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## SENTENCING PREGNANT DRUG ADDICTS: WHY THE CHILD ENDANGERMENT ENHANCEMENT IS NOT APPROPRIATE

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### Cover Page Footnote

J.D. Candidate, Florida State University College of Law 2016. Special thanks to Sam Wiseman for his support.

# SENTENCING PREGNANT DRUG ADDICTS: WHY THE CHILD ENDANGERMENT ENHANCEMENT IS NOT APPROPRIATE

Monica Carusello\*

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## I. INTRODUCTION

Does being pregnant when you commit a crime make you more culpable than someone who is not pregnant? Accordingly to new and frightening precedent, the answer is yes. In July 2014, a District Court judge decided that Lacey Weld, a Tennessee woman, “should face a longer prison sentence because she was pregnant at the time she was involved in a [methamphetamine (“meth”)] manufacturing operation.”<sup>1</sup>

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\* J.D. Candidate, Florida State University College of Law 2016. Special thanks to Sam Wiseman for his support.

<sup>1</sup> Katie McDonough, *Federal Judge: Pregnancy Can Be Grounds for Enhanced Criminal Penalties*, SALON (July 15, 2014), [http://www.salon.com/2014/07/15/tennessee\\_woman\\_may\\_face\\_a\\_double\\_prison\\_se](http://www.salon.com/2014/07/15/tennessee_woman_may_face_a_double_prison_se)

The judge “elect[ed] to impose an enhanced sentence on the grounds of child endangerment.”<sup>2</sup> He cited “substantial risk of harm to a minor” to justify the enhanced sentence.<sup>3</sup> U.S. Attorney William C. Killian issued a statement indicating that the precedent will guide future sentencing, citing a “tragic rise” in the number of drug-addicted babies, and saying that “[t]hrough this prosecution, the U.S. Attorney’s Office sends a message that, should a child, born or unborn, be exposed to a substantial risk of harm through the manufacture of methamphetamine, we will pursue any available enhancements at sentencing.”<sup>4</sup>

The question before the judge in *United States v. Weld* was twofold: whether the Federal Sentencing Guidelines (“Guidelines”) involving child endangerment apply to fetuses, and whether “women should be subject to a distinct set of laws by virtue of their pregnancies.”<sup>5</sup> Judge Varlan answered both questions in the affirmative.<sup>6</sup> In this note, however, I argue that the decision in *Weld* sets “a dangerous legal precedent for gender discriminatory laws, and could establish de facto fetal personhood as a judicial fiat.”<sup>7</sup>

Following Judge Varlan’s opinion, *Weld* appealed to the United State Court of Appeals for the Sixth Circuit.<sup>8</sup> The Sixth Circuit, however, granted the prosecution’s motion to dismiss, effectively affirming Judge Varlan’s decision.<sup>9</sup> As a result of this case, there are now: (1) separate and unequal laws that apply to women from the moment they carry a fertilized egg; (2) crimes that exist for pregnant women only; and (3) women that are subject to doubly punitive laws.<sup>10</sup>

Although the debate regarding drug-addicted criminals culminated in the 1980s and early 1990s with the “crack baby” hysteria, the debate is now rearing its ugly head again through

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[ntence simply because she was pregnant/](#); see also *United States v. Weld*, 619 F. App’x 512, 513 (6th Cir. 2015).

<sup>2</sup> McDonough, *supra* note 1.

<sup>3</sup> *Lacey Weld Sentenced to More Than 12 Years in Prison for Conspiracy to Manufacture Methamphetamine: Manufacturing and Smoking Methamphetamine While Pregnant Results in Enhanced Sentence*, U.S. DEP’T JUST. (July 15, 2014) [hereinafter *Lacey Weld Sentenced to More Than 12 Years*], <http://www.justice.gov/usao/tne/news/2014/July/071514%20Weld%20Sentencing%20Meth.html>.

<sup>4</sup> *Id.*

<sup>5</sup> McDonough, *supra* note 1; see also *Weld*, 619 F. App’x at 513.

<sup>6</sup> McDonough, *supra* note 1.

<sup>7</sup> *Id.*

<sup>8</sup> *Weld*, 619 F. App’x at 513.

<sup>9</sup> *Id.*

<sup>10</sup> McDonough, *supra* note 1 (reporting remarks from Lynn Paltrow, executive director of National Advocates for Pregnant Women).

sentencing decisions.<sup>11</sup> “States have primarily used child abuse, neglect, endangerment, controlled substance, homicide, and manslaughter statutes to punish pregnant drug-addicted women for allegedly exposing their fetuses to potential harm.”<sup>12</sup> But using these enhancements to punish pregnant drug-addicted women is simply bad policy. States argue that “these prosecutions are to protect the fetus from abuse and to deter women from using drugs during pregnancy”; however, instead of providing mothers with much-needed drug treatment, the prosecutorial strategy results in sending “a considerable number of women to prison.”<sup>13</sup>

This note explores how laws criminalizing pregnant women have developed and argues that recent sentencing decisions violate women’s rights and are dangerous to society. It presents non-judicial remedies, such as treatment and early-intervention, as solutions to handle the problem of pregnant drug-addicted women and drug-exposed newborns.

While likely constitutional due to state interest in health and public safety, and the lack of explicit targeting of suspect classes, these sentencing decisions nonetheless implicate constitutional concerns, impact abortion rights, and are a poor interpretation of the Guidelines. This note, therefore, argues that *Weld*’s sentence was excessively punitive because fetuses are not people or “minors” under the Guidelines, and even if they were, the harm to a drug-exposed fetus is not so severe as to warrant the use of the “substantial risk of harm to a minor” enhancement.<sup>14</sup> Thus, the *Weld* decision should be reversed, and child endangerment enhancements should be prohibited for pregnant drug-addicted women.

## II. LACEY WELD: A CASE STUDY

Lacey Weld (“Weld”), a twenty-six-year-old woman, “was picked up in an undercover sting at a meth[] manufacturing plant” in rural Jefferson County, Tennessee.<sup>15</sup> Weld cooperated in the case and

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<sup>11</sup> See generally Michael Winerip, *Revisiting the “Crack Babies” Epidemic That Was Not*, N.Y. TIMES (May 20, 2013), [http://www.nytimes.com/2013/05/20/booming/revisiting-the-crack-babies-epidemic-that-was-not.html?\\_r=0](http://www.nytimes.com/2013/05/20/booming/revisiting-the-crack-babies-epidemic-that-was-not.html?_r=0) (describing the 1980’s hysteria that revolved around “predictions that a generation of children would be damaged for life” because of the use of crack cocaine).

<sup>12</sup> Tiffany Lyttle, *Stop the Injustice: A Protest Against the Unconstitutional Punishment of Pregnant Drug-Addicted Women*, 9 N.Y.U. J. LEGIS. & PUB. POL’Y 781, 783 (2006).

<sup>13</sup> *Id.* at 781-82.

<sup>14</sup> *Weld*, 619 F. App’x at 513.

