

# MEDICAL TERMINATIONS OF PREGNANCY: REFORMS TO THE LAW AND CONTROVERSIES IN AUSTRALIA AND THE UNITED STATES

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• See I Freckelton, "Medical Termination of Pregnancy: Law and Controversies in the United States and Australia" (2024) 31(3) JLM 447-463



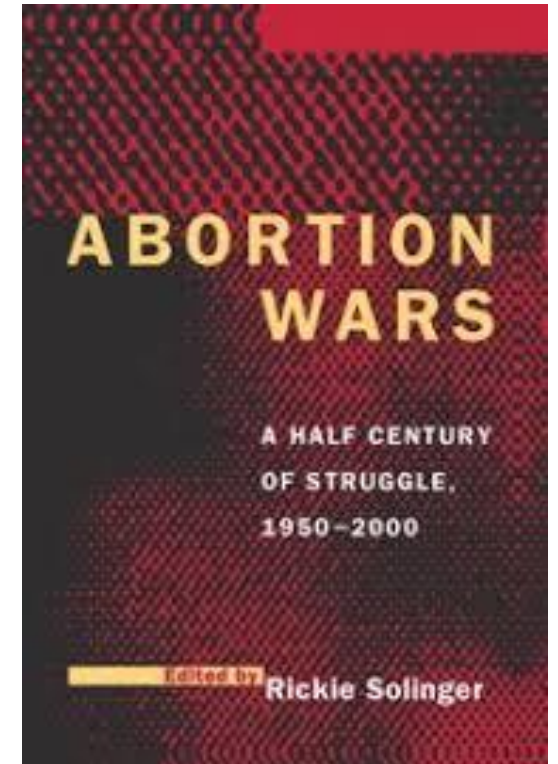
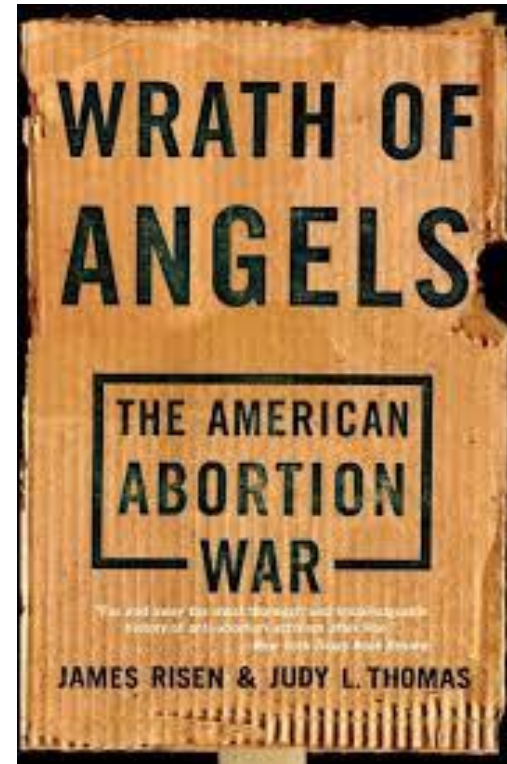
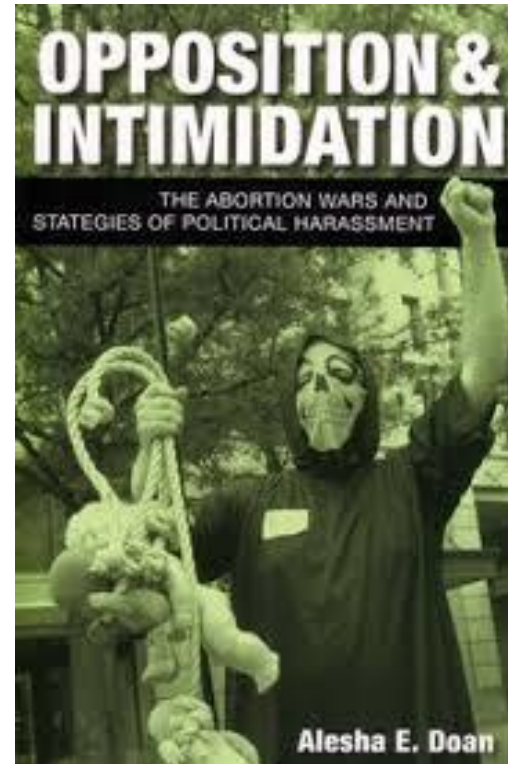
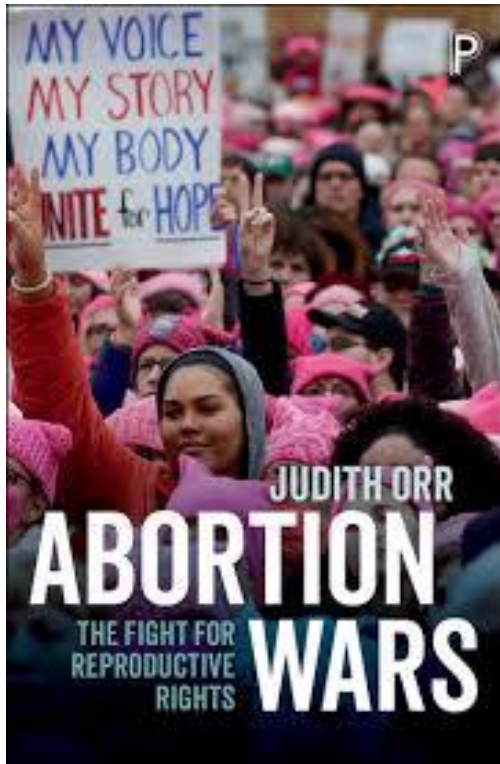
# Acknowledgment of Country

