

AFD Ep 462 Links and Notes - March 1873: Comstock Laws [Bill/Rachel] - Recording Mar 5, 2023

[Intro -Bill] 150 years ago last week, on March 3rd, 1873, the Comstock Laws on obscenity, including birth control and abortion supplies or information [as well as of course pornography], became part of the US Criminal Code. Some of this wasn't struck down until 1972, a full 99 years later!

[Rachel - current news hook about federal case about FDA-approved abortion pills]

<https://www.pbs.org/newshour/politics/fda-finalizes-rule-change-allowing-mail-order-abortion-pills>

<https://www.bmj.com/content/380/bmj.p35.full>

The effects of the Comstock Laws are still reverberating today, even though the federal laws have gone unenforced for the last 50 years or so. We can hear the echoes in the call for bans on mailing medication abortion drugs mifepristone and misoprostol. These drugs are used to safely and effectively induce abortions, and can be used in the first 10 weeks of pregnancy, and doctors have even prescribed them in 12- and 13-week abortions. Medication abortions account for more than half of all abortions in the US.

Prior to 2021, mifepristone could only be distributed by select pharmacies and physicians' offices, and had to be dispensed in-person. Misoprostol has other non-abortifacient uses and was less restricted. With the COVID-19 pandemic, the FDA temporarily lifted the in-person requirement.

Now, with the right to a safe and legal abortion under attack at the state level and no longer protected at the federal level after the Dobbs decision, the FDA announced in January that they are making the rule change permanent, as well as expanding availability of abortion pills to retail pharmacies, providing they complete a certification process, which includes registering with the FDA and training for pharmacists.

Medication abortion pills will also be available by US Mail, even in states where abortion is highly restricted or illegal. The Department of Justice ruled in December that mailing the drugs was not prohibited by the Comstock Act of 1873, which banned mailing of "obscene" material. The Justice Department ruling said that mailing the drugs "lacks the intent that the recipient will use them unlawfully." The abortion drugs could be ordered from online pharmacies and mailed to recipients in any state. This means that women can visit with a physician via a telehealth appointment (where legal), get the abortion pill prescribed and mailed to them without jumping through a lot of bureaucratic hoops, or even leaving their house.

[Rachel - current news hook about Walgreens deciding to stop selling abortion pills in 20 states]

<https://www.npr.org/2023/03/04/1161143595/walgreens-abortion-pill-mifepristone-republican-threat-legal-action>

<https://www.npr.org/2023/02/01/1153593174/mifepristone-abortion-pill-federal-texas-lawsuit-restrict-access-nationwide>

Despite the broadening in the availability of abortion pills in retail pharmacies and by mail, there are still battles over access to these drugs. Walgreens, one of the largest retail pharmacy chains in the country, has already said that they won't sell abortion pills in states where Republican attorneys general have threatened legal action, even in states that aren't currently restricting legal access to abortions. This is in addition to states that have already curtailed abortion access. Walgreens hasn't started distributing abortion pills at any of their locations because they are still in the certification process. This comes after 20 attorneys general sent a letter to Walgreens and other pharmacies threatening legal action if they dispensed mifepristone. Other pharmacy chains that have also received the letter have not yet disclosed whether or not they will choose to dispense mifepristone in states where the legality to do so is under legal threat. *Mifepristone — which is also used to ease miscarriages — is still allowed in some of the states where Walgreens won't sell it, including Alaska, Iowa, Kansas and Montana. The situation*

underscores how challenging it can be to obtain an abortion even in states where it remains legal.

