically demanding jobs still face crippling

however, when Senator Joe Manchin, whom Democrats needed to pass the bill, said that he would not support the legislation. Emily Cochrane & Catie Edmondson, *Manchin Pulls Support From Biden’s Social Policy Bill, Imperiling Its Passage*, N.Y. TIMES, <https://www.nytimes.com/2021/12/19/us/politics/manchin-build-back-better.html> (last updated Mar. 28, 2022) [<https://perma.cc/26TJ-LCLZ>].

⁵⁸ 29 U.S.C. § 2612(c).

⁵⁹ KOLBERT & KAY, *supra* note 25, at 214.

⁶⁰ *Id.*

⁶¹ Pregnancy Discrimination Act, Pub. L. No. 95-555 (1978).

discrimination. Advocates should work in the states to support proposed legislation like New York State's law which requires accommodations for pregnant workers and prohibits discrimination on the basis of pregnancy, childbirth, or breastfeeding.⁶²

9. REDUCE SEXUAL ABUSE, VIOLENCE, AND HARASSMENT

Kolbert and Kay first deliver good news: cases of sexual assault and rape have fallen in recent decades, perpetrators of sexual assault are held criminally liable more often than in the past, and workplaces are increasingly less tolerant of sexual abuse.⁶³ Moreover, the #MeToo movement has not only expanded the definition of sexual abuse but has also garnered international support for its drive to end sexual abuse and harassment, in the workplace and elsewhere. Advocates can push for limits on nondisclosure agreements when perpetrators settle cases of abuse, faster results for rape kits, and extended statutes of limitations for survivors who want to file civil lawsuits against their abusers or the institutions that shield them. In the authors' opinion, advocates of reproductive freedom are "natural allies" of those who oppose interpersonal violence or sexual assault, and vice versa, so building close alliances here must be a priority.⁶⁴

10. JOIN THE GLOBAL WOMEN'S HUMAN RIGHTS COMMUNITY

Kolbert and Kay round out their ten-step plan by describing the U.S. failure to ratify the major global treaty protecting women's rights, the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"),⁶⁵ as "a big embarrassing zit on the face of our democracy."⁶⁶ Often described as an "international bill of rights for women," only a handful of other

⁶² KOLBERT & KAY, *supra* note 25, at 215; *see also* N.Y. EXEC. LAW §§ 296(1)(a), (3); N.Y. LAB. LAW § 206-c.

⁶³ KOLBERT & KAY, *supra* note 25, at 216.

⁶⁴ *Id.* at 216–17.

⁶⁵ Convention on the Elimination of All Forms of Discrimination Against Women, adopted by General Assembly on December 18, 1979, GA Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193 (entered into force Sept. 3, 1981).

⁶⁶ KOLBERT & KAY, *supra* note 25, at 217.

countries have failed to ratify the treaty.⁶⁷ If advocates cannot move the federal government toward ratification, the authors say, there is still hope. Many cities, like Los Angeles, have implemented provisions from the treaty into their local law requiring such measures as data collection on gender discrimination in hiring, contracting, and the provision of city services. The authors urge advocates to push for CEDAW-like language at all levels of government and they end by reminding us that the U.S. cannot lead, or even take part in, efforts to guarantee women's human rights around the world unless it joins the world community and ratifies CEDAW.⁶⁸

CONCLUSION

Kolbert and Kay end their book by urging readers who value reproductive freedoms to do something *now*. They advise “[p]ick one of the options and strategies laid out here, or pick many. And don’t go it alone—consult with groups already doing the work, grab a friend or make a new friend, and hit the streets with us. There’s plenty of work to be done and progress to be made.”⁶⁹ It’s hard to argue with that. If reproductive rights advocates have lost the Supreme Court, and it seems as though we have, we don’t have the luxury of wallowing in despair. It’s up to us now—the women—will we submit to the handmaiden-like future some politicians and judges have planned for us, or will we band together, and use every tool at our disposal: the legislatures, the courts, and the streets, to make our voices heard? We better get busy, *now*, Kolbert and Kay say, if we want to ensure a future where our daughters are guaranteed full agency over their own bodies.

⁶⁷ *Id.*

⁶⁸ *Id.* at 218.

⁶⁹ *Id.*