

## [Boom! Lawyered: The Missouri Abortion Ban You Didn't Hear About](#)

Imani Gandy: Hello, fellow law nerds! Welcome to another episode of Boom! Lawyered, a Rewire.News podcast hosted by the legal journalism team that doubts your commitment to Sparkle Motion. I'm Imani Gandy.

Jess Pieklo: And I'm Jess Pieklo. Rewire.News is dedicated to bringing you the best reproductive rights and social justice news, commentary and analysis on the web. And the Team Legal podcast is part of that mission. So a big thanks to our subscribers and a welcome to our new listeners.

Imani Gandy: So Jess, I have good news. I've got bad news. And I have a question. Which do you want first?

Jess Pieklo: Hit me with the question.

Imani Gandy: It's a question about your kids.

Jess Pieklo: Okay.

Imani Gandy: So when you found out that you were pregnant with your kids, were you confused about what their race would be?

Jess Pieklo: I'm sorry, what? What?

Imani Gandy: I'm just wanting to know if at any time when you were pregnant with either of your kids, did you have any confusion about what the race of your kids would be?

Jess Pieklo: What kind of question, is this a trick question? What, what are you doing?

Imani Gandy: Nope, it's not a trick question.

Jess Pieklo: Okay. So what in the world are you talking about? Their dad's white. I'm white. And so any kids that we have would be white. I mean, let me be clear, that wasn't a prerequisite or anything, but I'm pretty sure that's how it works.

Imani Gandy: So it stands to reason then if, for example, a black woman found out she was pregnant and decided to continue that pregnancy to term, she would understand that barring any complications she would be giving birth to a black baby.

Jess Pieklo: Okay, sure. I mean that makes sense. When I was pregnant with both of my kids and I was going through my doctor's appointment, I never heard a black woman at the OB GYN saying something like, "Give it to me straight doc. Is my baby going to be black?" But again, Imani, why are you asking?

Imani Gandy: Well, because on Tuesday, a federal court in Missouri said that the state's race selective abortion ban can go into effect. That means that abortion providers cannot perform abortions if they know that the person choosing to get that abortion is doing so solely on the basis of the race of the fetus. And I just want to make sure that I wasn't losing my mind and thinking what a pointless fucking law.

Jess Pieklo: Okay, that makes sense because it is a really silly law. Missouri also said that the state sex selective ban can go into effect and that the Down syndrome ban can also go into effect too. Now the sex selection in Down syndrome ban aren't quite as, I guess I'd say, confused as the race ban, but with all three lawmakers in Missouri who enacted them are pretending to be concerned about a ridiculous non-issue. For example like pregnant people being confused about the race of their child. Or also a really serious issue based on stereotypes, like that there are scores of immigrant AAPI women who are choosing to abort girls because they are bringing so called cultural values to this country. Or even false narratives, right? Like the notion that terminating pregnancies due to a Down syndrome diagnosis is eugenics.

Imani Gandy: Yep.

Jess Pieklo: You said there was good news and bad news and we got to that question, but what's the good news? What's the bad news?

Imani Gandy: Well, you already touched on the bad news and that is that the state of Missouri has allowed the sex elective, race selective and Down syndrome bans to go into effect. But the good news is, and this is really good news, the court smashed down Missouri's ridiculous multi-week gestational ban.

Jess Pieklo: That is fantastic news. And in this episode we're going to talk about all of it.

Imani Gandy: All of it?

Jess Pieklo: All of it. Yes.

Imani Gandy: Okay, Jess. So where do we begin? What is going on with ... what the fuck is going on with Missouri?

Jess Pieklo: Question of the ages, Missouri, we love you, but Imani has written a couple letters...

Imani Gandy: Get it together Missouri. My God.

Jess Pieklo: Okay, on Tuesday, a judge blocked Missouri's ridiculous, like I can't stress enough how ridiculous this multi-week gestational ban. They blocked the ban a day before it was set to take effect. But the court ruled another restriction that bans abortion based on the race, sex or Down syndrome diagnosis of a fetus

could take effect. So it's a mixed bag from Missouri. And let's talk about the decision and what it means.

Imani Gandy: So the good news is abortion remains legal in Missouri up to 22 weeks.