In addition to private companies voluntarily curtailing the sale and distribution of mifepristone, a Texas court is currently trying a case that challenges the FDA approval status of the drug. If the judge determines that mifepristone shouldn't be FDA-approved, the state of medication abortion would be at risk nationwide. Although other drugs can be used to induce an abortion, the mifepristone-misoprostol combination is the gold-standard protocol. *Normally, as the FDA has noted in its defense of its approval process, it would be unusual to pull a drug from the market after more than two decades of widespread safe and effective use. If Judge Kacsmaryk sides with the anti-abortion group, mifepristone would have to be pulled from the market, at least temporarily. The FDA could choose to restart the approval process, which could take years.*

Judge Kacsmaryk is a Trump-appointed judge who has engaged in right-wing judicial activism, including working as an attorney for a conservative Christian legal group based in Texas.

"It's no accident that the complaint was filed in Amarillo, says Elizabeth Sepper, a University of Texas at Austin law professor.

"The way the district courts in Texas dole out cases makes it so that there are a few places where you pretty much know which judge you're going to get," Sepper says. "So they know they have a very sympathetic ear."

Any appeals in the case would go to the U.S. Court of Appeals for the Fifth Circuit – widely known as a conservative jurisdiction – and then to the U.S. Supreme Court.

[Background - Bill] Modern obscenity law in the Anglo-American world dates to about the end of the First Industrial Revolution and the early Second Industrial Revolution. Victorian Britain unsurprisingly led that charge when it passed the [Obscene Publications Act](#) in 1857, raising obscenity offenses to a more serious level of criminality and (perhaps more importantly) empowering the government to seize and destroy obscene materials. The United States was more distracted by a much more serious issue: the sectional crisis and looming Civil War, and so it did not immediately jump on the bandwagon, until after the actual crisis had passed. Then in 1868, over a decade later, the British courts had a high-profile court ruling in "Regina [i.e. the Crown] v. Hicklin" where they came to a clearer definition of what actually constituted obscenity, in a case where ironically the obscene content at issue was an anti-Catholic pamphlet that was sincerely attempting to horrify readers about the salacious misdeeds of Catholic priests. The [Hicklin test](#) was an extremely broad interpretation and crucially ruled that any materials with any obscene content could be suppressed in their entirety without taking into account mitigating context for the obscene portions of the content. This case is important to mention for our purposes even though it occurred outside of the United States and the US legal system because the US judges faced the same questions about the actual definition and parameters of obscenity if they were going to enforce or rule upon state and later federal obscenity laws. Their interim solution for the second half of the 19th century and the early 20th century was to adopt the Hicklin court ruling from Britain and to import that very broad obscenity definition and suppression methodology into US law without any particular input from legislators or even the US Supreme Court. That means that the 1870s federal laws on obscenity that we are about to discuss, which would remain in effect in full or in part for an entire century, were extraordinarily broad in both their intent and enforcement. Anything with even a shred of arguably obscene content within it could face the hammer of federal enforcement, and – as we're about to discuss – among many things that included advertisements or educational materials on birth control and abortion for any reason and to any audience. In 1872, there was an initial somewhat limited federal law passed on the issue of obscenity, but it was amended within a year by the March 3rd 1873 Comstock laws that vastly widened the scope. By this point, for setting our frame of mind,

the Second Industrial Revolution and all its mass consumer production and advertising was taking off at full speed in rapidly growing US cities and fully marketized US rural communities, President Grant was beginning to wind down Reconstruction in the post-Civil War American South and he was set to deliver his Second Inaugural Address the next day, and the United States was coming into its own as a true interstate economy and political system instead of a fragmented patchwork of state-level enterprises and sectional communities. Moral crusaders among Protestant Republicans and Democratic Catholics were taking up a range of purported “vice” problems and demanding laws to prohibit and criminalize those vices. While states and cities were already taking this up here and there, one man had made it his personal mission to federalize the situation and make the United States postal system the morality police: [Anthony Comstock](#) of the New York Society for the Suppression of Vice, also heavily backed by the YMCA. Through his tireless lobbying, Congress enacted the obscenity and morality laws that would come to be known by Comstock’s name. And he was further successful in being named as the US Postal Inspector tasked with enforcing the new laws. Perhaps the wildest fact about this guy, which rarely gets mentioned, is that he was just 29 years old when he shepherded through this sweeping new federal law and became a Postal Inspector. He remained in that post until January 1907, into his 60s, through nine different presidential administrations from both major parties. Apparently his obsession with morality policing had begun as a hyper-Christian 19 year old Connecticut Infantryman during the Civil War, when he was surrounded by ill-behaved soldiers. He would spend decades arresting people, destroying lives, driving people to suicide, and above all endlessly censoring anything and everything that he could find jurisdiction over in the federal government or in New York City.