<sup>15</sup> Amanda Marcotte, *Tennessee Sentenced a Woman to Six Extra Years in Jail Simply Because She Was Pregnant*, SLATE (Oct. 13, 2014),

testified against her co-defendants.<sup>16</sup> She pled guilty and “was sentenced to more than 12 years in prison and five years of supervised release for her involvement in meth manufacturing.”<sup>17</sup> Judge Varlan, who decided the case for the United States District Court for the Eastern District of Tennessee, used the Guidelines’ enhancements to tack on an additional six years because Weld was pregnant at the time of her arrest.<sup>18</sup>

The question in Weld’s case was not about adding additional charges because she was pregnant, but rather whether the court should enhance her sentence for crimes to which she already pled guilty.<sup>19</sup> Ultimately, Judge Varlan enhanced Weld’s sentence for putting her unborn child at a substantial risk of harm.<sup>20</sup> However, Weld was not convicted for smoking meth; she pled guilty for conspiracy to manufacture meth.<sup>21</sup> The Department of Justice nevertheless justified the penalty, in part, because Weld had “apparently used methamphetamine while pregnant.”<sup>22</sup> But “[d]rug use . . . is not a crime under either Tennessee or federal law.”<sup>23</sup> Therefore, imposing “criminal sanctions for *using* meth, a non-existent crime, violates clear due process principles and prohibitions on ex post facto laws.”<sup>24</sup>

Here, “Weld was convicted of manufacturing, not possession of, methamphetamine.”<sup>25</sup> “Tennessee law allows sentence enhancements if the victim is especially vulnerable, but Weld was not convicted of victimizing her son. Those six extra years were for a crime that isn’t a crime in Tennessee at all.”<sup>26</sup> Unarguably, “Weld’s son was born sick and . . . ‘tested positive for opioids and meth[.]’”<sup>27</sup>

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[http://www.slate.com/blogs/xx\\_factor/2014/10/13/lacey\\_weld\\_case\\_tennessee\\_woman\\_gets\\_six\\_extra\\_years\\_in\\_prison\\_for\\_being.html](http://www.slate.com/blogs/xx_factor/2014/10/13/lacey_weld_case_tennessee_woman_gets_six_extra_years_in_prison_for_being.html); see also Kristen Gwynne, *A Woman Got Six Extra Years In Prison Because She Was Pregnant*, VICE (Oct. 10, 2014), <http://www.vice.com/read/a-woman-got-six-extra-years-in-prison-because-she-was-pregnant-1010>.

<sup>16</sup> Gwynne, *supra* note 15.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Weld*, 619 F. App’x at 513.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*; see also Marcotte, *supra* note 15.

<sup>22</sup> Marcotte, *supra* note 15.

<sup>23</sup> *Id.* (quoting Letter from Lynn M. Paltrow, Exec. Dir., Nat’l Advocates for Pregnant Women, to Eric H. Holder, Attorney Gen., U.S. Dep’t of Just. (Oct. 7, 2014) [hereinafter Letter from Lynn M. Paltrow], <http://advocatesforpregnantwomen.org/DOJ%20Weld%20Letter%20-%20signed.pdf>).

<sup>24</sup> Letter from Lynn M. Paltrow, *supra* note 23 (emphasis in original).

<sup>25</sup> Marcotte, *supra* note 15.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

Afterwards, Weld expressly accepted “responsibility for exposing her son to drugs in utero, telling the court, ‘He could have died, and I just pray and thank God that my sister has him and he’s OK.’”<sup>28</sup>

However, many things can cause harm to a fetus in utero, including consumption of caffeine or alcohol, using tobacco, and even lack of sleep or too much exercise.<sup>29</sup> Accordingly, Weld’s defense attorney, John Eldridge, said, “There’s no proof as to what caused the withdrawal. There was drug use, and there was exposure in a meth lab . . . [Testimony] just said opioids and meth were in the baby’s system, so the judge concluded that it was meth exposure [which caused withdrawal symptoms]. I think it’s opioids.”<sup>30</sup>

Generally, the law does not punish women for behaving badly while pregnant.<sup>31</sup> These sentence enhancements, however, are criminalizing otherwise non-criminal acts for pregnant women.<sup>32</sup> In Weld’s case, she received an enhanced sentence because she took part in an unhealthy, but not illegal, activity while pregnant.<sup>33</sup> Allowing punishment for legal, albeit unhealthy, choices opens the door to all types of paternalistic “policing of pregnant women’s behavior.”<sup>34</sup>

Eldridge also reported that he did not believe that “this particular [sentencing] enhancement was ever designed for pregnant women.”<sup>35</sup> Eldridge believed that the law was “intended to prevent ‘substantial risk of harm to life of a minor or an incompetent’ [and] do[es] not mention harm to a fetus.”<sup>36</sup> While there is no “civil right to be pregnant in a meth lab,” pregnant women have the right to be treated the same as those who are not pregnant in the criminal justice system.<sup>37</sup>

### III. THE PROBLEMS WITH PUNISHING PREGNANT DRUG-ADDICTED WOMEN FOR HARM TO A FETUS

The act of punishing pregnant drug-addicted mothers has faced harsh criticism, and for good reason. In addition to implicating

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*; see also Gwynne, *supra* note 15. See generally *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).

<sup>30</sup> Gwynne, *supra* note 15.

<sup>31</sup> Marcotte, *supra* note 15; Gwynne, *supra* note 15.

<sup>32</sup> Marcotte, *supra* note 15.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Gwynne, *supra* note 15.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

constitutional rights and misunderstanding medical science, criminalizing pregnancy has been criticized as a mechanism for enforcing racial oppression deeply rooted in the tragic practice of slavery.<sup>38</sup>

### A. *Bad Policy*

The tragedy of drug-exposed babies is initially a tragedy of drug-addicted mothers.<sup>39</sup> “Both are part of a larger tragedy of a community that is suffering a host of indignities, including, significantly, the denial of equal respect for its women’s reproductive decisions.”<sup>40</sup> “[T]he punishment of drug addicts who chose to carry their pregnancies to term violates their constitutional rights to equal protection and privacy regarding their reproductive choices.”<sup>41</sup> Using child endangerment sentence enhancements not only conflicts with constitutional concerns, but also fails to properly protect fetal health, as demonstrated below.

“Poor crack addicts are punished for having babies because they fail to measure up to the state’s ideal of motherhood.”<sup>42</sup> This is best illustrated in cases where prosecutors charge women who use drugs during pregnancy without demonstrating harm to the fetus.<sup>43</sup> For example, in *Johnson v. State*, the prosecution failed to introduce evidence that the children involved were adversely affected by their mother’s crack use.<sup>44</sup> The opining judge noted that the “birth was normal with no complications,” and that “[t]here was no evidence of fetal distress either within the womb or during the delivery.”<sup>45</sup>

Beyond that, when the primary effect of a government policy is punishing poor, predominately black women having babies, a shadow of racial eugenics is evoked, “especially in light of the history of sterilization abuse of women of color.”<sup>46</sup> Arguably, these women are

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<sup>38</sup> Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1481 (1991).

<sup>39</sup> *See id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 1419.

<sup>42</sup> *See id.* at 1472.

<sup>43</sup> *See, e.g., Johnson v. State*, 602 So. 2d 1288, 1290-91 (Fla. 1992) (attempting to prosecute a mother “delivery of a controlled substance to the infant during the thirty to ninety seconds following the infant’s birth, but before the umbilical cord is severed”).

<sup>44</sup> *Id.* at 1291.

