



October 7, 2014

The Honorable Eric H. Holder, Jr.
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Attorney General:

As you may know, on July 15, 2014, U.S. Attorney William C. Killian of the Eastern District of Tennessee announced that Lacey Weld, who was convicted of conspiracy to manufacture methamphetamine, received an enhanced sentence because she committed the crime while pregnant.¹ We believe that seeking – and touting – an enhanced sentence based on pregnancy is contrary to this Administration’s commitment to rational and just sentencing policies, and undermines the rights, health, and well-being of pregnant women, children, and families. It also flouts this Administration’s stated support for science and evidence-based research as the basis for public policy. We are writing to bring this counterproductive departure from Administration policy to your attention, and to seek your assurance that these actions are not endorsed by the Department of Justice. We also urge that if Ms. Weld appeals her sentence, the DOJ renounce its position supporting enhanced penalties for pregnant women.

In this case, Ms. Weld pled guilty to the crime of conspiracy to manufacture methamphetamine. She also apparently agreed to cooperate with the DOJ in its prosecution of others involved in this manufacturing operation. According to Mr. Killian’s press release, Ms. Weld used and participated in the manufacturing of methamphetamine while in her ninth month of pregnancy, and it is because she was pregnant at the time she committed the crime of conspiracy to manufacture that she was given an enhanced sentence.

The enhanced penalty and the press release celebrating it endorse the profoundly discriminatory principle that women who become pregnant may be subject to separate, unequal, and harsher penalties than other persons. This violates fundamental principles of constitutional law, human rights, and reproductive justice.

Becoming pregnant and either continuing or terminating a pregnancy is a fundamental right for which no person should be subject to punishment directly or through enhanced penalties.

¹ Press Release, *Manufacturing and Smoking Methamphetamine while Pregnant Results in Enhanced Sentence*, U.S. Dep’t of Justice (July 15, 2014), <http://www.justice.gov/usao/tne/news/2014/July/071514%20Weld%20Sentencing%20Meth.html>.

According to the DOJ press release, the effort to impose an enhanced penalty is based on the argument that Ms. Weld exposed her “unborn” child to “a substantial risk of harm.” This claim not only provides the basis for separate and unequal treatment of pregnant women, it is also one that cannot legally, logically, or medically be limited to use of or exposure to criminalized substances. *Stallman v. Youngquist*, 531 N.E.2d 355, 359 (Ill. 1988) (“Since anything which a pregnant woman does or does not do may have an impact, either positive or negative, on her developing fetus, any act or omission on her part could render her liable . . .”). Numerous actions, conditions, circumstances, and substances have been found to create equal or greater risks of harm to fertilized eggs, embryos, and fetuses than any of the criminalized drugs, including methamphetamine. *See, e.g., Int’l Union v. Johnson Controls*, 886 F.2d 871, 914 & n.7 (7th Cir. 1989) (Easterbrook, J., dissenting) (noting that an estimated 15 to 20 million jobs entail exposure to chemicals that pose fetal risk), *rev’d and remanded*, 499 U.S. 187 (1991).

Indeed, in 2009, a federal district court judge in Maine also thought that pregnancy provided a basis for enhancing a sentence in a case unrelated to the use of criminalized drugs.² In that case, the judge extended a pregnant woman’s sentence to 238 days, making clear that the sentence was calculated specifically to protect an unborn child by ensuring that the woman, who was HIV positive, remained incarcerated for the duration of her pregnancy.³ However, upon a *joint* motion filed by the woman’s defense attorneys and the U.S. Attorneys’ office,⁴ which had prosecuted the case, the First Circuit vacated the enhanced sentence and remanded for appropriate resentencing.⁵

Further, the DOJ’s support for Ms. Weld’s enhanced sentence suggests that actions that are not ordinarily criminal may become criminal if performed by a pregnant woman. According to the press release, the DOJ justifies the enhanced penalty in part because Ms. Weld apparently *used* methamphetamine while pregnant. Drug use (rather than possession), however, is not a crime under either Tennessee or federal law – and as the press release admits, Ms. Weld was convicted of manufacturing, not possession of, methamphetamine. That possession rather than use is criminalized is based in part on the recognition that some use is the result of addiction, a health condition over which people have limited control. *See, e.g., Robinson v. California*, 370 U.S. 660

² Transcript of Sentencing at 13, 20, 30-31, *United States v. Tuleh*, No. 1:09-cr-00019 (D. Me. May 14, 2009) (the court opined, “[m]y obligation is to protect the public from further crimes of the defendant, and that public, it seems to me at this point, should likely include the child she’s carrying. I don’t think the transfer of HIV to an unborn child is a crime technically under the law, but it is as direct and as likely as an ongoing assault,” explaining “that if she is released early, she will end up transmitting HIV to a wholly innocent person,” because she “would not get the medicine [she] need[ed] for [her] child,” and the court was therefore “inclined to keep [her] in jail . . . to prevent [her] child from being born HIV positive.”).