- I acknowledge the traditional custodians of the unceded lands on which this talk is being delivered, past, present and emerging, and on which all participants in this conference are residing and visiting.
- In particular, I acknowledge the hospitality of the Arrernte Nation of Alice Springs and of the Warlpiri People of Yuendumu with whom I have been working and living for much of the last two years.



# The Latest Chapter in the Abortion Wars

- A new chapter in a deeply socially divisive issue
- United States developments are influential over global debates





# The United States Election

- Reproductive rights have assumed an unparalleled political prominence

**ABC**

"Trump Abortion Bans are preventing doctors from providing basic medical care. Women are bleeding out in parking lots, turned away from emergency rooms, losing their ability to ever have children again. Survivors of rape and incest are being told they cannot make decisions about what happens next to their bodies. And now women are dying."

**Kamala Harris**  
Vice-president of the United States of America



# Reproductive Choice as an Issue in the Queensland Election

- RANZCOG and RACGP, as well as Children by Choice, Women's Health Services Alliances, Qld Sexual Assault Network and others, wrote a public letter:
- "We are deeply concerned by recent discussions suggesting the potential re-criminalisation of abortion. This would be a harmful step backward, risking the health and safety of pregnant people and undoing years of progress.
- "Access to abortion is essential health care. Restricting it leads to dangerous consequences, with vulnerable communities facing the greatest harm. We must ensure that decisions about pregnancy remain personal and healthcare-based, not politicised."



# Mifepristone and Misoprostol

- Mifepristone (RU486) blocks progesterone, a hormone needed for maintenance of pregnancy
- Misoprostol causes cervical ripening and induces uterine contractions
- They are often prescribed together: MS-2 STEP
- They are available over the counter in pharmacies



# Australian Regulation of Medical Abortion

- 2006: Mifepristone and Misoprostol made available on Authorised Prescriber Scheme after repeal of ministerial veto
- 29 August 2012: Mifepristone available through TGA for prescription by medical practitioners
- 1 February 2015: Composite pack (MS-2 Step) listed on PBS for termination up to 63 days
- May 2023: Senate Community Affairs References Committee recommended efforts to enhance availability of MS-2 Step
- 1 August 2023: GPs and nurse practitioners permitted to prescribe & restrictions on pharmacies removed
- 2023: PBS commenced to subsidise MS-2 Step
- Telephone consultations are now permitted



# United States Litigation

- *Dobbs v Jackson Women's Organization*, 597 US 215 (2022), overturning *Roe v Wade*, 410 US 113 (1973)
- *Alliance for Hippocratic Medicine v Food and Drug Administration*, 602 US 367 (2024)
- *Moyle v United States*, 603 US (2024)



# ***Dobbs v Jackson Women's Organization,*** **597 US 215 (2022)**

- Alito, Thomas, Gorsuch, Kavanaugh and Barrett JJ with Roberts CJ in the majority
- Breyer, Sotomayor and Kagan JJ dissenting
- Challenge by a doctor to Mississippi's Gestational Age Act which provided that "[e]xcept in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform... or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks".