<sup>45</sup> *Id.*

<sup>46</sup> Roberts, *supra* note 38, at 1472; *see also* Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CAL. L. REV. 1239, 1252 (2012) (“[T]he reproductive capacities of Black women have historically served as a primary site for punishment within the criminal justice system. The intersection of race and gender in the lives of women of color, and Black women in



punished because they are seen as unfit to bear children due to their poverty, race, and drug addiction.<sup>47</sup> Yet, it is fundamentally held that:

The right to bear children goes to the heart of what it means to be human. The value we place on individuals determines whether we see them as entitled to perpetuate themselves in their children. Denying a woman the right to bear children—or punishing her for exercising that right—deprives her of a basic part of her humanity.<sup>48</sup>

Protecting fetuses is a valuable government motive; however, enforcing unduly punitive measures against mothers is not a productive way to ensure fetal health.<sup>49</sup> While fetal exposure to meth or other drugs is certainly not desirable, it is not detrimental enough to the health and development of the fetus to merit such punishments of the mother.<sup>50</sup> The narrative of “meth babies” that seems to be driving much of this prosecution is based more on hysteria than fact.<sup>51</sup>

In 2005, addiction specialists and medical associations released a letter calling for responsible and accurate reporting on the issue “based on science, not presumption or prejudice.”<sup>52</sup>

The use of stigmatizing terms, such as “ice babies” and “meth babies,” [the doctors explained,] lack scientific validity and should not be used. Experience [has demonstrated] that similar labels applied to children exposed . . . to cocaine . . . [has resulted in] lower[ed] expectations for their academic and life achievements, [has] discourag[ed] investigation into other causes for

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particular, render them vulnerable to a host of ideological constructions—including sexual promiscuity and bad mothering—that portray them as lacking fundamental aspects of feminine gender identity. Because of these failings, women who have been criminalized or incarcerated are later subjected to punishments that involve the prevention or punishment of their choice to reproduce, often as a formal part of their sentences.”) (citation omitted).

<sup>47</sup> Roberts, *supra* note 38, at 1472.

<sup>48</sup> *Id.* (citing Kenneth L. Karst, *The Supreme Court 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 32 (1977)).

<sup>49</sup> *See generally id.* at 1430 (explaining that “[t]he response of state prosecutors, legislators, and judges to the problem of drug-exposed babies has been punitive,” rather than preventative).

<sup>50</sup> *See id.* at 1430-32.

<sup>51</sup> *See* Letter from Doctors, Scientists, & Specialists Urging Major Media Outlets Not to Create “Meth Baby” Myth (July 25, 2014) [hereinafter Letter from Doctors, Scientists, & Specialists],

<http://advocatesforpregnantwomen.org/%2522Meth%2522%20Open%20Letter%20-%202005.pdf>.

<sup>52</sup> *Id.*

their possible physical and social problems . . . , and lead[] to policies that ignore factors [like] poverty that may[] play a much more significant role in their lives.<sup>53</sup>

By definition, babies cannot be addicted to meth or any other drugs.<sup>54</sup> “Addiction is a technical term . . . refer[ring] to compulsive behavior that continues . . . [de]spite adverse consequences.”<sup>55</sup> As described in the letter, “[i]n utero physiologic dependence on opiates (not addiction), known as Neonatal Narcotic Abstinence Syndrome, is readily diagnosable and treatable, but no such symptoms have been found to occur following prenatal cocaine or methamphetamine exposure.”<sup>56</sup>

Medical professionals have warned that the spread of false information results in “punitive civil and child welfare interventions that are harmful to women, children and families rather than in the ongoing research and improvement and provision of treatment services that are so clearly needed.”<sup>57</sup> Here, the most productive solution to promoting health is not to break up families by means of incarceration, but rather to preserve the family by helping women achieve sobriety and become responsible mothers.

In 1990, “[t]he American Academy of Pediatric’s [(“AAP”)] Committee on Substance Abuse . . . adopted a policy statement that ‘punitive measures taken toward pregnant women, such as criminal prosecutions and incarceration, have no proven benefits for infant health.’”<sup>58</sup> Women in prison are taken from their families and receive few resources to overcome addiction. Additionally, female prisoners are not afforded the opportunity to refine their parenting skills. “The AAP is concerned that such involuntary measures may discourage mothers and their infants from receiving the very medical care and social support systems that are crucial to their treatment.”<sup>59</sup> If society is concerned about fetal health and the development of healthy citizens, then incarcerating drug-addicted mothers is counterproductive.

Even if imposing enhanced sentences on drug-addicted mothers furthered state interests in child welfare, enhanced sentences

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Letter from Doctors, Scientists, & Specialists, *supra* note 51.

<sup>58</sup> Carol S. Larson, *Overview of State Legislative and Judicial Responses*, 1 FUTURE CHILD. 72, 80 (1991) (citing American Academy of Pediatrics, *Committee On Substance Abuse, Drug-Exposed Infants*, J. PEDIATRICS (Oct. 4, 1990)), [https://www.princeton.edu/futureofchildren/publications/docs/01\\_01\\_06.pdf](https://www.princeton.edu/futureofchildren/publications/docs/01_01_06.pdf).

<sup>59</sup> *Id.* at 80 n.49.

would surely fail the “least restrictive alternative” standard, which dictates that, “even though the governmental purpose [may] be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”<sup>60</sup> Currently, these enhanced sentences are disrupting families, failing to provide support and resources for women, and even deterring healthy pregnancies and encouraging the termination of pregnancy.<sup>61</sup> If becoming pregnant while addicted to drugs subjects a woman to enhanced sentences, it affects her decision to become a mother. It infringes on her liberty as a woman. So what is the least restrictive alternative to further state interests in child welfare? The problem of drug-exposed babies is best addressed through adequate prenatal care for poor women and drug treatment programs that meet the needs of pregnant drug-addicted women.<sup>62</sup>

As the experiences of slavery,<sup>63</sup> the War on Drugs, and current events have taught us, government control of pregnancy punishes women for having babies, perpetuates the notion that a woman’s value is determined exclusively by her ability to procreate, and deems the poor, black, and drug-addicted as unworthy of the dignity of childbearing.<sup>64</sup> Arguably, the government is better suited to make decisions about fetal care than a drug-addicted mother. However, allowing the government to determine who is entitled to be a mother is a wholly separate matter. State interference in the decision to have children is more constitutionally significant than control of lifestyle

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<sup>60</sup> *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

<sup>61</sup> Lyttle, *supra* note 12, at 789-91.

<sup>62</sup> *Id.* at 789.

<sup>63</sup> See Ocen, *supra* note 46, at 1267-68 (citing DARLENE CLARK HINE, *Female Slave Resistance: The Economics of Sex*, in HINE SIGHT: BLACK WOMEN AND THE RE-CONSTRUCTION OF AMERICAN HISTORY 31 (1994)). According to Ocen:

[A]ttempts to resist sexual exploitation and domination contributed to the characterization of Black women as bad mothers. . . . Black women often refused to bear children who were conceived in acts of violence or to raise their children in a state of bondage. The white slaveholding class, however, interpreted this resistance as evidence of Black women’s status as degenerate mothers. . . . [O]ne Southern physician suggested that all doctors in Hancock County, Georgia, were “aware of the frequent complaints of planters about the unnatural tendency in the African female population to destroy her offspring.”

*Id.* at 1267. This construction of Black women as bad mothers endured beyond slavery and supported a new system of racial subordination in which Black women continued to be exploited through the state’s policing of crime. *Id.* A new construction of the Black woman as an inherently dangerous and morally corrupt criminal appeared in post-slavery America. *Id.* at 1268-69.