Jess Pieklo: Yay. Jazz hands.

Imani Gandy: Jazz hands. Spirit fingers. So, Missouri lawmakers had passed this bill that Jess referred to in a previous episode as a "Russian nesting doll" of abortion bans. It was perfect terminology and I love it. The law stacked pre-viability gestational marker bans on top of each other. So the law made it a felony to perform an abortion at eight weeks, at 14 weeks, at 18 weeks and at 20 weeks. The law was written in such a way that if the court had blocked the eight-week ban, it could have still enforced the 14-week ban, for example. And if the court blocked the 14-week ban, then it could maybe enforce the 18-week ban and so on. Hence the Russian nesting doll imagery. So on Tuesday, judge Howard Sachs, who is a Jimmy Carter appointee-

Jess Pieklo: What?

Imani Gandy: ... let me just stress that he was appointed by Jimmy peanut farmer Carter in 1970 what the fuck ever, which is why it is so important to understand how screwed we are with these Trump judges. Because they are going to be on the bench until 3055.

Jess Pieklo: 3055. We'll all be like Battlestar Galactica. But there's going to still be Trump judges on the bench.

Imani Gandy: They will be heads in a jar like Futurama. It's just going to be like Trump's head in a jar and we're going to be like, "All hail emperor Trump head in a jar." That's what life is going to be like in 3055. But I digress. So this Jimmy Carter appointee blocked all of these pre viability, multi gestational marker bans. So that's the good news. There's more good news. Anti-choice activists continue to lose on these extreme abortion bans. Now they are working like mad to pass them, but so far not a single federal court has let them enforce one. So that's the good news. Fantastic news.

Jess Pieklo: That's excellent news. Yes. All right, Naturally I get to deliver the bad news, I see how this works.

Imani Gandy: Yeah.

Jess Pieklo: All right. So the bad news is that the court allowed Missouri's reason ban to take effect. And like we've said, that law would ban pre-viability abortions, and I want to say that again. Pre-viability abortions. If the reason for the abortion was based on the race, sex or Down syndrome diagnosis of the fetus. Anti-choice lawmakers like to call these restrictions, discrimination bans or eugenics bans,

because they're hoping that by inflaming people's emotion they can distract from what these really are, which are patently unconstitutional pre-viability abortion bans.

Imani Gandy: Unconstitutional pre-viability abortion bans. I just feel like, you know, I really needed to reiterate that. I also need to reiterate that this is not eugenics, especially when it comes to the Down syndrome diagnosis. They are wielding people who have Down syndrome and weaponizing them against people who want to maintain reproductive autonomy. Right. And it's really gross. What they're doing is they're saying that this is some sort of large scale eugenics plan when it's not. If a person decides to terminate a pregnancy because they receive a diagnosis of Down syndrome, that's not eugenics. That's an individual person making an individual choice about what to do with their own individual goddamn body.

Eugenics on the other hand, like your friend Amanda Stevenson, who's a professor at University of Colorado, lovely woman, very smart. She said to me, for an article that I wrote about Clarence Thomas yapping on about eugenics. She said, "Eugenics is an ideology advocating for population-wide policies aimed at changing who has kids in order to 'improve the population,' it's about removing or constraining individual reproductive choices," right? So it is not about the choices that individuals make about their own reproductive autonomy. I just really need people to understand that people who choose to terminate a pregnancy based on a Down syndrome diagnosis are not complicit in some eugenics plan.

Jess Pieklo: And that when you hear anti-choice activists call these things, eugenics bans, that you know what they're up to, right?

Imani Gandy: Absolutely, yes.

Jess Pieklo: So these bills have become wildly popular in the states like Ohio, Kentucky, Arkansas, North Dakota, Utah, a couple others I can't remember off the top of my head.

Imani Gandy: So many.

Jess Pieklo: There are so many. We've got them on the tracker, go to the tracker. They have all passed similar measures and when the courts have had a chance to rule on the constitutionality of these bans, they've declared them unconstitutional, all of them until Missouri. So that's the bad news. I delivered it. But Imani, I kind of have the feeling we've got more.

Imani Gandy: Oh, there's more, there's always more. We're in Trump's America. It's just more, more, more, more. Bad, bad, bad.