# ***Dobbs v Jackson Women's Organization,*** **142 S Ct 2228, 1240 (2022), Alito J**

- Abortion presents a profound moral issue on which Americans hold sharply conflicting views. Some believe fervently that a human person comes into being at conception and that abortion ends an innocent life. Others feel just as strongly that any regulation of abortion invades a woman's right to control her own body and prevents women from achieving full equality. Still others in a third group think that abortion should be allowed under some but not all circumstances, and those within this group hold a variety of views about the particular restrictions that should be imposed

# ***Dobbs v Jackson Women's Organization,*** **142 S Ct 2228 (2022), Alito J**

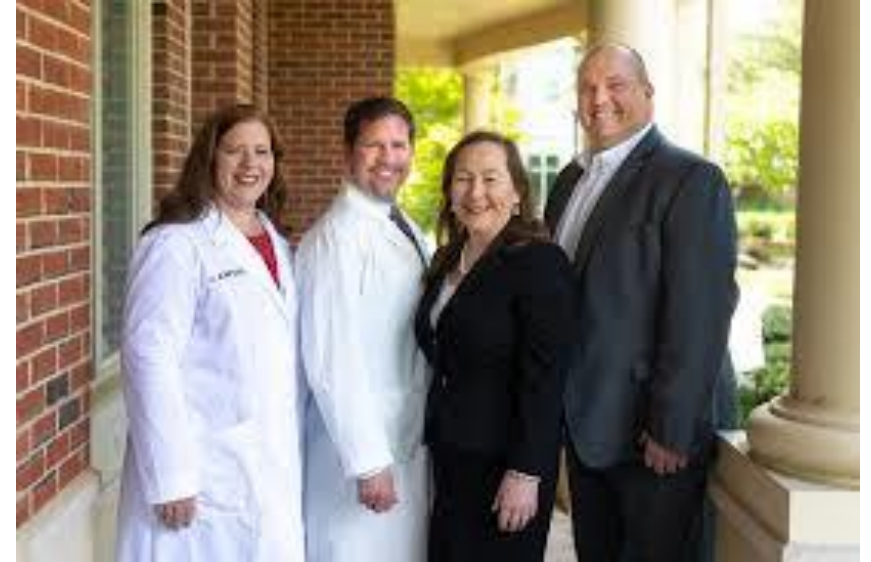
- For the first 185 years after the adoption of the Constitution each State was permitted to address the issue in accordance with the views of its citizens
- The Court in *Roe v Wade* had acknowledged that States have a legitimate interest in protecting “potential life”, but commented that it found that this interest could not justify any restriction on previability abortions.
- Rejected argument that there is a constitutional right to abortion
- *Roe v Wade* and *Casey* have distorted legal doctrine and observed “it is very hard to see why viability should mark the point where ‘personhood’ begins”
- Accepted the relevance of the doctrine of stare decisis but identified *Roe v Wade* as distorting the law and “plainly wrong”

# ***Dobbs v Jackson Women's Organization, 142 S Ct 2228 (2022), Breyer, Sotomayor and Kagan JJ***

- A result of the Court's decision will be "the curtailment of women's rights, and of their status as free and equal citizens"
- As of today, this Court holds, a State can always force a woman to give birth, prohibiting even the earliest abortions. A State can thus transform what, when freely undertaken, is a wonder into what, when forced, may be a nightmare. Some women, especially women of means, will find ways around the State's assertion of power. Others - those without money or childcare or the ability to take time off from work - will not be so fortunate. Maybe they will try an unsafe method of abortion, and come to physical harm, or even die. Maybe they will undergo pregnancy and have a child, but at significant personal or familial cost. At the least, they will incur the cost of losing control of their lives. The Constitution will, today's majority holds, provide no shield, despite its guarantees of liberty and equality for all

# ***Alliance for Hippocratic Medicine v Food and Drug Administration, 602 US 367 (2024)***

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- Four pro-life medical associations and several individual doctors initiated a legal attack on the availability of abortifacient medications.
  - They applied for a preliminary injunction requiring the FDA to rescind approval of mifepristone or to rescind the FDA's 2016 and 2021 regulatory actions
  - Danco Laboratories, which sponsors Mifeprex, intervened to defend the actions by the FDA.
  - Held the plaintiffs lacked standing to challenge the actions of the FDA
  - “[T]he law has never permitted doctors to challenge the government’s loosening of general public safety requirements simply because more individuals might then show up at emergency rooms or in doctors’ offices with follow-on injuries. Stated otherwise, there is no Article III doctrine of “doctor standing” that allows doctors to challenge general government safety regulations. Nor will this Court now create such a novel standing out of whole cloth “



# President Biden



Today's decision does not change the fact that the fight for reproductive freedom continues. It does not change the fact that the Supreme Court overturned Roe v. Wade two years ago, and women lost a fundamental freedom. It does not change the fact that the right for a woman to get the treatment she needs is imperiled if not impossible in many states.