<sup>64</sup> Roberts, *supra* note 38, at 1472-76.

choices.<sup>65</sup> Moreover, the lack of access to safe abortions and other resources necessary for healthy pregnancies and parenthood limit the reproductive freedom of many women, and disproportionately affect poor women of color.<sup>66</sup> The government both directly interferes with their decisions and fails to facilitate them.<sup>67</sup>

Clearly, enhancing the sentences of pregnant drug-addicted women is bad policy. First, it is medically unclear how much harm fetuses endure. Second, the marginal deterrence benefit of incarceration is outweighed by the harm incarceration causes to women and families. Lastly, these sentence enhancements are discriminatory and conflict with abortion and other constitutional rights.

### *B. Equal Protection*

“While officials are calling [*Weld*] the first case of its kind, criminalizing women based on their pregnancies is hardly a new phenomenon.”<sup>68</sup> “Between 1973 and 2005, there were 413 documented cases in which a woman’s pregnancy was a necessary factor in the criminal charges brought against her by the state.”<sup>69</sup> In addition to those 413 cases, the National Advocates for Pregnant Women (“NAPW”) “has identified 350 other cases in the last decade in which a woman’s pregnancy was a determining factor in her prosecution or detention.”<sup>70</sup> The judiciary is reading into the Guidelines the ability to enforce punitive sentences based on a degraded notion of the drug-addict, ruling as if it is their paternal responsibility to punish drug-addicted mothers for their choice to procreate.

#### *i. Gender*

The “criminalization of maternal substance abuse singles out women for punishment.”<sup>71</sup> No similar or equal law exists for men.<sup>72</sup>

<sup>65</sup> See, e.g., Lyttle, *supra* note 12, at 789 (arguing that “states’ prosecutorial strategies [for prosecuting drug-addicted mothers] violate the constitutional guarantees to due process, equal protection, and right to privacy”).

<sup>66</sup> Roberts, *supra* note 38, at 1461-62.

<sup>67</sup> *Id.* at 1461. “One of the most significant obstacles to receiving prenatal care is the inability to pay for health care services. . . . Institutional, cultural, and educational barriers also deter poor women of color from using the few available services.” *Id.* at 1447 n.144.

<sup>68</sup> McDonough, *supra* note 1; see also Gwynne, *supra* note 15 (“*Weld*’s sentencing hike on the basis of her pregnancy was ‘unique.’”).

<sup>69</sup> McDonough, *supra* note 1; see also Jeanne Flavin & Lynn M. Paltrow, *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. POL’Y & L. 299, 299-300 (2013).

<sup>70</sup> McDonough, *supra* note 1.

<sup>71</sup> Lyttle, *supra* note 12, at 793.

Men who give pregnant women drugs and help conceive children are not prosecuted for the harm they cause, despite “studies which suggest that the sperm of male substance abusers can lead to health risks for the fetus.”<sup>73</sup> “A pregnant drug-addicted woman who gives birth to a healthy baby, however, may still be charged under various criminal statutes for exposing her fetus to ‘harm.’”<sup>74</sup> This indicates that there are special gender discriminatory laws in place that penalize women for a condition—pregnancy. In many of these cases, women were deprived of basic constitutional rights of due process, and even right to legal counsel, because they were pregnant.<sup>75</sup> This “differential, gender-based treatment is discrimination in violation of the Equal Protection Clause of the Constitution.”<sup>76</sup>

The problem with this argument “under the Equal Protection Clause is that in some situations, pregnancy-based classifications may only receive deferential rational basis review.”<sup>77</sup> “Although gender-based classifications are subject to heightened, intermediate scrutiny, pregnancy-based classifications are not necessarily gender-based classifications and thus do not necessarily receive this same high level of scrutiny.”<sup>78</sup> It is incomprehensible how pregnancy-based classifications are not gender-based classifications, since, despite our most modern medical advances, men still cannot become pregnant. However, “[u]nder the rational basis test, the State only has to demonstrate that the classification is rationally related to a legitimate government interest,”<sup>79</sup> so an “equal protection attack premised on sex

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<sup>72</sup> *Id.* (“State prosecutors do not punish the men who help conceive the children and who give pregnant women drugs . . .”).

<sup>73</sup> *Id.* (citing Julia E. Jones, *State Intervention in Pregnancy*, 52 LA. L. REV. 1159, 1166-67 (1992)).

<sup>74</sup> *Id.*

<sup>75</sup> See Flavin & Paltrow, *supra* note 69, at 305-09 (summarizing cases “that illustrate some of the varied circumstances in which pregnant women have been deprived of their liberty, the different legal mechanisms used to do that, and some of the consequences of those deprivations”).

<sup>76</sup> Lyttle, *supra* note 12, at 793; see also *id.* at 793 n.93 (citing Michelle Oberman, *Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 HASTINGS L.J. 505, 527-31 (1992) (concluding that a Minnesota law regarding the reporting of prenatal exposure to controlled substances would fail intermediate scrutiny, given that the government interest in pre-viable fetal life is not sufficient to permit state regulation of mothers’ bodies)).

<sup>77</sup> Lyttle, *supra* note 12, at 793; see also *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974).

<sup>78</sup> Lyttle, *supra* note 12, at 793; see also *Geduldig*, 417 U.S. at 496 n.20 (“While it is true that only woman can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . .”).

<sup>79</sup> Lyttle, *supra* note 12, at 794; see also Louise M. Chan, *S.O.S. From the Womb: A Call for New York Legislation Criminalizing Drug Use During Pregnancy*, 21 FORDHAM URB. L.J. 199, 224 (1993).

discrimination” would likely not prohibit the prosecution of drug-addicted pregnant women.<sup>80</sup>

## ii. Race

Many studies indicate that white and African-American women use drugs during pregnancy at similar rates.<sup>81</sup> However, “another study indicates that a pregnant African-American woman is almost ten times more likely than a pregnant white woman to be reported to health authorities for drug use.”<sup>82</sup> “This gross racial disparity in reporting and the subsequent prosecution and sentencing of drug-addicted women leads . . . to a belie[f] that [there is] a discriminatory purpose motivat[ing] state prosecutors’ desire to make maternal substance abuse a crime.”<sup>83</sup>

However, “[s]uch disparities do not prove that the prosecutions are unconstitutional . . . because the Supreme Court has interpreted racial discrimination under the Equal Protection Clause narrowly,” requiring discriminatory intent in addition to a disparate impact.<sup>84</sup> “It is difficult to prove that the State, in its prosecutions for maternal substance abuse, actually intended to discriminate against pregnant, drug-addicted, African-American women.”<sup>85</sup> In order to prove such intent, “a litigant would most likely have to show evidence indicating a pattern of disparate treatment that is unexplainable” on any other grounds, “or is a departure from the normal procedures for bringing charges against drug-addicted women.”<sup>86</sup>

While prosecuting pregnant-drug addicted women may not be facially racially discriminatory, race is certainly implicated in the prosecutions and subsequent sentencing of pregnant drug-addicted women, as evidenced above, and should be considered in analyzing the validity of the use of child endangerment enhancements.

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<sup>80</sup> Lyttle, *supra* note 12, at 794.

<sup>81</sup> *Id.* (citing Kathleen R. Sandy, *The Discrimination Inherent in America’s Drug War: Hidden Racism Revealed by Examining the Hysteria Over Crack*, 54 ALA. L. REV. 665, 687 (2003)).

<sup>82</sup> Lyttle, *supra* note 12, at 794-95 (citing Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1204 (1990)).

<sup>83</sup> *Id.* at 795.

<sup>84</sup> *Id.*; see also *Washington v. Davis*, 426 U.S. 229, 239-45 (1976).