Jess Pieklo: More, more, more. Bad, bad, bad.

Imani Gandy: That's going to be his like 2020 campaign slogan. More, more, more. Bad, bad, bad.

Jess Pieklo: More, more, more. Bad, bad, bad.

Imani Gandy: So what do you want to talk about first? Do you want to talk about enforcing these bans? Or do you want to talk about what's going to happen at the courts?

Jess Pieklo: Oh, Christ, well, both I think might require a whisky. How about we start with what enforcing a ban like this might look like?

Imani Gandy: Well, that's a good question because in reality, who the hell knows? And it can't be good. It's just, it's more, more, more. Bad, bad, bad.

Jess Pieklo: More, more.

Imani Gandy: So in order-

Jess Pieklo: That's the new theme song for Boom! Lawyered. More, more, more. Bad, bad, bad.

Imani Gandy: Yeah. We're putting that on a T-shirt, guys, merch is coming. So providers will have to certify that the reason for an abortion is not one of the prohibited reasons. And if the state is going to properly enforce this ban, it means that the state is going to have to take a look at those abortion records and that means we've just opened the door to Missouri further snooping around in the provider-patient relationship.

Jess Pieklo: Super. Let me just say super. This is a state that has officials that had no problems shaking down medical students, for example, to try and intimidate them out of going into the practice of medicine. I feel really, really good about what these folks are going to do. I feel like they're going to come at this from a very solid and good-natured place, don't you?

Imani Gandy: Oh, absolutely. I couldn't agree with you more. Actually, no, I couldn't agree with you less.

Jess Pieklo: I mean, who do you think they're going to investigate? Right? We've got a race man, I'm going to guess they're going to start with the black patients who had abortions.

Imani Gandy: Yep. I'm going to guess that you're absolutely right. They're also probably going to target Asian American and Pacific Islander women, right? And pregnant people, AAPI people, because they have this notion in their head that immigrant women, immigrant people are coming to this country and bringing so called cultural values from the countries that they're emigrating from. And these cultural values, these, you know, boy first, no girls values, there's no evidence.

There is literally zero evidence that that sort of sex selection is going on in this country. But that doesn't matter to anti-choicers who want to weaponize people of color, women of color, immigrants to foment their further restriction of abortion access.

Jess Pieklo: How are they going to prove this shit anyway? Like sincere legal question, how do you prove this shit?

Imani Gandy: They're ultimately impossible to prove, right? Because they add a mens rea element to abortion restrictions where it's not possible to really prove mens rea.

Jess Pieklo: Okay, so hold up. What do you mean by mens rea, since our listeners may not know?

Imani Gandy: So mens rea, which is spelled M-E-N-S R-E-A, if you want to go look it up. Mens rea refers to a person's criminal intent. It refers to essentially their state of mind. What was the person thinking when they committed a certain crime? That's the question that mens rea asks. It's a way to differentiate between people who didn't mean to commit a crime and a person who set out with the intent to commit a crime. Now certain crimes require a certain mens rea.

Jess Pieklo: Right. So for example, to be convicted of first degree murder, you have to have meant to murder someone. As opposed to involuntary manslaughter, which is basically killing someone by accident.

Imani Gandy: So think about these reason bans, particularly think about the race and sex reason bans. How is a provider to know whether or not a person is seeking an abortion "solely because" of the race or sex of the fetus? That's what the law says. It says, "No person shall perform or induce an abortion on a woman if the person knows that the woman is seeking the abortion solely because of the sex or race of the unborn child."

Jess Pieklo: So this really puts providers in the position of interrogating their patients rather than caring for them. And this is way beyond the scope of providing any care, right? Like this is, "Excuse me, what are you doing?"

Imani Gandy: Precisely. And these sorts of bans will be difficult for a reasonable and non-corrupt or aggressive prosecutor to prosecute. Because the reason bans try to turn respecting someone's reproductive choice into a kind of hate crime and hate crimes are very difficult to prosecute.

Jess Pieklo: Can you say more? That that seems like a lot.

Imani Gandy: Absolutely. Let me explain what I mean by that. Hate crimes are crimes that require an extra layer of proof. So for example, in order to morph a run-of-the-mill assault, which is an act intended to cause an apprehension of harmful or

offensive contact, that's the legal terminology, the legal description of the term assault.

