



MEDICINE THEN AND NOW
Contemporary Comstockery: Legal Restrictions on Medication Abortion

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As of May 2022, the overturning of *Roe v. Wade* appears imminent, even as the U.S. Food and Drug Administration has expanded access to medication abortion through the mail. The agency permanently approved the mailing of mifepristone to patients, and it will no longer require an in-person physician visit to obtain the drug via prescription. Approved to induce abortion up to the eleventh week of pregnancy and to treat miscarriages, the drug is taken in combination with a second one, misoprostol, which is widely available via regular prescription and used to treat other conditions. A recent study published in *JAMA Internal Medicine* found that medication abortion is so reliably safe and effective that there is little need for in-person testing prior to the distribution of these pills.¹ Patients are able to safely self-manage medication abortions at home. The FDA's stance reflects this excellent record. Nonetheless, in response to the federal policy change, antiabortion state legislators have already begun introducing new legislation to restrict or outright ban medication abortions through the mail, citing safety and the protection of women's health as justification.¹ As a *New York Times* headline put it mere days after a draft of Justice Alito's majority opinion was leaked to the press, "Abortion Pills Will Become the Next Battleground in a Post-Roe America."²

For historians of law and medicine, this is a familiar story and it echoes similar battles in the nineteenth and early twentieth centuries. Abortion was not illegal in the colonial or early national period, and when prosecuted, it was usually in local courts that looked to common law precedent. By the 1820s, state legislatures began to regulate substances that induced abortion, but were also known to be poisonous even in small

doses. Within fifty years, however, federal and state laws would come heavily regulate abortifacients and abortion information sent via mail under new obscenity doctrines, ironically pushing women towards a more dangerous underground economy of unregulated patent medicines. Today's fight to ban medication abortion by mail is the inverse, targeting a well-regulated, thoroughly tested drug whose safety record far exceeds the ordinary risks of pregnancy and delivery in the United States. Moreover, as the historical record well shows, this repression did little to stem abortion rates in general, whether medical or surgical.

As we illustrate in this essay, reexamining these origins provides a roadmap to understanding the stakes of medication abortion in a changing legal landscape. In particular, understanding the history of abortifacients and the postal service provides crucial context—even if the worlds of 1873 and today are quite different. In the nineteenth century, outwardly stated concerns about morality and obscenity drove the passage of these laws, which at their core were about controlling women's bodies and reproductive lives. Today, that veneer of "morality" has been whitewashed, but the core principle remains the same for those wanting to eliminate abortion options.

ROOTS OF REPRODUCTIVE CONTROL

Abortion was a common practice in early America and most women experienced some combination of menstruation, pregnancy (and its prevention via various contraceptive methods), birth, miscarriage, and abortion over their reproductive life cycle.^{3, 4} Unlike today, none of these reproductive processes was necessarily overseen by a physician. In the early nineteenth century, the parameters of what constituted a "trained physician" were not even yet officially established, and medical school graduates competed fiercely for both patients and respect with the "irregulars" also practicing medicine, including midwives, folk healers, and homeopaths.^{5, 6}

In the 1820s, however, abortion slowly became a subject of intense interest and scrutiny. State legislatures began to take an interest in abortion for the first time from a statutory perspective, targeting the advertising and sale of abortifacients that included hellebore, tansy, pennyroyal, and other plants that could be poisonous. Simultaneously, state legislatures sought

¹ Georgia bill would ban abortion pills by mail, require exams. ABC News. Available at: <https://abcnews.go.com/Health/wireStory/georgia-bill-ban-abortion-pills-mail-require-exams-82466376>

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to regulate the shifting practices of medicine and surgery, including, but not limited to, abortion.⁷