<sup>85</sup> Lyttle, *supra* note 12, at 795.

<sup>86</sup> *Id.* at 795-96 (citing *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (discussing factors that are relevant to proving racially discriminatory purpose, such as “a clear pattern, unexplainable on grounds other than race,” “[t]he historical background of the decision,” “legislative or administrative history” of official state actions, and “departures from the normal procedural sequence”)).

### C. Right to Privacy

Punishing women for having babies violates their constitutional right to privacy for many reasons. First, it violates women's right to autonomy over their reproductive decisions.<sup>87</sup> Second, it creates a discriminatory government standard for childbearing.<sup>88</sup> Using the privacy doctrine to advocate for women is useful because it emphasizes the value of personhood and protects against abuse of government power.<sup>89</sup>

People who use illegal drugs are already subject to punishment under an array of criminal laws in this country.<sup>90</sup> "Pregnant women are not exempt," and they too can be prosecuted under these laws.<sup>91</sup> However, punishing drug addicts who choose to carry their pregnancies to term unconstitutionally burdens the right to autonomy over their reproductive decisions as established in *Roe v. Wade*.<sup>92</sup>

In *Roe*, the [U.S.] Supreme Court held that the right to privacy, "whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>93</sup>

By violating poor, predominately black women's reproductive rights, the government "perpetuate[s] a racist hierarchy in our society."<sup>94</sup> Thus, the "[p]rosecutions . . . impose a standard of motherhood that is offensive to both principles of equality and privacy."<sup>95</sup>

"[A] woman does not lose her right to privacy simply because she becomes pregnant."<sup>96</sup> Pregnant women remain persons under the Constitution, and the "constitutional right to privacy 'extends to both women and men, regardless of their biological differences.'"<sup>97</sup> For these reasons, "[s]tates' mechanisms [for punishing drug-addicted

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<sup>87</sup> Roberts, *supra* note 38, at 1463, 1468.

<sup>88</sup> *Id.* at 1463-64; *see also* Lyttle, *supra* note 12, at 797.

<sup>89</sup> Roberts, *supra* note 38, at 1468.

<sup>90</sup> Larson, *supra* note 58, at 74.

<sup>91</sup> *Id.*

<sup>92</sup> *See* *Roe v. Wade*, 410 U.S. 113, 153 (1973); Lyttle, *supra* note 12, at 796.

<sup>93</sup> Lyttle, *supra* note 12, at 796 (quoting *Roe*, 410 U.S. at 153).

<sup>94</sup> Roberts, *supra* note 38, at 1425.

<sup>95</sup> *Id.*

<sup>96</sup> Lyttle, *supra* note 12, at 796.

<sup>97</sup> *Id.* (quoting Deanna R. Reitman, Note, *The Collision Between the Rights of Women, the Rights of the Fetus and the Rights of the State: A Critical Analysis of the Criminal Prosecution of Drug Addicted Pregnant Women*, 16 ST. JOHN'S J.L. COMM. 267, 302-03 (2002)).

women]—prosecution by child abuse, endangerment, controlled substance abuse, manslaughter, and homicide statutes—infringe upon [their] . . . fundamental right to privacy because these mechanisms punish [drug-addicted women] . . . simply for exercising [their] . . . constitutional right to procreate.”<sup>98</sup> Women have a “constitutional right ‘to become pregnant and give birth despite drug dependence.’”<sup>99</sup> “Punishing a woman for her behavior during pregnancy infringes upon her personal autonomy,” her right to be “free from interference by others, and . . . [her] ability to flourish among and in relation to others.”<sup>100</sup>

Those who support enhanced sentences believe that a woman’s freedom must be jeopardized in order to convince her to stop using drugs or to enroll in a treatment program.<sup>101</sup> Criminal prosecutions, however, may do just the opposite.<sup>102</sup> Fear of prosecution will deter these women, who already lack many of the resources necessary for a healthy pregnancy, “from seeking care, confiding in their doctors, and participating in treatment.”<sup>103</sup>

There is a strong tie between abortion rights and criminalizing dangerous behavior while pregnant.<sup>104</sup> The threat of enhanced sentences weighs on a woman’s choice to have children, a strong liberty and privacy interest.<sup>105</sup> Women fearing criminal prosecution for drug-abuse while pregnant are less likely to seek help or carry their pregnancies to term.<sup>106</sup> “The states’ prosecutorial strategies discourage pregnant drug-addicted women from seeking pre- and post-natal care because of fear.”<sup>107</sup> This fear of punishment could force

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.* (quoting Brief for Am. Pub. Health Ass’n et al. as Amici Curiae Supporting Defendant, *People v. Gilligan* (N.Y. Sup. Ct. 2003) (No. 2003-1192), [http://www.nyclu.Org/rp\\_gilligan\\_amicus\\_110503.html](http://www.nyclu.Org/rp_gilligan_amicus_110503.html)).

<sup>100</sup> *Id.* at 796-97 (citation omitted).

<sup>101</sup> Larson, *supra* note 58, at 75, 80; *see also* Lyttle, *supra* note 12, at 786 (“Michigan prosecutor Tony Tague argued that underlying the general deterrence objective of the criminal prosecution of pregnant drug-addicted women is the hope that it will encourage women to seek drug treatment.”).

<sup>102</sup> Larson, *supra* note 58, at 80.

<sup>103</sup> *Id.* (“Many of these opponents also believe that this deterrence will result from automatically involving the child protective services agency when a pregnant woman uses drugs.”).

<sup>104</sup> *See* Lyttle, *supra* note 12, at 796-97.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 790.

<sup>107</sup> *Id.* (citing *Over 50 Public Health Organizations, Experts, and Related Advocates Condemn the Prosecution of Pregnant Woman*, NAT’L ADVOCATES FOR PREGNANT WOMEN (Oct. 30, 2003), [http://www.advocatesforpregnantwomen.org/issues/pr\\_ltr\\_gilligan.htm](http://www.advocatesforpregnantwomen.org/issues/pr_ltr_gilligan.htm)).



drug-addicted women to turn to abortion.<sup>108</sup> “[T]he government’s [chief] response to the crisis of drug-exposed babies should be the recognition of their mother’s worth and entitlement to autonomy over their reproduction lives.”<sup>109</sup> The proper solution to ensure healthy babies, and therefore a healthy society, is a government committed to “guaranteeing these fundamental rights of poor women . . . rather than punishing them.”<sup>110</sup>

“The right to privacy argument . . . is limited by the State’s interest in protecting the life of the unborn.”<sup>111</sup> Indeed, “the right to privacy is not absolute.”<sup>112</sup> “It must be balanced against the State’s interest in protecting the potential life that the pregnant drug-addicted woman is carrying.”<sup>113</sup> However, “there is rarely, if ever, a context in which the State is justified in using the criminal justice system to interfere with a woman’s child-bearing decisions.”<sup>114</sup>

#### *D. Due Process*

The Due Process Clause:

[R]equires that [w]hen an individual’s life, liberty or property is to be curtailed by the government, that individual must receive notice from the government, which usually occurs through the publication of laws passed by the legislature. The State violates the fair notice requirement of due process when it fails to warn drug-addicted woman that her fetus will be treated as a child or victim and that she will be . . . a criminal offender for “harming” her fetus for purposes of child abuse, neglect, endangerment, homicide, manslaughter, and controlled substance abuse statutes.<sup>115</sup>

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<sup>108</sup> *Id.*

<sup>109</sup> Roberts, *supra* note 38, at 1482.