Jess Pieklo: Lawyers, man.

Imani Gandy: I mean, honestly. So in order to turn a run-of-the-mill assault into a hate crime, a prosecutor must prove that the accused undisclosed intent was based upon prejudice or bias. So if there's a white supremacist out there beating up black people, the prosecutor has to prove that that white supremacist's undisclosed intent to beat up black people was based on his prejudice or bias against black people.

Jess Pieklo: Right. Because beating up someone is itself a crime. Beating up someone because they are black is a hate crime though. And I just got to say all of this is bonkers because we're talking about legal abortion and there's nothing criminal about legal abortion.

Imani Gandy: There's nothing criminal about legal abortion.

Jess Pieklo: You should turn that into like a song.

Imani Gandy: There is nothing criminal about legal abortion. There's nothing about legal abortion. If you think that legal abortion is criminal, you're wrong. Okay, there you go. That was my little ditty for the day. Oh, for Christ's sake, we have lost our minds.

Jess Pieklo: Missouri, you made us bananas.

Imani Gandy: Honestly. Honestly. Seriously, Missouri get your shit together. So for hate crimes. I have to have to say as an aside, I have a friend from Missouri, you know Missouri is called the Show-Me state. He said, "You know, I'm from Missouri and I can let you know that it's not so much the Show-Me state as it is the show-me-the-way-out state." Which is sad, but he's from Missouri, so he can say things like that. I would never say things like that because I know lovely people from Missouri who are doing their damndest to push back against these nonsense laws. But back to the hate crimes discussion.

Jess Pieklo: Yes.

Imani Gandy: So for hate crimes, a prosecutor has to get inside the accused mind in order to prove criminal intent. And again, criminal intent is mens rea. And then the prosecutor must go one layer deeper into the accused mind to prove beyond a reasonable doubt that bias or prejudice form the foundation for that intent. So the prosecutor has to kind of look into the accused minds and try to figure out, "Well, why is it that you beat up that black person? Is it just because, I don't know, the black person was in your way at the CVS? Or is it because you're a

white nationalist who supports Trump and really hates black people?" That's what the prosecutor has to figure out.

And it's hard to kind of look into a person's mind and figure out what their intent is. So now when it comes to these reason bans, it's even more difficult, because the prosecutor must get inside the pregnant person's head to determine whether that pregnant person sought to terminate a pregnancy based solely on the sex or race of the fetus. And then the prosecutor has to determine that the doctor performing the procedure knew that the pregnant person was seeking to terminate that pregnancy solely based upon these prejudices. That's a lot of layers of proof for something that, like you said, isn't criminal because abortion isn't criminal, abortion isn't criminal. Abortion is a legal procedure that you can get under the constitution.

Jess Pieklo: I just, that's amazing. At some point we're going to do an all sing song episode.

Imani Gandy: I was going to say Boom! Lawyered the musical is absolutely happening some day.

Jess Pieklo: It has to happen! Between the two of us. Okay, so that conversation was really helpful for me to contextualize what it would look like regarding the race ban. But what about the Down syndrome ban? That seems like it might be a little different.

Imani Gandy: It is a little bit different and it might be a little bit easier for a prosecutor to prosecute, especially if the person decided to get an abortion immediately after receiving a medical diagnosis of Down syndrome. But even so, how is the abortion provider to know that the sole reason the person is seeking an abortion is due to the Down syndrome diagnosis? Maybe the pregnant person was already on the fence, perhaps for economic or other reasons and a Down syndrome diagnosis was the final straw. That pregnant person realized that they didn't have the resources to care for a child with Down syndrome.

But that doesn't mean that the Down syndrome diagnosis was the sole reason, which is what the law requires. It requires it to be the sole reason. And again, I just want to say it's not eugenics. It's an individual choice that that person is making. But, you, go, go forth please. Before I started singing again.