³ *See* Margo Kaplan, *Behind Bars for Being Pregnant and HIV-Positive*, RH Reality Check, June 10, 2009, <http://rhrealitycheck.org/article/2009/06/10/behind-bars-being-pregnant-and-hivpositive>; Judy Harrison, *Judge Jails Pregnant Woman Until Baby is Born*, Bangor Daily News, June 2, 2009, <http://bangordailynews.com/2009/06/02/news/bangor/judge-jails-woman-until-baby-is-born>; Judy Harrison, *Judge Resentences HIV-Positive Woman to Time Served*, Bangor Daily News, Aug. 4, 2009, <http://bangordailynews.com/2009/08/04/news/judge-resentences-hivpositive-woman-to-time-served>.

⁴ Parties’ Joint Mot. to Vacate and Remand for Resentencing, *United States v. Tuleh*, No. 1:09-cr-0019 (D. Me. Jun. 17, 2009).

⁵ Judgment, *United States v. Tuleh*, No. 09-1708 (1st Cir. June 24, 2009).

(1962). According to the DOJ press release and the sentencing decision in this case, drug use (including addiction) has effectively been criminalized for one class of persons – women who become pregnant and seek to continue their pregnancies to term.

Targeting women who become pregnant for unique crimes and special penalties defies principles of equal protection as well as this Administration’s clear commitment to equal justice for women and families, as demonstrated by numerous efforts including its establishment of the Council on Women and Girls, its support for reauthorization of the Violence Against Women Act, and its emphasis on pay equity.

The imposition of criminal sanctions for *using* methamphetamine – a non-existent crime – violates clear due process principles and prohibitions on ex post facto laws. It also directly conflicts with Administration positions on drug policy. As the Acting Director of the Office of National Drug Control Policy recently explained: “Under the Obama administration, we’ve really tried to reframe drug policy not as a crime but as a public health-related issue, and that our response on the national level is that we not criminalize addiction. . . . We want to make sure our response and our national strategy is based on the fact that addiction is a disease.”⁶

Scientifically informed public policy is another hallmark of the Obama Administration. Yet the DOJ press release uses the inaccurate term “drug-addicted” when describing Ms. Weld’s newborn. Addiction is a medical term with clear and unambiguous meaning. Newborns who are prenatally exposed to drugs do not meet any of the diagnostic criteria of addiction. As scores of leading medical experts and health organizations have repeatedly made clear, it is not a term properly attributed to newborns.⁷ Newborns exposed prenatally to a variety of drugs, including opioids and antidepressants (importantly, *not* methamphetamine) may be born *dependent* (not addicted) as a result of prenatal exposure, but following appropriate treatment, they are no longer physically dependent. Being labeled an “addict” at birth is not only medically unjustified, it is also stigmatizing to the child whose health and future may be significantly misjudged as a result of this label.

It also appears from the press release that the court and the DOJ did not follow prescribed legal standards regarding scientific evidence. The basic principle that scientific questions must be informed by reliable scientific evidence underlies *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the landmark Supreme Court ruling on the admissibility of expert testimony under Federal Rule of Evidence 702. 509 U.S. 579 (1993). *See also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir. 1995), *cert. denied*, 516 U.S. 639. Less frequently acknowledged is

⁶ Tony Gonzalez, *Drug Czar Slams Criminalizing Moms as Haslam Mulls Veto*, The Tennessean, April 28, 2014, <http://www.tennessean.com/story/news/politics/2014/04/28/drug-czar-slams-criminalizing-moms-haslam-mulls-veto/8435967/>.