It was no secret that surgical abortion, performed by both “regulars” and “irregulars,” was widely available in larger cities and smaller towns alike. Abortifacients including tinctures, pills, powders and douching solutions and equipment purchased in pharmacies or sent via the mail were even more commonplace. Typical advertisements for such services or products noted their benefits in aiding women who needed to eliminate “suppressions” or find “relief” for “irregularities.”² Fertility rates in late eighteenth and early nineteenth century America clearly indicated that women, especially those who were white and middle- or upper-class, were indeed regulating pregnancies.⁴ Free Black women in the urban North had even lower birth rates, while enslaved women before the Civil War extended breastfeeding and used herbs to avoid pregnancy as strategies of resistance against a system that exploited their reproduction for profit.⁸ Although it is difficult to assess abortion rates before the middle of the nineteenth century, historians and demographers have guessed that abortion rates had risen from one abortion for every 25–30 births before 1840 to possibly as high as one abortion for every 5–6 live births by the 1860s.³

Historians of medicine have long chronicled how, in the nineteenth century, newly professionalizing “regular” physicians made abortion a key issue. This was in part to distinguish themselves from midwives, homeopaths, and “irregulars” who did not have formal medical school training. In a period dominated by enormous social changes—particularly with respect to the emergent women’s rights movement and shifting racial and ethnic demographics—doctors sought to professionalize and solidify their position in the medical marketplace. Part of this included regulating the moral and physical health of the nation.¹¹ A vocal contingent, including physicians like Horatio Storer, began a campaign against abortion, decrying its high rates. Religious and political leaders came together alongside doctors to warn Americans about the dangers of native-born, Protestant white women shunning the duty of motherhood. President Theodore Roosevelt openly declared that “the more educated classes” and their “murder of children before birth” was nothing less than “race suicide.”⁴ By 1900, individual physicians and the American Medical Association were successful in lobbying state legislatures to pass laws prohibiting abortion in every state in the Union.⁵ These transformations had the unequivocal effect of endowing male legislators, clergy, and physicians more control over women’s health.

COMSTOCK’S CRUSADE

Abortion clearly faced many legal obstacles in this period at the state level. But to better understand the potential limitation of access to mifepristone by mail, there is a particular flashpoint in this long history of suppression: the passage of the federal 1873 Comstock Law, formally known as the Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use. Born in Connecticut in 1844, Anthony Comstock, for whom the law was named, was not a physician. But as a moral crusader, he would make it his life’s work to link anything and everything to do with sex—including pornography, birth control, and abortion—with obscenity, waging a war on the broad concept of “vice.” His battleground of choice was the U.S. Postal Service.¹²

Obscenity law in the nineteenth-century United States was mostly regulated by local courts and there was no consistent legal standard applied. A wide range of Victorian printed smut, abortifacients, sex toys, and contraceptives proliferated in catalogs, shops, and pharmacies. After the Civil War, Comstock moved to New York, where he became affiliated with vice regulators working through the auspices of the Young Men’s Christian Association (YMCA). Shocked at the number of brothels and sexually explicit material sold on the streets, Comstock became determined to expand the definition and scope of what constituted obscenity. Joining a YMCA-sponsored squad known as the Committee for the Suppression of Vice, he accompanied the police on raids and sought to shut down and prosecute local businesses that trafficked in contraceptives, abortifacients, and pornography. In 1873, the YMCA and the NYSSV sent him to Washington to lobby for an expanded obscenity law that would restrict the sexual material and information so common in nineteenth century America. Congress passed the “Comstock Postal Act” within a month of his arrival in D.C.

There was no doubt that the Comstock Act had sharp legal teeth. As Comstock and his anti-vice crusaders desired, the definition of obscenity expanded to include anything deemed “obscene, lewd, or lascivious” with no restrictions and regulated advertising, manufacturing, or distributing anything via the mail classified as such. Penalties included huge fines and prison time. Postal inspectors could now initiate violent raids on private individuals and businesses suspected of using the mails to distribute forbidden items. Moses Harman, publisher of the radical free-thought newspaper *Lucifer the Light Bearer*, wrote of this regime:

[We have] passed through many critical periods, many trying times...but in none of these critical periods did there seem to be such combinations of adverse forces as at the present moment. Never before have we faced judicial rulings so thoroughly hostile to freedom of speech, freedom of press, freedom of discussion upon the subject that all subjects needs the light of free

² Brodie; 1997: 70-71.

