

Imani Gandy: Hello, fellow law nerds. Welcome to a special episode of Boom! Lawyered, a Rewire News Group podcast hosted by the legal journalism team that has split up for the week, but not permanently. I'm Rewire News Group editor-at-large, Imani Gandy. And, wait, who are you? You're not Jess.

Garnet Henderson: Shh, don't tell them.

Imani Gandy: Oh, well you gotta tell 'em who you are. We just won't tell Jess.

Garnet Henderson: Oh, okay. I'm not Jess Pieklo, it's true. I'm also not a lawyer. I am Garnet Henderson, Rewire News Group's senior multiplatform reporter. Rewire News Group is the one and only home for expert repro journalism that inspires you to meet a new person on a podcast this week. Yay! And Boom! Lawyered is part of that mission. A big thanks to our subscribers and welcome to our new listeners and viewers.

Imani Gandy: So, Garnet, you just started a couple of months ago here at Rewire News Group. What is your story? Talk to me about you.

Garnet Henderson: Thank you, Imani. Yes, I just came on staff full-time at Rewire in February. Before that, I was a freelancer for almost a decade, writing on the intersections of health and culture with a special focus on abortion access. And Rewire was always one of my favorite places to contribute. So I'm so excited to be on staff here.

So far, I've covered, honestly, a lot of internet-related stories. I've covered mis- and disinformation about birth control that's circulating on social media, the all-volunteer team that moderates the abortion subreddit, and an abortion pill service promising to send people abortion pills that they ordered online quickly and cheaply that kinda collapsed before it ever got off the ground. And another piece to look out coming soon is a piece I did that I've been wanting to write for a year, about the fact that "crisis pregnancy centers" appear in CDC directories, online directories of STI testing service centers. So stay tuned for that one to find out what the CDC said to me about that. I'll give you a hint, it left a lot to be desired.

Imani Gandy: Yikes. Well, for those of you who are just getting to know Garnet, you should go to Instagram because she's got some really great explainer reels on birth control and the Comstock Act, which is what we're going to talk about today because Garnet has become a bit of a resident expert on the Comstock Act. So, let's talk about it. What is the Comstock Act? Who the hell is Anthony Comstock? Why hasn't the Comstock Act been repealed? I have a lot of questions and I need you to answer them for me, please.

Garnet Henderson: All great questions. So the Comstock Act was passed in 1873. So just to situate us in time, that's the Reconstruction Era immediately after the Civil War. That's how far back into history we're reaching, 150 years. And it was named for Anthony Comstock, who was an anti-vice crusader. So he did fight on the side of the Union in the Civil War. That's one good thing I can say that he did. He did think that slavery was bad, but he was also really disturbed by

what he saw as all the vice among the soldiers, the smoking, the drinking, the gambling, the seeing sex workers. He was very disturbed.

Imani Gandy: I feel like if you are fighting in a war, you should be able to drink and smoke and visit sex workers. Like, I feel like that should be in the contract.

Garnet Henderson: I agree, especially some of the stuff we know about the conditions those soldiers were living under during the war. It was miserable. They were miserable. They were all mostly very young. So yeah, I agree. So after the Civil War ended, he moved up to New York where he basically became an epic narc. So he loved to call the cops on brothels basically, continuing the hatred of sex workers. And he actually wrote the Comstock Act and went to Congress to lobby for it, got it passed, which is why they named it after him. And what the Comstock Act did was it wanted to prevent the circulation of any materials that were considered obscene, lewd, lascivious, or filthy. So obviously-

Imani Gandy: Mm, my favorite kind of materials.

Garnet Henderson: Well, the most fun kind of materials, right? Anthony Comstock is like the biggest buzzkill of history. So mostly that sounds like porn, right? And it meant porn. I'm not sure what porn looked like in 1873.

Imani Gandy: Stick figures with boobs.

Garnet Henderson: That's right. I imagine it must have been illustrations, right? Because didn't posing for photographs take a really long time? I don't know.

Imani Gandy: Not very efficient.