⁷ David C. Lewis et al., *Top Medical Doctors and Scientists Urge Major Media Outlets to Stop Perpetuating “Crack Baby” Myth* (Feb. 25, 2004), available at <http://advocatesforpregnantwomen.org/ScienceNotStigma.pdf>; Ronald Abrahams et al., *Open Letter to the Tennessee Medical Association* (July 17, 2014), available at <http://bit.ly/1rn3iNr>; Robert G. Newman et al., *Open Letter to the Media and Policy Makers Regarding Alarmist and Inaccurate Reporting on Prescription Opiate Use by Pregnant Women* (Mar. 11, 2013), available at <http://bit.ly/1eEbXWO>.

that these decisions also stand for the proposition that reliable scientific evidence, including expert testimony, is necessary to prove a causal link between *in utero* drug exposure and harm to a child after birth. Yet, according to the DOJ press release, a Department of Children's Services case manager and a Tennessee Bureau of Investigation special agent – neither of whom are qualified experts under *Daubert* – provided the only testimony concerning the baby's health conditions and the alleged causes of those conditions. In other words, the DOJ and the court drew conclusions about the origins of the child's health problems based on presumption rather than qualified scientific evidence. Pregnant women, no less than others, have a right to due process of law and the protections afforded by the Rules of Evidence.

Rather than suggest that punishment is an appropriate response to pregnant women and drug use, the DOJ should have policy consistent with positions taken by leading medical experts and organizations. These groups unanimously recognize that threats of arrest and punishment do not protect children, but do increase risks of harm to maternal, fetal, and child health by deterring women from seeking prenatal care and speaking openly about their health problems.⁸ Moreover, as the World Health Organization recognizes, incarceration itself can increase health risks to pregnant women and their future children.⁹ This is well illustrated by *In re Unborn Child of Starks*, 18 P.3d 342 (Okla. 2001). In that case, a woman was arrested and charged with attempted manufacture of a controlled drug, unlawful possession of a controlled drug, and unlawful possession of drug paraphernalia. Because she was pregnant, the state sought to prevent her from being released on bail, based on the belief that her unborn child would be protected if she remained incarcerated for the duration of her pregnancy. According to documents filed in that case, during the more than thirty days Ms. Starks spent in the Rogers County Jail, she lost twelve pounds, developed urinary tract infections and sinus problems, and had to be taken to the emergency room of Claremore Hospital as a result of experiencing dehydration and premature labor.¹⁰

Finally, opening the door to enhanced penalties for pregnant women will unquestionably make women of color – a group already subject to extraordinary disproportionality in criminal punishment and sentencing¹¹ – even more vulnerable to state and federal control and punishment. Arrest and detentions of women in relationship to their pregnancy have been disproportionately

⁸ See, e.g., American Academy of Pediatrics, Committee on Substance Abuse, *Drug Exposed Infants*, 86 Pediatrics 639, 641 (1990); Report of American Medical Association Board of Trustees, *Legal Interventions During Pregnancy*, 264 JAMA 2663, 267 (1990). See also American College of Obstetricians and Gynecologists, Committee on Ethics, *Committee Opinion 321 Maternal Decision Making, Ethics and the Law*, 106 Obstetrics & Gynecology 1127 (2005); American College of Obstetricians and Gynecologists, Committee on Ethics, *Committee Opinion 473 Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist*, 117 Obstetrics & Gynecology 200 (2011); American Medical Association, *Treatment Versus Criminalization: Physician Role in Drug Addiction During Pregnancy*, Resolution 131 (1990).

⁹ Kyiv Declaration, *Women's Health in Prison: Correcting Gender Inequity in Prison Health*, UNODC and WHO Europe (2009) at para 4 (2) (“The imprisonment of pregnant women and women with young children should be reduced to a minimum and only considered when all other alternatives are found to be unavailable or are unsuitable.”).

¹⁰ Petition for Habeas Corpus at ¶ 14, *Starks v. Smith*, No. HB-1999-1243 (Okla. Crim. App. Oct. 20, 1999).

¹¹ See, e.g., *Caught in the Net: The Impact of Drug Policies on Women and Families* (2005), available at https://www.aclu.org/files/images/asset_upload_file431_23513.pdf.

applied to low-income women of color.¹² As a leader in recognizing and addressing the disproportionate application of the criminal justice system to people of color,¹³ we implore you to actively oppose enhanced sentencing that will, ultimately, subject women of color to additional penalties.

For these reasons, we urge the DOJ to publicly renounce the position that the commission of a crime while pregnant should expose the pregnant woman to enhanced criminal penalties. For Ms. Weld's case, we also ask that the DOJ expressly revoke any position in favor of this increased sentence. The Justice Department's role is to ensure the "fair and impartial Administration of justice for all Americans." Women retain their civil and constitutional rights throughout pregnancy. Pregnant women, like all people in the United States, are entitled to the equal and fair administration of justice.