[Bill] So what did the March 3rd 1873 federal criminal code amendments state? *"Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose and every written or printed card, letter, circular, book, pamphlet advertisement, or notice of any kind giving information directly or indirectly, where, or how, or of whom, or by what means any of the hereinbefore-mentioned matters, articles or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed or how or by what means conception may be prevented or abortion may be produced, whether sealed or unsealed; and every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device or substance and every paper, writing, advertisement or representation that any article, instrument, substance, drug, medicine, or thing may, or can be, used or applied, for preventing conception or producing abortion, or for any indecent or immoral purpose; and every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing, is hereby declared to be a non-mailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever shall knowingly deposit or cause to be deposited for mailing or delivery, anything declared by this section to be non-mailable, or shall knowingly take, or cause the same to be taken, from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."* https://en.wikipedia.org/wiki/Comstock_laws

The federal law also added even harsher restrictions and punishments for obscene materials or objects within the District of Columbia, which had no state government to enact laws on the

question. Possession with intent to distribute (i.e. not for personal, private use) could lead to hard labor sentences for up to five years.

DC aside, the core of the law is about the mail. The US postal system was the legal mechanism for making this a federal criminal matter in an era where the courts still tended to view matters within state lines as being purely state matters. But also, the US postal system had exploded in popularity and usage in the decade preceding the Comstock laws. Back in August 2020, in episode 319, we looked at [the history of US mail](#), and we will repeat one short section of that here because it matters a great deal to this topic's context: According to [the USPS's official 2020 self-history](#), doorstep delivery in cities with high (profitable) volumes of local mail began in 1863 after it had been demonstrated in Britain that free doorstep delivery actually encouraged higher usage of the postal system and thus generated more revenues than it cost to provide delivery beyond the post office, where previously people had to pick up their mail. (Plus, Union soldiers were sending mail to be paid upon delivery by the recipient.) Mailboxes at home did not arise until 1912, so mail carriers had to circle back until someone was home before they could deliver. Doorstep delivery after 1863 also included multiple deliveries per day to business districts because mail was time-sensitive for businesses...

One other interesting thing of course that the text of this law tells us is what was being circulated or distributed at the time of its enactment, which is a good reminder of how much of our recent debates on morality, abortion, and birth control were already in full swing 150 years ago. And even though it was passed by Congress and signed into law, this does not mean that everyone in the United States agreed with the Comstock laws or enforcement actions at the time. Backed by much of the US free press, tens of thousands of people signed petitions in the 1870s in favor of repealing them, to no avail. Comstock simply dismissed the petitions as fake. When Congress didn't move on the issue in response to this public pressure, organized opposition did fade – perhaps through a combination of demoralization and fear – until the 1910s, a generation or so later. It is probably not a complete coincidence that this happened around the time that the Post Office Department began transitioning Americans from hand deliveries to mailbox deliveries. It also coincides with the US becoming a majority-urban population for the first time.

[Rachel - more notes here, elaborating on the consequences of the enforcements and examples]

<https://thehill.com/opinion/education/3882873-the-comstock-law-at-150-a-highly-relevant-cautionary-tale-for-today/>

During the Comstock Law's reign, millions of books, newspapers, magazines, prints, photographs and circulars were burned under court order. More than 3,000 persons arrested for violations of the Comstock Act served a total of 600 years in prison, most for writing about topics that today are widely accepted in society, including atheism, homosexuality and sexual health. Medical professionals writing about abortion or contraception were prosecuted, as well as 'freethinkers' who believed in the separation of church and state. Gilded Age freethinker and editor D.M. Bennett was imprisoned for 'crimes' including advocating for equality of the sexes.