Garnet Henderson: No, but a photography expert can correct me on that. I don't know about that. So yes, it meant porn, it meant erotica, but it also specifically in the text of the law calls out anything related to abortion and contraception. And it prevented sending all these things in the mail, mail or common carrier. So like today, that would include things like UPS and FedEx, not just the United States Mail. And it carried a sentence of up to five years in prison. So the penalties here were really severe and there were some famous Comstock violators.

Imani Gandy: Ooh, I love these.

Garnet Henderson: Margaret Sanger. Yes, founder of Planned Parenthood, was arrested for violating Comstock because of the content of her feminist magazine. And she actually fled the country to avoid those charges, but only after distributing 100,000 pamphlets about contraception.

Imani Gandy: That's our girl, Maggie.

Garnet Henderson: That's right. Complicated history, right?

Imani Gandy: Very complicated.

Garnet Henderson: But she did some cool stuff and that was one of the cool things that she did. Very rock and roll. Speaking of very rock and roll, also, Emma Goldman, the famous feminist and anarchist was also arrested twice, actually, and served time in jail once for violating Comstock. And I just wanted to read this really funny tweet from a historian named Lauren MacIvor Thompson who is a historian of birth control. She's an expert on Comstock. And she tweeted the other day, "Comstock was a coward who hated himself because he obsessively masturbated, hoarded the dildoes he confiscated, berated his only daughter. She slept around, go figure. And his death was greeted with jeers by a public who couldn't stand him."

Imani Gandy: Wow. Dildo hoarder.

Garnet Henderson: That is right. Dildo hoarder and extremely unpopular. People really did-

Imani Gandy: And chronic masturbator.

Garnet Henderson: Yes, right. I mean, he was trying to legislate out of the existence all the things that he was ashamed of, right?

Imani Gandy: Every accusation is a confession when it comes to these people, right?

Garnet Henderson: Exactly. And so people really did hate him, especially the high-profile prosecutions of some people, like Margaret Sanger and Emma Goldman, really helped turn the tide against the law which had kind of flown under the radar at first. And then it was chipped away at over the years in a lot of court decisions, but it never actually got repealed. So this 150 year old law is still on the books.

Imani Gandy: And that brings us to why do we care about the Comstock Act right now? Like, I've been in repro for a pretty long time and all I mean, I've known what the Comstock Act is, but as of late it's really entered the public discourse, and I just wanna know why, because it seems like a zombie law that we should be ignoring, frankly.

Garnet Henderson: That's right. If anything, people used to point to it as kind of like a bit of evidence of how far we've come, right? How different things are now. Well, turns out wrong. So this all comes back to the mifepristone lawsuit that's working its way through federal courts right now. The Alliance Defending Freedom, the conservative kinda super firm, is behind that lawsuit. And they have asked the Supreme Court specifically to rule on the Comstock Act. So it's gonna happen eventually. Both Matty K, Judge Kacsmaryk, the federal judge in Texas and the Fifth Circuit, have already referenced Comstock in their opinions in that mifepristone stone lawsuit. So it's coming.

Imani Gandy: But the Supreme Court should throw out the Comstock Act argument, right? Like, it's a nonsense argument. But it is a great vehicle to institute, as Jess Pieklo, said on Twitter, "a low-key seven week abortion ban," right? And that's what the Supreme Court has basically been put on the bench to do, right? They've been put on the bench to decimate abortion access and they can't decimate abortion access without also decimating medication abortion, because medication abortion is the wave of the future. It's safer. It's not as stigmatized. You can't shame people for going and getting surgery and murdering babies in the same way that you can with procedural abortions. So they'll probably side with Matty K, if I know the Supreme Court, and I think I do even though they're, and the Fifth Circuit panel even though their analysis is 100 percent wrong, right?

Garnet Henderson: Mm hmm. Yeah, same historian who had the hilarious tweet I mentioned earlier, Lauren MacIvor Thompson, reported on this for the Washington Post. And she wrote that the initial draft of the Comstock Act actually contained an exception for physicians. So it prohibited, and this is a quote, "any article or medicine for the prevention of conception or for causing abortion, except on a prescription of a physician in good standing given in good faith." So there was an exception built in.