³ Mohr, 52.⁹ Further, as the Guttmacher Institute has demonstrated, abortion restrictions have not been the main driver of the decline in US abortion rates between 2011 and 2017. See¹⁰

⁴ The Minneapolis Journal. 1903 March 2.

⁵ Mohr: 1

investigation...as does the subject of sex, involving and including as that subject does the right of woman to self-ownership – ownership of her creative powers and functions, and the right of the child to be born well, if born at all.⁶

The reach of obscenity law was even greater as state statutes and local ordinances known as the “Little Comstock Laws” also followed in the wake of the 1873 federal statute to further regulate sex and sexual material. In the first twenty years of the federal law’s enactment, it alone resulted in thousands of dollars in fines and seizures of materials, as well as hundreds of arrests.¹³

The Comstock Act and its corresponding state restrictions no doubt had a chilling effect on free speech.¹⁴ By the 1920s, sexual reformers like Ida Craddock, Margaret Sanger, and Alice Stockham were also openly challenging the law with their distribution of pamphlets and materials that relayed birth control information and sex education in frank terms. Famously, Margaret Sanger spent time in jail for doing exactly this at her Brooklyn birth control clinic, the 1910s predecessor to Planned Parenthood. In a pamphlet she published in 1914 titled *Family Limitation*, Sanger warned against relying on *coitus interruptus* or the rhythm method. She explained douching methods (and included a recipe that included a teaspoonful of Lysol and two quarts of warm water), condom usage, and provided descriptions of pessaries, sponges, and vaginal suppositories, complete with diagrams.¹⁵

The uncoupling of contraception from obscenity was a long and protracted legal battle, slowly working test cases (including Sanger’s) through the system and eventually leading to new case law. In the 1930s, the Sanger-founded National Committee on Federal Legislation for Birth Control unsuccessfully attempted to lobby Congress directly to intervene and update outdated “vice” prohibitions. Instead, the birth control movement found that its only legal inroad was through the courts. In the wake of World War I and government suppression of political activism, civil liberties law was already transforming dramatically in this era. In addition to the limits of political radicalism, judges and juries also began to reconsider what constituted obscenity. Could scientific information about reproductive health really be obscene? they asked. The general consensus answer was trending towards a firm, “no.” With the help from the NCFLB and the American Civil Liberties Union, numerous court decisions including ones like *United States v. Dennett* (1930), *United States v. One Book Called Ulysses* (1933), and *U.S. v One Package of Japanese Pessaries* (1936) transformed the legal landscape around obscenity and sex. The courts were especially sympathetic to physicians who wanted to prescribe birth control to patients, and to reformers authoring scientifically grounded sex education pamphlets that prescribed proper sexual

behavior. Comstock laws gradually came to be viewed as antiquated and out of touch.¹⁶

Moreover, the Comstock laws never wholly prevented “black market birth control.”¹² An entire underground economy of sexual health-related products flourished, despite the laws on the books attempting to suppress them. Pharmacies and mail order companies sold sex toys and barrier contraceptives under the guise of medical equipment. Distributors maintained their lucrative sales by fashioning their items in advertising as health aids. Vaginal suppositories, douching mechanisms, and pessaries promised to fix medical issues such as a prolapsed uterus, or were promoted to ensure “vaginal irrigation” or feminine “hygiene.”¹⁷ Most significantly, a wide range of abortifacients marketed as patent medicines—containing harmful ingredients that sickened and killed women attempting to use them—continued to be sold. These medicines, often consisting of powerfully emetic herbs, were consumed in teas or chewed, but it was difficult to assess the quantities needed which made them markedly dangerous. Yet because doctors in many states were prohibited by their state’s obscenity law from even discussing birth control with patients, the vast majority of Americans obtained fertility control items and information from an open market.⁸

Although many physicians were sympathetic to their patients’ desire to want to control their families, many refused to discuss birth control at all, either from fear of legal prosecution or their own moral stance on it. As a result, the market for contraception and abortifacients continued to be, by all purposes, largely unregulated. Sanger, a trained nurse, wrote of her patient Sadie Sachs, a Russian Jewish immigrant whose death by a self-induced abortion spurred her to action in founding the birth control movement.⁹ She and other reformers recognized the potential to legalize contraception by urging strict medical regulation of birth control, arguing that the open underground market hurt women and left them at the mercy of unscrupulous contraceptive distributors whose products were, at the very least, merely ineffective and, at worst, deadly.¹⁹

CONCLUSION: CONTEMPORARY COMSTOCKERY?