<sup>110</sup> *Id.*

<sup>111</sup> Lyttle, *supra* note 12, at 797 (citing *Planned Parenthood of Se Pa. v. Casey*, 505 U.S. 833, 869 (1992) (“The woman’s liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State’s interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.”)).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* (citing *Roe v. Wade*, 410 U.S. 113, 155 (1973) (“[A]t some point the state interests as to protection of health, medical standards, and prenatal life, become dominant.”)).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 792 (internal quotation marks omitted) (citing Margaret Phillips, Comment, *Umbilical Cords: The New Drug Connection*, 40 BUFF. L. REV. 525, 540 (1992)).

Women do “not have fair notice that child abuse, neglect, endangerment, homicide, manslaughter, and controlled substance statutes apply to [their] . . . maternal behavior’s potential, and actual, effects on . . . [their] fetus[es].”<sup>116</sup>

The Due Process argument, however, is “weakened because states have been prosecuting drug-addicted women for their behavior during pregnancy since the late 1970s,” which makes it “difficult to accept the claim that these women lack fair notice.”<sup>117</sup> The “extensive media coverage reporting on . . . babies exposed to drugs in the womb” may also provide some degree of “notice that their behavior could potentially harm their fetuses.”<sup>118</sup> Still, women may not be aware that the statutes written to protect children apply to fetuses.

#### IV. SENTENCING

Prosecutors and proponents of criminalizing drug-addicted women believe that “severe punishments [will] act as disincentives for women who are likely to engage in drug use . . . during pregnancy.”<sup>119</sup> They claim “that the creation of crimes that punish women who endanger their fetuses would educate the public through ‘the publicity accompanying the trial, conviction, and sentencing’ of the ‘proper distinctions between good and bad behavior.’”<sup>120</sup> They “have sought to accomplish . . . deterrence and the protection of potential life by prosecuting drug-addicted women under an array of criminal statutes.”<sup>121</sup>

Some mechanisms that prosecutors have used to prosecute drug-addicted women are manslaughter and homicide statutes.<sup>122</sup> “In *State v. McKnight*, Regina McKnight, a twenty-two-year-old African-American woman, was charged with homicide by child abuse after experiencing a stillbirth.”<sup>123</sup> In McKnight’s case, “[t]he South Carolina Supreme Court held that under South Carolina law, a viable

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<sup>116</sup> *Id.*

<sup>117</sup> Lyttle, *supra* note 12, at 792.

<sup>118</sup> *Id.* (citing Shona B. Glink, Note, *The Prosecution of Maternal Fetal Abuse: Is this the Answer?*, 1991 U. ILL. L. REV. 533, 538-39 (1991) (explaining how the media’s extensive coverage of the growing drug problem in United States, particularly among pregnant women, has contributed to the public’s awareness of the effects of drug use on fetuses)).

<sup>119</sup> *Id.* at 786.

<sup>120</sup> *Id.* (quoting Elizabeth L. Thompson, Note, *The Criminalization of Maternal Conduct During Pregnancy: A Decisionmaking Model for Lawmakers*, 64 IND. L.J. 357, 367 (1989)).

<sup>121</sup> *Id.* at 787.

<sup>122</sup> *Id.* at 788.

<sup>123</sup> Lyttle, *supra* note 12, at 788 (citing *State v. McKnight*, 576 S.E.2d 168, 171 (S.C. 2003)).

fetus is a ‘child’ within the meaning of the child abuse statute.”<sup>124</sup>

While “prosecutors contend that punishing drug-addicted women protects the potential fetal life from abuse and ensures the fetus’s right to bodily integrity, . . . [t]he Supreme Court has held that the word ‘person’ as used in the Fourteenth Amendment does not include the unborn.”<sup>125</sup> The “unborn are therefore not entitled to constitutional protection,” despite what prosecutors argue, when they claim “that the fetus is a person entitled to legally recognized rights such as bodily integrity and right to life.”<sup>126</sup>

### A. *The Federal Sentencing Guidelines*

In 1984, Congress passed the Sentencing Reform Act (“SRA”), establishing the United States Sentencing Commission.<sup>127</sup> The SRA, through the Sentencing Commission, was designed to:

Promulgate judicial federal sentencing guidelines, establishing the “policies and practices” that would “provide certainty and fairness in . . . sentencing, avoiding unwarranted sentencing disparities” between like offenders guilty of like criminal conduct, while maintaining sufficient flexibility to allow for consideration of individual mitigating and aggravating factors not taken into account by established general sentencing practices.<sup>128</sup>

Congress had three main objectives in sentencing reform: honesty, uniformity, and proportionality.<sup>129</sup> The first objective—honesty—aimed at reducing the disparity between time sentenced and time served, and eliminating confusion regarding how sentencing decisions were made.<sup>130</sup> The second objective—uniformity—hoped to increase consistency “between the federal courts in sentencing like offenders for like criminal conduct.”<sup>131</sup> The final objective—proportionality—sought to sentence “defendants in a manner

<sup>124</sup> *Id.* at 789 (citing *McKnight*, 576 S.E.2d at 174-75).

<sup>125</sup> *Id.* at 786-87 (citations omitted).

<sup>126</sup> *Id.* at 787.

<sup>127</sup> 28 U.S.C. § 991(a) (2015) (“There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member.”).

<sup>128</sup> John Garry, *Why Me: Application and Misapplication 3A1.1 the Vulnerable Victim Enhancement of the Federal Sentencing Guidelines*, 79 CORNELL L. REV. 143, 148-49 (1993) (citing 28 U.S.C. § 991(b)(1)(A)-(C) (1988)).

<sup>129</sup> U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (U.S. SENTENCING COMM’N 2014).

<sup>130</sup> *Id.*

<sup>131</sup> Garry, *supra* note 128, at 150 (citing U.S.S.G. ch. 1, pt. A).

consistent with the severity of their particular criminal conduct.”<sup>132</sup> “The Commission identifies a rift between proponents . . . who call for scaling punishment to the ‘offender’s culpability and resulting harms,’” and opponents “who advocate the imposition of punishment based on ‘practical crime control considerations.’”<sup>133</sup>

The Guidelines, promulgated by the Commission, “consider the nature and seriousness of the offense, as well as the history and characteristics of the defendant.”<sup>134</sup> The Guidelines also aim “to promote respect for the law,” provide proportional punishment for offenses, serve as an “adequate deterrence to criminal conduct,” protect the public from future criminal activity, and provide opportunities for rehabilitation.<sup>135</sup> “Other goals of the SRA may be to reduce the use of incarceration in sentencing,” when possible, “and increase public confidence in the criminal justice system.”<sup>136</sup> While judges are required to consult the Guidelines during sentencing, the Guidelines are advisory, not mandatory.<sup>137</sup> Despite their advisory nature, it remains important for judges “to keep this legislative intent in mind when interpreting the Sentencing Guidelines.”<sup>138</sup>

In theory, the “application of the Guidelines is a mechanical process.”<sup>139</sup> The Guidelines Manual (“Manual”) provides judges with general application principles.<sup>140</sup> In reality, however, there is a great deal of judicial discretion as the “judge identifies the component parts that will yield the fully calculated sentence.”<sup>141</sup>

First, the judge must refer to “the statutory index, which cross-references the federal statutes with guideline sections,” to determine the applicable guideline section.<sup>142</sup> The applicable guideline “provides a base level offense, which, in turn, is adjusted by specific offense characteristics.”<sup>143</sup> The judge “then applies the various sections of

<sup>132</sup> *Id.* (citing U.S.S.G. ch. 1, pt. A).