Imani Gandy: So that seems like it should be the end of the conversation. Why are we here? Podcast over, see you on the tubes.

Garnet Henderson: I wish, I wish. But that amendment was amended. So the text of the final bill reads any article whatever for the prevention of conception or for causing unlawful abortion, or shall advertise the same.

Imani Gandy: But it said, you said unlawful abortion.

Garnet Henderson: That's right.

Imani Gandy: How is mifepristone unlawful when it was authorized by the FDA 23 years ago, and studies, not just U.S. studies, but studies in Europe show that it is exceptionally exceedingly safe. What are what- I can't with these people. But let's talk a little bit more law since that's my purview. I'm gonna go ahead and jump into that a little bit.

Yes. There's a 1936 case, like the '30s was right around the time period guard Garnet's talking about when Maggie Sanger was being yolked up by the cops and Emma Goldman was being yolked up by the cops. There was a Second Circuit case called *United States v. One Package*. And that case affirmed that physicians had the right to prescribe contraception and import devices for medical research to use them quote, "for the health of their patients." And the person who wrote the majority opinion his name is Augustus Hand. And I actually have to wonder if he's related to Learned Hand. I don't know, I'm gonna have to look that up.

At any rate, his opinion even commented that Comstock's Acts design, the Comstock Act's design was not to prevent, quote, "the importation, sale, or carriage by mail of things which

might be intelligently employed by conscientious and competent physicians for the purpose of saving lives or promoting the wellbeing of their patients." Right, like. This is what this federal judge said. This is the case that has essentially formed the basis for interpreting the Comstock Act since 1936 because the Supreme Court of the United States has not weighed in on it. And this isn't something, like, some rogue Second Circuit Court decided this, this is how the Comstock Act has been interpreted. This is how Congress itself interprets the act, because in light, they specifically said in some hearing or another, they knew about the Second Circuit case, and they still decided not to change the law to make it applicable to all abortions and not just unlawful abortions. So truly, I don't understand why we are here.

Garnet Henderson: Yeah, it's also worth noting too that *Griswold v. Connecticut*, which was a really important basis for *Roe v. Wade*, was also a Comstock case. Because a lot of states also passed their own versions of Comstock, which is a whole other thing. So that was about the Comstock law in Connecticut. But the reason that conservatives love Comstock now, you know, in addition to the whole every accusation is a confession thing, as you said earlier, is that it paves the way for a national abortion ban. Because-

Imani Gandy: See, you said national abortion ban and your house started to collapse.

Garnet Henderson: And my "Say the Word Abortion" poster fell down.

Imani Gandy: Oh, is that what it is? Oh my God.

Garnet Henderson: It was struck down.

Imani Gandy: I think there's a ghost and our podcast is being haunted.

Garnet Henderson: This building that I live in was built in, like, 1908. So actually we're really talking about peak Comstock era. So there really might be, like, a Comstock ghost in my apartment in New York, this building built in 1908.

Imani Gandy: Amazing.

Garnet Henderson: Okay, well, if I disappear, you'll know what happened.

Imani Gandy: Gonna be black bagged by the feds and hauled out. Like, Garnet, no.

Garnet Henderson: That would be a really exciting first podcast appearance for me though.

Imani Gandy: Wouldn't it?

Garnet Henderson: So, you know, when we hear things about the mail, right, because Comstock is all about the mail. And so I think in this modern context, most of us immediately think, oh yeah, abortion pills by mail. Comstock could ban that, right? But what's really scary

about Comstock is that if you think about it actually everything that's in a doctor's office or a clinic when you go there was shipped at some point.

So Comstock could lay the groundwork for a total abortion ban nationally, because if we get some kind of a ruling that says, you know, abortion is unlawful, well, then, it's not just medication but it's every piece of equipment, every device that would be in a clinic that could be prevented from being sent in the mail. And this could also ban contraception, health care for LGBTQ people, really just to name a couple of the very scary implications of this. And already, there's a lawsuit from everybody's favorite person, Jonathan Mitchell. That's the architect of SB 8.