It does mean that mifepristone, or medication abortion, remains available and approved. Women can continue to access this medication – approved by the FDA as safe and effective more than 20 years ago.

But let's be clear: attacks on medication abortion are part of Republican elected officials' extreme and dangerous agenda to ban abortion nationwide. Since the overturning of Roe v. Wade, Republican elected officials have imposed extreme abortion bans in 21 states, some of which include zero exceptions for rape or incest. Women are being turned away from emergency rooms, or forced to go to court to plead for care that their doctor recommended or to travel hundreds of miles for care. Doctors and nurses are being threatened with jail time, including life in prison, for providing the health care they have been trained to provide. And contraception and IVF are under attack.

# Moyle v United States, 603 US (2024)

- *Defense of Life Act* (the *Idaho Act*) prohibited abortions unless necessary to prevent a pregnant woman's death
- The Idaho law made no exceptions for abortions necessary to prevent grave harms to a woman's health, short of death, such as the loss of her fertility or psychiatric harm.
- However, before the *Idaho Act* could take effect, the Federal Government sued Idaho under the *Emergency Medical Treatment and Labor Act* (EMTALA) which requires a Medicare-funded hospital to provide essential care to patients experiencing medical emergencies *Emergency Medical Treatment and Labor Act*, 42 USC §1395dd. (EMTALA)



# ***Moyle v United States, 603 US (2024)***

- Supreme Court vacated the stay and prevented Idaho from enforcing its abortion ban when a termination of pregnancy is need to prevent serious harms to a woman's health
- Kagan, Sotomayor and Jackson JJ held that EMTALA generally obliges Medicare-funded hospitals to provide whatever treatment is necessary to stabilize a medical emergency, ie when there is serious jeopardy to health
- The United States has emphasized the host of emergency medical conditions that require stabilizing abortions – even when the procedure is not necessarily life saving. That list includes pre-eclampsia, preterm premature rupture of the membranes (PPROM), sepsis, and placental abruption, to name just a few examples. Having now been sued over its interference with EMTALA's protections for people experiencing these conditions, Idaho has shifted its position, both here and before the District Court, recharacterizing abortions in these scenarios as life-saving care permitted under Idaho law

# ***Moyle v United States, 603 US (2024)***

A strong dissent from Alito J:

- “The decision leaves unresolved the clinical and ethical distinction between pregnancies that may cause death, on the one hand, and pregnancies that will have seriously deleterious health effects for the mother, on the other hand, and the justification as a health intervention for medical abortion in the latter circumstances.”



# The Evolving Situation in the United States

- *Moyle v United States* to protect the status and effect of the *EMTALA* might appear reassuring as a bulwark against State legislation which inhibits the application of federal legislation. However, ultimately, the case depended significantly upon its own facts and may provide limited protection against future challenges, with the potential that the approach of States' entitlement to legislate as they wish likely to be influential in the Supreme Court as currently constituted.
- Much too will depend upon what is construed as the threat posed by a pregnancy to a woman's life.

# The Evolving Situation in the United States

- The decision in Alliance for Hippocratic Medicine limiting the involvement of busybodies is to be welcomed.
- However, it is inevitable that further comparable challenges will be brought by those with the technical interest to initiate such litigation

# The Legacy of Dobbs etc

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- Turbulence and uncertainty
- A fillip to creative litigation by those opposed to abortion
- In Australia the diversity and ambiguity in abortion legislation creates an opportunity for legal challenges, potentially drawing upon human rights legislation
- **HOWEVER**, the clinical trajectory of changes made over two decades by the FDA in the United States, the TGA in Australia and Medsafe in New Zealand, together with evolving attitudes in the community, and the availability of abortion pills, are likely to entrench the availability of first trimester medical abortions.