<sup>133</sup> *Id.* (citations omitted).

<sup>134</sup> *Id.*; see also 18 U.S.C. § 3553(a)(1) (2015).

<sup>135</sup> 18 U.S.C. § 3553(a)(2); see also Garry, *supra* note 128, at 149.

<sup>136</sup> Rebecca L. Spiro, *Federal Sentencing Guidelines and the Rehnquist Court: Theories of Statutory Interpretation*, 37 AM. CRIM. L. REV. 103, 120-21 (2000) (citation omitted).

<sup>137</sup> See *United States v. Booker*, 543 U.S. 220, 245 (2005) (establishing that the Guidelines are “effectively advisory”). Justice Breyer, citing 18 U.S.C. § 3553(a), indicated that the sentencing judge must consider the guideline ranges, but is free “to tailor the sentence in light of other statutory concerns as well.” *Id.* at 245-46.

<sup>138</sup> Spiro, *supra* note 136, at 121.

<sup>139</sup> Garry, *supra* note 128, at 151.

<sup>140</sup> See U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (U.S. SENTENCING COMM’N 2014); see also Garry, *supra* note 128, at 151.

<sup>141</sup> Garry, *supra* note 128, at 151.

<sup>142</sup> *Id.* (citing U.S.S.G. app. A; U.S.S.G. § 1B1).

<sup>143</sup> *Id.*

Chapter Three of the . . . Manual to the base offense level.”<sup>144</sup> These “adjustments [are] for factors involving the characteristics of the victims, the role that the defendant played in the offense, and any obstruction of the proceedings by the defendant.”<sup>145</sup> Lastly, the judge “uses separate calculations to compute a sentencing range based on . . . a sentencing table contained in Chapter Five.”<sup>146</sup> The range considers “probation, restitution, imprisonment, community confinement, and fines.”<sup>147</sup> The judge may then decide whether “an upward or downward departure is appropriate” and “sentence the defendant within the calculated range.”<sup>148</sup>

Despite the Guidelines, there is great judicial discretion in sentencing, which now rests on a reasonableness analysis.<sup>149</sup> In Weld’s case, however, enhancing her sentence on the grounds of “substantial risk of harm to a minor” because she was involved in the manufacture of meth while pregnant, seems unreasonable.<sup>150</sup> It does not effectively further state interests in promoting fetal health, but instead promulgates an excessively punitive system, restricts women’s rights, and implicates constitutional concerns.

### B. Gender and the Guidelines

While the Guidelines are supposed to remove gender as a factor, it is clear that gender is a factor in many crimes, trials, and sentencing decisions.<sup>151</sup> Judge Varlan made Weld’s gender an issue by enhancing her sentence with child endangerment and substantial risk of harm to a minor enhancements as a result of her pregnancy.<sup>152</sup> His gendered deviation from the Guidelines, however, did not have to result in an upward departure. There were opportunities for downward departures as well, including Section 5H1.6 “Family Ties and

<sup>144</sup> *Id.* at 152.

<sup>145</sup> *Id.* (citing U.S.S.G. §§ 3A1.1-3A1.3, 3B1.1-3B1.4, 3C1.1).

<sup>146</sup> *Id.* (citing U.S.S.G. ch. 5, pt. A).

<sup>147</sup> Garry, *supra* note 128, at 151 (citing U.S.S.G. §§ 5B1.1-5G1.3).

<sup>148</sup> *Id.*; see also *id.* at 152 n.47 (“A judge’s power to depart from a sentencing range is carefully circumscribed under the Guidelines and departure is strictly reviewed at the appellate level. *But see* United States v. Merritt, 988 F.2d 1298, 1309 (2nd Cir. 1993) (advocating departure based on offender characteristics because ‘departure in the appropriate case is essential to the satisfactory functioning of the sentencing system’”).

<sup>149</sup> *Id.* at 152.

<sup>150</sup> See *Lacey Weld Sentenced to More Than 12 Years*, *supra* note 3; see also United States v. Weld, 619 F. App’x 512, 513 (6th Cir. 2015).

<sup>151</sup> See Myrna S. Raeder, *Gender-Related Issues in A Post-Booker Federal Guidelines World*, 37 MCGEORGE L. REV. 691, 693 (2006).

<sup>152</sup> *Weld*, 619 F. App’x at 513.

Responsibilities,” Section 5K2.20 “Aberrant Behavior,” and Section 3E1.1 “Acceptance of Responsibility.”<sup>153</sup>

Scholars contend that it is appropriate to consider gender in sentencing cases, but not to enhance penalties for non-violent drug-addicted mothers, which only serves to keep mothers away from their children, and further reduce chances of getting sober and obtaining future employment.<sup>154</sup> The Guidelines make an “effort to produce identical sentences for males and females who commit similar crimes;” however, this has never been successful.<sup>155</sup> Instead, it imposes excessive and oppressive “costs on families as well as women who do not resemble the violent male drug dealers who inspired the severe federal drug penalties.”<sup>156</sup> Therefore, “gender-related differences *can* play a legitimate role in sentencing.”<sup>157</sup> Because “by ignoring the gendered realities of caregiving,” a completely gender-neutral sentencing scheme “has the potential of increasing intergenerational crime.”<sup>158</sup>

#### V. JUDGE VARLAN’S UNFOUNDED INTERPRETATION OF THE GUIDELINES IN *WELD*

Judge Varlan’s imposition of an enhanced sentence in Weld’s case was inappropriate. Applying the child endangerment enhancement of “substantial risk of harm to a minor” to a woman charged with manufacturing meth is bad policy because it conflicts with important constitutional values, and it improperly interprets the Guidelines purported principles. While substantial risk of harm to a minor has been a permissible child endangerment enhancement in other contexts, as a matter of interpretation, it should not apply to Lacey Weld.

The United States Code guides judges by providing that: In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of . . . agencies of the United States, the words “person,” “human being,” “child,” and “individual,” shall include every infant member of the species *homo sapiens* who

<sup>153</sup> See Raeder, *supra* note 151, at 717-18, 737-38.

<sup>154</sup> See generally *id.* at 692 (arguing that downward deviations based on gender can and should be appropriate for mothers).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* (emphasis added).

<sup>158</sup> *Id.*

is born alive at any stage of development.<sup>159</sup>

The U.S.C. goes on to describe “born alive,” which was clearly not at issue in this case because the fetus was still in Weld’s womb.<sup>160</sup> Additionally, the U.S.C. states, in pertinent part, that the section quoted above shall not “be construed to affirm, deny, or expand any legal status or legal right applicable to any member of the species *homo sapiens* at any point prior to being ‘born alive.’”<sup>161</sup> Here, fetuses are clearly not accounted for, as they are not a person, human being, child, or individual under the letter of the law.<sup>162</sup> Therefore, applying the substantial risk of harm to the life of a minor enhancement is inappropriate.