Imani Gandy: Oh, that fucking guy, as me and Jess call him.

Garnet Henderson: That fucking guy is always popping up. And so of course, he's popping up on this issue of the Comstock Act. And he is—he filed this in state court in New Mexico trying to overturn New Mexico's abortion protections, claiming that the Comstock Act criminalizes distribution by mail of obscene materials, including of course materials that are used in abortion care.

Imani Gandy: Okay, well, let's talk about this lawsuit for just a minute, because as much as I can't stand that fucking guy, I've gotta hand it to him, like, he's a real, he's a very clever attorney. At least he's clever—

Garnet Henderson: And tenacious.

Imani Gandy: And very tenacious, absolutely. He's got a goal and he's going to achieve that goal. And he's smart enough to come up with really bizarre ways to go about it. Like, I don't know, conferring standing on any random motherfucker, right, what Jess and I call ARM standing and saying, hey, the government's not gonna enforce this law, we're gonna let you fine citizens snitch on each other and enforce the law. I mean that is Mitchell's jam. So he files this lawsuit seeking basically a declaratory judgment seeking the court to say whether or not the Comstock Act applies to all abortion related devices, or just only unlawful ones. He files in Eunice, New Mexico. Why Eunice, New Mexico? Because aside from the fact that New Mexico generally is a very pro-choice state, and they're doing really, really well in terms of protecting abortion access, there are specific towns in New Mexico who are going even further, right?

Eunice is one of those towns. It's a quote, "sanctuary city" for abortion. And Andrea Grimes, who's former Rewire alum, friend of the podcast, and just an all around great person who you should follow on Twitter and her Substack, she's pointed out that, and I agree, that Jonathan Mitchell is not trying to win this lawsuit in New Mexico. What he's trying to do is get contradictory rulings on what the Comstock Act says, therefore essentially requiring the Supreme Court to step in and sort of lay down the law of the land. This is what the Comstock Act says. This is what it does, right? The New Mexico state courts and the Supreme Court is likely to rule that the Comstock Act does not apply to all pills or all abortion devices, but only unlawful ones. So then Mitchell can take that case to the Supreme Court and get the Fed Soc six to weigh in on the

Comstock Act, maybe earlier than they otherwise would have, because God knows how long this mifepristone FDA lawsuit's gonna take now that it has to go back down to the Fifth Circuit and may even have to go back down to the district court before moving its way back up. I mean, that could take literally years.

But here, we've got a really nice case that's gonna make, you know make half of the claim for him, that Comstock Act does provide protections for all for unlawful- The Comstock Act prohibits only unlawful abortions and then he's gonna try and get maybe the Ninth Circuit in the Washington case is gonna rule that the Comstock Act doesn't. I mean what we're doing here is we're looking for a circuit split, even though it's not a circuit split, because we're in federal and state court, not just federal court. But the point is the Supreme Court's gonna have to step in. They want the Supreme Court to step in, so they're filing losing cases.

Garnet Henderson: Mm hmm, and one thing we know about Jonathan Mitchell is he'll keep trying.

Imani Gandy: Oh yeah.

Garnet Henderson: Right?

Imani Gandy: Yeah, yeah, he's a very, as you said, tenacious man. So talk to me about what's gonna go on next with the Comstock Act. I don't have Jess here to be my Cassandra so you need to sort of, you gotta be the Comstock Cassandra.

Garnet Henderson: I'll try. I'll try to be the Comstock Cassandra. Well, as you said this mifepristone case is gonna be working its way through the courts potentially for a very long time. Maybe it'll make it back to the Supreme Court as soon as their next term, depending on what happens. But yeah, I would expect we're gonna hear more about Comstock from the Fifth Circuit and from Matty K, if this gets bumped back to him. There are also the two competing mifepristone lawsuits, one filed in Washington state and one filed in Maryland, complicating that whole mess. Who knows, maybe ADF or somebody is gonna ask for, you know, judges in those cases to weigh in on Comstock too. And all of this is also happening at a potentially historic moment for the birth control pill.