Sincerely,



Lynn M. Paltrow
Executive Director, National Advocates for Pregnant Women

On behalf of the following sister Reproductive Justice organizations:

ACCESS Women's Health Justice
Oakland, CA

Advocates for Youth
Washington, D.C.

Black Women for Wellness
Los Angeles, CA

California Latinas for Reproductive Justice
Los Angeles, CA

¹² See Lynn Paltrow and Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women's Legal Status and Public Health*, 38 J. Health Pol'y & L. 299, 311-12, 333-34 (2013), available at <http://jhpl.dukejournals.org/content/38/2/299.full.pdf>.

¹³ See, e.g., Sari Horwitz, *Holder Seeks to Avert Mandatory Minimum Sentences for Some Low-Level Drug Offenders*, Wash. Post, Aug. 12, 2013, http://www.washingtonpost.com/world/national-security/holder-seeks-to-avert-mandatory-minimum-sentences-for-some-low-level-drug-offenders/2013/08/11/343850c2-012c-11e3-96a8-d3b921c0924a_story.html; Sari Horwitz, *Reforming Justice System is Personal Goal for Holder*, Wash. Post, Nov. 14, 2013, http://www.washingtonpost.com/world/national-security/reforming-justice-system-is-personal-goal-for-holder/2013/11/14/134554bc-4c7e-11e3-be6b-d3d28122e6d4_story.html; Sari Horwitz, *Eric Holder: Basing Sentences on Data Analysis Could Prove Unfair to Minorities*, Aug. 1, 2014, http://www.washingtonpost.com/world/national-security/us-attorney-general-eric-holder-urges-against-data-analysis-in-criminal-sentencing/2014/08/01/92d0f7ba-1990-11e4-85b6-c1451e622637_story.html.

Carr Center for Reproductive Justice at NYU School of Law
New York, NY

Center on Reproductive Rights and Justice at UC Berkeley School of Law
Berkeley, CA

Chicago Abortion Fund
Chicago, IL

Civil Liberties and Public Policy Program at Hampshire College
Amherst, MA

Colorado Organization for Latina Opportunity and Reproductive Rights
Denver, CO

Desiree Alliance
Fort Smith, AR

Family Law & Cannabis Alliance
Boston, MA

Forward Together
Oakland, CA

Healthy and Free Tennessee
Memphis, TN

The International Center for Traditional Childbearing
Portland, OR

Justice Now
Oakland, CA

Law Students for Reproductive Justice
Oakland, CA

National Asian Pacific American Women's Forum
New York, NY & Washington, D.C.

National Black Network for Reproductive Justice
National Network

National Latina Institute for Reproductive Health
Washington, D.C. & New York, NY

National Network of Abortion Funds
Boston, MA

National Women's Health Network
Washington, D.C.

New Voices Cleveland: Women of Color for Reproductive Justice
Cleveland, OH

New Voices Philadelphia: Women of Color for Reproductive Justice
Philadelphia, PA

New Voices Pittsburgh: Women of Color for Reproductive Justice
Pittsburgh, PA

Positive Women's Network – USA
Oakland, CA

Religious Coalition for Reproductive Choice
Washington, D.C.

Reproductive Health Technologies Project
Washington, D.C.

SisterLove, Inc.
Atlanta, GA

SisterReach
Memphis, TN

SisterSong: Women of Color Reproductive Justice Collective
Atlanta, GA

SPARK Reproductive Justice NOW
Atlanta, GA

Surge Northwest
Seattle, WA

Tewa Women United
Santa Cruz, NM

Third Wave Fund
Brooklyn, NY

URGE: Unite for Reproductive and Gender Equity
Washington, D.C.

Women With A Vision, Inc.
New Orleans, LA

Women's Re-entry Network
Tucson, AZ

WV Focus: Reproductive Education and Equality (WV FREE)
Charleston, WV

Young Women United
Albuquerque, NM

And on behalf of the following civil liberties, drug policy reform, and women's rights organizations:

American Civil Liberties Union Reproductive Freedom Project
New York, NY

American Civil Liberties Union of Tennessee
Nashville, TN

California Women's Law Center
El Segundo, CA

Drug Policy Alliance
New York, NY

Gender Justice
St. Paul, MN

Legal Voice
Seattle, WA

Southwest Women's Law Center
Albuquerque, NM

Women's Law Project
Philadelphia, PA

cc:

W. Neil Eggleston, White House Counsel
William C. Killian, U.S. Attorney, Eastern District of Tennessee
Michael Botticelli, Acting Director, White House Office of National Drug Control Policy