Section 2D1.1(b) of the United States Sentencing Guidelines provides for an increase of six offense levels when the defendant engages in the manufacture of methamphetamine and creates a substantial risk of harm to the life of a minor or an incompetent.<sup>163</sup> In determining whether the offense created a substantial risk of harm to human life, the court may consider factors such as the quantity of chemicals found in the laboratory, manner in which the toxic substances were disposed of, duration of the offense, extent of the manufacturing operation, and location of the laboratory.<sup>164</sup>

Here, then, the question becomes whether a fetus is a minor or an incompetent for the purposes of sentencing. In Section 2D1.1, “incompetent” is defined as “an individual who is incapable of taking care of the individual’s self or property because of a mental or physical illness or disability, mental retardation, or senility.”<sup>165</sup> This clearly does not apply to a fetus, as a fetus is not an individual lacking the capacity to care for itself due to “mental or physical illness, disability, mental retardation, or senility.”<sup>166</sup> Thus, for the purposes of

<sup>159</sup> 1 U.S.C. § 8(a) (2015).

<sup>160</sup> *Id.* § 8(b) (defining “born alive” as “the complete expulsion or extraction from his or her mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion”).

<sup>161</sup> *Id.* § 8(c).

<sup>162</sup> *See id.* § 8(a)-(c).

<sup>163</sup> 18 U.S.C.S. App’x § 2D1.1(b)(13)(D) (LEXIS through PL 114-115).

<sup>164</sup> 18 U.S.C.S. App’x § 608(b)(1)(B) (LEXIS through PL 114-114) (explaining that the provisions include substantial risk of harm to the environment as well as to a minor or incompetent).

<sup>165</sup> U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. 18(B)(ii) (U.S. SENTENCING COMM’N 2014).

<sup>166</sup> *Id.*

sentencing, a fetus does not meet the definition of “an incompetent.”<sup>167</sup>

The Guidelines go on to define “minor” as:

(A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.<sup>168</sup>

Is a fetus an individual who has not attained the age of eighteen years? Merriam-Webster defines minor as a “person who is not yet old enough to have the rights of an adult.”<sup>169</sup> Based on these definitions, a fetus is arguably not a person or an individual and, therefore, not a minor. Allowing a fetus to be classified as a minor creates *de facto* fetal personhood, which has been explicitly prohibited by the laws of this country.<sup>170</sup> The legal status of fetuses is hotly contested and allowing laws designed to protect minors, people not old enough to have the rights of adults, to extend to fetuses would create policy problems and alienate much of the population.

Fortunately, however, existing case law can provide guidance and avoid these pitfalls. In *United States v. Carney*, the defendant was convicted of conspiracy to “manufacture, distribute, or dispense 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine,” and carrying a firearm in furtherance of the crime.<sup>171</sup> Carney was sentenced using a six-level sentencing enhancement pursuant to Section § 2D1.1(b)(5)(C) of the Guidelines, and he appealed.<sup>172</sup> The appellate court held that the substantial risk of harm to the life of a minor enhancement did not “apply whenever manufacture of meth[] caused a substantial risk of *any type* of harm to a minor,” but rather, the sentencing enhancement required “a type of harm that could cause death or serious injury that would adversely affect the life of a minor.”<sup>173</sup>

“Carney argue[d] that the phrase ‘harm to the life of a minor’

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<sup>167</sup> *Id.*

<sup>168</sup> U.S.S.G. § 2A3.1 cmt. 1.

<sup>169</sup> *Minor*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/minor> (last visited Apr. 3, 2016).

<sup>170</sup> *Roe v. Wade*, 410 U.S. 113, 156-57 (1973) (explaining that because abortion is legal, fetuses cannot have personhood status, or abortions would be criminalized as murder).

<sup>171</sup> *United States v. Carney*, 117 F. App’x 928, 929 (5th Cir. 2004).

<sup>172</sup> *Id.* at 929.

<sup>173</sup> *Id.* at 930-31 (emphasis added).



contemplates serious harm, not just any harm.”<sup>174</sup> “[T]he government argued that the words ‘to the life’ are inconsequential surplusage.”<sup>175</sup> On appeal, the court held that “[t]he district court simply erred by dismissing the words ‘to the life’ when interpreting the guideline[s],” noting that “Congress chose the specific words” to carry meaning.<sup>176</sup> Following the rules of statutory construction, the court noted that “the plain and unambiguous meaning of the statutory language” must be followed and that the statute must “be construed . . . [so] that every word has some operative effect.”<sup>177</sup>

The appellate court concluded that “[i]f Congress had intended for § 2D1.1(b)(5)(C) to apply whenever the manufacture of methamphetamine caused a substantial risk of any type of harm to a minor, then it would have passed a law that said ‘substantial risk of harm to a minor.’”<sup>178</sup> However, Congress instead “passed a law that requires a substantial risk of harm to the life of a minor.”<sup>179</sup> The inclusion of “‘to the life’ indicates that Congress wanted to punish situations in which children faced a substantial risk of serious harm, as opposed to any type of harm.”<sup>180</sup> Therefore, “[h]arm ‘to the life of a minor’ suggests a type of harm that could cause death or a serious injury that would adversely affect the life of a minor.”<sup>181</sup>

*Carney* can be applied to Weld’s case. As discussed above, the harm that Weld may have exposed her fetus to, in the manufacturing of meth, is not the type of harm that would “cause death or serious injury that would adversely affect the life of a minor.”<sup>182</sup> Indeed, Weld’s son was born alive, and although he suffered severe withdrawal symptoms,<sup>183</sup> the symptoms are unlikely to persist or affect his health in the future.

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<sup>174</sup> *Id.* at 930.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Carney*, 117 F. App’x at 930. (citing *United States v. Kay*, 59 F.3d 738, 742 (5th Cir. 2004)).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*; see also Letter from Doctors, Scientists, & Specialists, *supra* note 51 (“In utero physiologic dependence on opiates (not addiction), known as Neonatal Narcotic Abstinence Syndrome, is readily diagnosable and treatable, but no such symptoms have been found to occur following prenatal cocaine or methamphetamine exposure.”).

<sup>183</sup> *Lacey Weld Sentenced to More Than 12 Years*, *supra* note 3 (explaining that the baby “suffered from withdrawals for almost six weeks”).

## VI. CONCLUSION

Allowing judges to consider pregnancy when sentencing drug-addicted women is another mechanism for devaluation and suppression. This creates *ex post facto* law and fetal personhood, whose life is valued higher than that of its mother— a judicial fiat. Fetuses are not minors within the meaning of the Guidelines, and even if a judge were to interpret the word “minor” to include fetuses, the harm caused by in-utero meth exposure does not warrant the use of the “substantial risk of harm to a minor” enhancement. Keeping women away from their children and families not only makes them wards of the state, it also leaves the government to support the families on the outside. Additionally, prisons fail to offer the treatment programs that these women need to become competent mothers and contributing members of society.

As evidenced above, the enhanced sentences are counterproductive. Judges should not have the discretion to enhance a pregnant drug user’s sentence beyond what was explicitly permitted by Congress. Treatment, including early intervention and rehabilitative services, is what states should utilize to address the problem of drug-exposed newborns.

Using the child endangerment enhancement in the Guidelines to justify harsher sentences for pregnant women, while not strictly unconstitutional, nevertheless implicates constitutional rights to privacy and personal autonomy, fosters racism, and impedes the goal of healthy families. Criminally prosecuting pregnant drug-addicted women creates a conflict between women’s rights to privacy and personal autonomy, the rights of fetuses to physical integrity, and the right of the state to protect potential human life.

As seen in Judge Varlan’s decision, there is a state interest in protecting potential human life, and prosecutors are using criminal sanctions to protect the physical integrity of fetuses and justify punishment of pregnant women. However, the results of these prosecutions are counter to the state’s goal. The effect is the unjustified subordination of women and denial of constitutional guarantees.