So I do wanna bring it back to that, because when we talk about Comstock, we're talking about abortion, but we're also talking about contraception. And on May 9 and 10, there's an FDA advisory committee that's actually holding hearings that are part of the process for determining whether a birth control pill called Opill should become available over the counter. And if the pharmaceutical company that's bringing this application before the FDA is successful, that will be the first over-the-counter contraceptive pill in the United States. We are actually way behind most of the rest of the world on that, by the way. In over 100 countries around the world you can walk into a pharmacy and get a birth control pill without a prescription. And you cannot do that here.

Imani Gandy: So that's a big deal.

Garnet Henderson: It's a huge deal. And May 9 happens to be Free The Pill Day, which is actually the anniversary of the day the FDA approved the first birth control pill in 1960. So a historic moment all around. And you know, the whole outcome of the mifepristone case really depends on how the FDA responds to Comstockery, which is what people called-

Imani Gandy: Comstockery.

Garnet Henderson: Really what people called that whole era and that whole approach to policing personal bodily freedoms that arose from the Comstock law. So the whole outcome of the mifepristone case actually hinges on how the FDA chooses to respond to Comstockery, which is what people really called this whole approach.

Imani Gandy: Comstockery. Sounds like fuckery.

Garnet Henderson: Exactly. Perfect. Because no matter what the Supreme Court or what the Fifth Circuit says the FDA has discretion over how it enforces the law. And so they can just say, yeah, thanks for your opinion but we're not gonna enforce that decision, even if we do get a decision that would theoretically limit access to mifepristone. Now, whether they're gonna have the guts to do that, hard to say.

But I think these birth control hearings are another opportunity that they have. And by the way, this is not, you know, the science is totally on the side of bringing all birth control pills over the counter, but especially this particular pill that is, you know, being considered right now has a phenomenal safety record. It does not contain estrogen, so it doesn't carry the risk of blood clots that birth control pills, other combined birth control pills can carry for some people. So it really is such a strong application. There's no reason for it to be denied. So the FDA has a real opportunity here to say we stand with science because, you know, that's their job.

Imani Gandy: Yeah, yeah. Throw up some middle fingers to the Fifth Circuit and Matty K, that's what I want the FDA to do.

Garnet Henderson: Exactly, yeah. So we've got a lot more coverage coming on that. I've got an explainer with some background on this particular pill and the hearings that will be up in the next couple of days. And then on May 9 and 10, those hearings, I will be live tweeting them, so you can follow along with that.

Imani Gandy: And on May 17, we have oral arguments in the Fifth Circuit on the mife case, and am I gonna be here? I'm gonna be here. I don't know if I'm gonna live tweet them, 'cause I leave for France the next day and I will probably be in a stone cold panic. So that's gonna wrap it up for us today. If you would like to talk to us more about the Comstock Act or birth control or anything involving basically a uterus, you can follow Garnet Henderson @garnethenderson. It's a very easy Twitter handle to remember.



You can follow me @angryblacklady. You can and should follow Rewire News Group on Twitter, on Instagram, and subscribe to our YouTube channel, because that's where you're gonna get all of our notifications for our live streams. And let me tell you, sweaty SCOTUS season is coming and that means Jess and I are gonna be hopping on live streams to talk about some of these truly crappy rulings that are gonna be coming down like the end of affirmative action, or the end of the Indian Child Welfare Act and tribal sovereignty. Or whether or not a bigot can ask the Supreme Court for an advisory opinion saying that she doesn't have to make wedding websites for gay couples, even though she doesn't make wedding websites for anybody right now.

Garnet Henderson: It's gonna be a really long summer.

Imani Gandy: It's gonna be a really long summer. And on that note, Garnet, what are we gonna do?

Garnet Henderson: We'll see you on the tubes.

Imani Gandy: We will see you on the tubes, folks.