In 1915, William Sanger and Margaret Sanger were arrested on separate occasions for disseminating information about contraception through the mail (Margaret Sanger wrote a newspaper called *The Woman Rebel* which was distributed by mail) and in their New York clinic. Although convicted, her conviction was later overturned on the grounds that contraceptive devices could legally be promoted for the cure and prevention of disease. However, she did end up spending 30 days in a women's penitentiary in Queens.

In 1932, Sanger again ran afoul of Comstock. She had a shipment of diaphragms sent from Japan to a sympathetic New York City doctor. When US customs seized the shipment, Sanger

filed a lawsuit challenging the seizure. In 1936, a federal appeals court ruled in *United States v. One Package of Japanese Pessaries* that the federal government could not interfere with doctors providing contraception to their patients.

<https://www.politico.com/story/2009/02/emma-goldman-snubs-comstock-law-feb-11-1916-018679>

Emma Goldman is another famous person who challenged the Comstock Law, also for disseminating information about contraception. On Feb. 11, 1916, Goldman was in the middle of a lecture on family planning in New York when she was arrested. After her arrest, Goldman told reporters "When a law has outgrown time and necessity, it must go, and the only way to get rid of the law is to awaken the public to the fact that it has outlived its purpose. And that is precisely what I have been doing and mean to do in the future." Goldman spent two weeks in a prison workhouse.

Griswold v. Connecticut (1965) struck down the last remaining state Comstock law regarding contraception in Connecticut and Massachusetts, but only for married couples. *Eisenstadt v. Baird* (1972) extended the right to contraception to unmarried people.

https://en.wikipedia.org/wiki/Roth_v._United_States

Roth v. United States (1957) was a case against Samuel Roth, who ran a book store in New York. He was charged with violating the Comstock Law by advertising and distributing a magazine called *American Aphrodite*, which contained literary erotica and nude photography. Although his conviction was upheld, *Roth v. United States* was a landmark case in that it established a legal test for defining what constituted obscene materials: Whether the average person, applying contemporary community standards, would find that the material appeals to a prurient interest in sex, and whether the material was utterly without redeeming social value.

https://en.wikipedia.org/wiki/One,_Inc._v._Olesen

One Inc v Olesen was a 1958 decision which held that homosexual materials weren't per se obscene. The October 1954 issue of *One Magazine*, a pro-gay publication, was declared "obscene, lewd, lascivious and filthy" by Los Angeles postmaster Otto Olesen. *One Inc v. Olesen* was the first SCOTUS decision pertaining to homosexuality and the first to address free speech rights with respect to homosexuality.

<https://www.oyez.org/cases/1965/368>

Massachusetts law allowed the attorney general to initiate legal proceedings against an "obscene" book, *Memoirs of a Woman of Pleasure*, also known as *Fanny Hill*, written by John Cleland in about 1750. Massachusetts courts deemed the book to be obscene. That ruling was appealed to the Supreme Court, who heard arguments in December of 1965. The Court held that Massachusetts was not right in finding *Memoirs* obscene. Applying the Roth test, the book was not totally without social value. The Court reaffirmed that books could not be deemed obscene unless they were unqualifiedly worthless, even if the books possessed prurient appeal and were "patently offensive."

<https://www.oyez.org/cases/1971/70-73>

In 1973, the Supreme Court further lessened the definition of "obscene" materials in *Miller v. California*. Marvin Miller was convicted of distributing obscene material after conducting a mass-mailing advertising campaign for the sale of "adult" materials. In their ruling, the Court amended the Roth test: The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest. . . (b) whether the work depicts or describes, in a

patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

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