Although abortion itself remained a crime until the 1970s, starting in the mid-twentieth century the landscape of fertility

⁷ For more on the idea of social camouflaging of commodities whose use is illegal or socially unacceptable, see ¹⁷

⁸ Tone: 80-81;¹⁸

⁹ From the historical record, it remains unclear whether Sadie Sachs was a real person by that name, a pseudonym for a real person, or a pastiche character devised by Sanger from a number of different persons and employed in her writings for maximum narrative effect. For an accessibly written introduction to this person and this question, see, for example, Hajo, CM. Birth of a movement: the case of Sadie Sachs. Margaret Sanger Papers Project. 2012. Available at: <https://sangerpapers.wordpress.com/2012/07/11/birth-of-a-movement-the-case-of-sadie-sachs/>

⁶ Lucifer the Light Bearer. 1905 June 22.

control changed dramatically and for the better. From the 1930s through the 1960s, when these obscenity laws began to change and the Comstock era finally ended, women began to gain freer access to a growing range of contraceptive tools, prescribed by their physicians. These options included not just the diaphragms of Sanger's banned literature, but the new oral contraceptive pill, brought to market in the United States in 1960. Simultaneously during these decades, the consumer protection mandate of the Food and Drug Administration had expanded to include both the safety and efficacy of drugs and devices. A robust regulatory framework has evolved even further in our post-Comstock world, where information about reproductive health is freely accessible and a wide array of safe contraceptive technologies is available often at no direct cost from the doctor's office or local pharmacy.

The federal expansion of medication abortion employs the postal service for a medical benefit and subverts the ongoing attacks that have already severely curtailed abortion clinic access in many states. Indeed, the post office has played an important role in U.S. medical history, including delivering medications and supplies to rural Americans since the earliest days of the republic. Although this could include the delivery of patent medicines of dubious efficacy, over the course of the twentieth century, it played an increasingly vital role in supporting the provision of FDA-regulated prescription drugs. The rise of the Internet and e-commerce more generally in the past two decades has only solidified the centrality of mail and parcel delivery in Americans' lives, including their daily dose of prescription pharmaceuticals. The corner drugstore is now in the cloud.¹⁰

Yet the potential for new laws regulating the sale of abortion pills threatens to reenact a Comstockian regime of sorts. Unlike the late nineteenth and early twentieth centuries, however, where obscenity laws simply drove the trade to the black market and did almost nothing to regulate safety, today's proposed legal restrictions threaten to eliminate access to a safe and effective set of medications that physicians and patients need to treat miscarriage and safely induce abortion. Antiabortion legislators, however, seek to ban these medications on protectionist grounds, arguing they are unsafe for women. Not only would this limit a vital medication, but as history also shows, enactment of these laws will almost certainly result in the proliferation of an illegal trade in mifepristone and misoprostol, and may encourage "copycat" drugs that elude legal consequences but are, in fact, ineffective or unsafe.

In a post-*Roe* world, it will be more important than ever for patients to have a variety of options to access safe abortion methods. The postal service will again play a crucial role in maintaining access to medication abortion. We have seen the consequences already of curtailing the freedom of the mails in

the name of "morality." The argument about safety that legislators and supporters of restricting medication abortion are making is not only medically false, but functions as a disingenuous cover for the same arguments the Comstock laws' made about protecting Americans from "obscenity." The Comstock Act never achieved the goals of its architect which was to stop the trade of sexual material. Instead, its most serious consequence was to limit the conversation on sex and reproduction in America for a century—a curtailing whose negative outcomes haunt us to this moment.

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