Jess Pieklo: Yeah. I mean, it's all true. It gets me stammering because, I mean, our listeners should remember that prosecutors had been really aggressive when it comes to prosecutions related to abortion restrictions and logistically in Missouri it would be impossible, I think, to get a diagnosis and then boom, get an abortion. Like it's not like abortion access is wide. You know, Missouri is not like an aborto-utopia, right? It's not, you know, it is really difficult already to get an abortion there. So what this means is that this is going to leave so much room for bad faith prosecutions and just that aggressiveness when it comes to abortion restrictions and prosecutions, none of it good.

Imani Gandy: Nope, none of it's good. So, yeah, I guess it's time to talk about the courts now, because I'm sure that's going to be great. Yay.

Jess Pieklo: Yeah. That always goes better.

Imani Gandy: It definitely always gets better. So Missouri let this ban take effect and that's the bad news, right?

Jess Pieklo: It is. Also, I'm going to say it's qualified bad news though. Okay. Because the judge also said that he'd be open to as applied challenges or those, for listeners, are case by case challenges and blocking the law. And I mean personally I think that's kinda crappy because you make one person go to the court and beg for the possibility of having an abortion. That's terrible.

Imani Gandy: Yeah. And just let me just pop in and interrupt for a minute. The difference between an as applied challenge and a facial challenge. A facial challenge looks at a statute and says, "This statute is unconstitutional across the board for everyone." And as applied challenge makes an individual plaintiff go in and say, "This statute is unconstitutional as applied to me specifically," meaning that a bunch of providers would have to go into court and say, "This statute is unconstitutional as applied to me." "And me too." "And me too." "And me too." And it's a more difficult and arduous process.

Jess Pieklo: Yeah. So, you know, I mean that leaves a little bit of daylight because he also said that there is the chance that the plaintiffs could still win at the preliminary injunction stage. Right. So Tuesday's ruling is a temporary block. While the lawsuit challenging the bans proceeds. So it ain't over. But-

Imani Gandy: It ain't over till it's over. Just like Lenny Kravitz said.

Jess Pieklo: Lenny Kravitz. Anyway, sorry.

Imani Gandy: Lenny Kravitz. Another black Jew.

Jess Pieklo: So I mean, that's the qualified good news. But here's Jess coming in to even rain on the qualified good news. Missouri is in the Eighth Circuit and that's a bad circuit, it's a real bad circuit.

Imani Gandy: Terrible.

Jess Pieklo: It's really conservative. And they've been looking for any reason to chip away at abortion rates.

Imani Gandy: Yeah. For example, the fact that the Eighth Circuit just greenlighted prosecuting flu, we did an episode on this woman who is being prosecuted for having a bad pregnancy outcome. She's a native American woman, living on a reservation and is therefore subject to federal law. Lower court said, "No, we're not prosecuting

this person because that's not what the law is intended to do." And the Eighth Circuit was like, "Screw you, district court. We are absolutely going to go ahead and let this prosecution go forward." So, it's all bad.

Jess Pieklo: Yeah, so that's the kind of climate right now at the Eighth Circuit, who will actually later in the year consider a nearly identical Arkansas bill to the one that just got blocked through Missouri. So there's that. Now there's also the Sixth Circuit. The Sixth Circuit is Ohio, Kentucky, those States, it's poised to rule literally any day now. I mean this, any day. They had oral arguments in January on Ohio's reason ban.

Imani Gandy: Yeah, it's not going to be good. The problem is, is that this eugenics language is really starting to take hold. They're really starting to make it seem as if pregnant people are getting abortions in order to sort of reduce the Down syndrome population as some sort of ideology. When that's just not the case. It's just people making decisions for themselves about whether or not they're able to care for these children. Whether it's a child with Down syndrome, whether it's just a child with no syndrome. I mean it's just like they are making these individual choices and, politicians and anti-choice lawmakers are trying to castigate these people as participating in some sort of widespread eugenics policies. And it's just not, that's not the case.

Jess Pieklo: Yeah, it's not. And Imani, I've got more.

Imani Gandy: Why do you always have more?

Jess Pieklo: Why do I always have more? That is an excellent question. I'm kind of fun at parties though. There's a path to the Supreme court. Should one of these circuits go ham.

Imani Gandy: You know. All of these circuits are going to go ham all at the same time. And honestly, I feel like they're targeting us specifically. Because-

Jess Pieklo: It might be, I do feel attacked now that you mention it.

Imani Gandy: Because, I mean, for Christ's sake. It's like, last night for example, what, 8:00 o'clock you're like, "Yeah, Seventh Circuit decision just came down." What? Why? Why are we doing this? Stop trying, stop hurting us, America.

Jess Pieklo: Imani and I were working on the show and I was like, "Sweet, I think we got it. Oh, here's more news. All right." That's behind the curtain at Team Legal. But, seriously, what feels like, I don't know, 40 lifetimes ago, but it was just like May. The Supreme Court hinted it might be willing to consider one of these kinds of bans.

Imani Gandy: Right. That's the Indiana case *Box v. Planned Parenthood of Indiana and Kentucky* or PPINK, which I think is an awesome acronym. So *Box v. PPINK* is the

case where the Supreme Court declined to hear an appeal regarding the Seventh Circuit's ruling that Indiana's reason ban, its race, sex and Down syndrome ban, was unconstitutional, right? So in a concurring opinion, Clarence Thomas used basically a routine denial of cert. to pen this absurd screed connecting the modern day family planning movement to eugenics. Right? That's what we're talking about here.

- Jess Pieklo: Yep. That's the one. We talked about it on the podcast and you wrote an amazing piece about it. And one of the reasons why the court didn't take the case is because the question of whether reason bans are constitutional was what it said was novel. In other words, not a lot of courts had yet had a chance to weigh in. And in fact, the Missouri decision Tuesday cites Thomas here for part of the reason that the Missouri ban gets upheld. It's almost like, "What the hell? Why not? Let's see what happens if we let one of these take effect?"
- Imani Gandy: I mean, doesn't that seem to be the way, like that seems like what a lot of States are doing. A lot of lawmakers are just flouting court orders and flouting the constitution and ignoring precedent just to be like, "Maybe we can get this shit in front of Brad McBeer and he's going to rule our way."
- Jess Pieklo: You know, so if the court signaled in the Indiana case that it would be interested in considering the constitutionality of these kinds of patently unconstitutional pre-viability abortion bans. Say it with me, they are patently unconstitutional pre-viability abortion bans.
- Imani Gandy: Patently unconstitutional pre-viability abortion bans.
- Jess Pieklo: Anyway, in the Indiana court or in the Indiana case, if the court signaled that it was willing to take a look at these now and we've got a whole bunch of Trump judges now on the bench, I'm going to predict it's only a matter of time, Imani, before this issue is back before the Roberts Court.
- Imani Gandy: Yeah. Yeah.
- Jess Pieklo: Yeah. And I guess if it gets there, we could probably see the court bless another unconstitutional pre-viability abortion ban, the first being the so called federal partial birth abortion act, and further erode viability as the bright line when it comes to reproductive autonomy.
- Imani Gandy: And this is something we've talked about seemingly incessantly. We recently did an episode on Tennessee's effort to roll back fetal viability to the point of conception.
- Jess Pieklo: Georgia. We're looking at you.
- Imani Gandy: Georgia, Alabama. I mean my God, it's just, listeners, dear listeners, it's not good. Can't sugarcoat it. The days of sugarcoating are long gone. We're just

giving it to you straight and then passing you a shot of whiskey. And on that note, on that cheerful note, we're going to go ahead and close this episode. If you'd like to talk about any of this with us on Twitter or if you'd like to join us for a celebratory whiskey shot, you can follow me on Twitter @angryblacklady. You can follow Jess on Twitter @hegemommy, H-E-G-E-M-O-M-M-Y. And you can follow Rewire.News @Rewire\_News. And yeah. Join our Facebook group. Answer the questions. Answer the questions. Brad McBeer, Brad McFunnel cake.

Jess Pieklo: McFunnel cake or funnel face. Did you say funnel cake or funnel face?

Imani Gandy: I said funnel cake, but funnel face is also good. Now I want funnel cake. And anyway, what's going to happen next, Jess?

Jess Pieklo: We're going to see all on the tubes.

Imani Gandy: We're going to see on the ding ding tubes.

Speaker 4: Boom! Lawyered is created and hosted by Jessica Mason Pieklo and Imani Gandy. This episode was produced by Marc Faletti, who is also our Executive Producer and the Rewire.News Editor-In-Chief is Jodi Jacobson.