

***McDonald v. Fair and Catch the Hope:***

Understanding the Relationship between  
Institutional Reform Litigation and Community Activism

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## INTRODUCTION

Pregnant inmates present a unique challenge to corrections departments in the United States. Female inmates are a minority population in corrections systems; pregnant inmates comprise an even smaller sub-group of this minority population, just six to ten percent of all female inmates.<sup>1</sup> Probably because the numbers are so small, most correctional systems have not adequately addressed the needs of pregnant inmates. Ellen M. Barry, Founding Director of Legal Services for Prisoners with Children (LSPC) in California, explains:

Correctional systems typically have inadequate prenatal protocols, staff, and equipment to treat pregnant women, and they do not have resident obstetricians. In addition, prisons deprive pregnant women of adequate diets, nutrition, and exercise, and officials subject women prisoners to inappropriate and dangerous methods of shackling and physical restraint.<sup>2</sup>

### Background:

In the early 1980s, Anne Braudy, an attorney at the Massachusetts Correctional Legal Services (MCLS), began to receive many complaints from women imprisoned at the Massachusetts Correctional Institute-Framingham (MCI-Framingham) who did not feel that they were receiving adequate prenatal and postpartum care.<sup>3</sup> MCI-Framingham is a medium security correctional facility that is the only committing institution for

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<sup>1</sup> Ellen M. Barry, *Recent Developments: Pregnant Prisoners*, 12 HARV. WOMEN'S L. J. 189, 190 (1989). Women comprise about sixteen percent of the total corrections population, including those on probation, in local jails, in prison, and on parole. They comprise just under six percent of the total prison population. Lawrence Greenfeld and Tracy Snell, *Women Offenders*, 1998, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, December 1999, 6, NCJ 175688.

<sup>2</sup> *Id.* at 190.

<sup>3</sup> Telephone Interview with Anne Braudy, former attorney at Massachusetts Correctional Legal Services (November 5, 2000).

female offenders in Massachusetts.<sup>4</sup> The pregnant women inmates complained that they did not have access to maternity clothing; they were not receiving a satisfying or nutritious diet during their pregnancies; they were chained to their beds during labor and delivery; and their babies were taken away from them immediately following the delivery.<sup>5</sup> In 1985, Braudy filed *McDonald v. Fair*, a class action lawsuit on behalf of women inmates at MCI-Framingham aimed at improving the prenatal and postpartum services the prison offered its pregnant inmates.<sup>6</sup>

The needs of pregnant inmates in Massachusetts had not gone unnoticed prior to the filing of *McDonald*. Beginning in the early-1980s, concurrent with Braudy's introduction to the issue, Social Justice for Women (SJW), a prison reform advocacy organization in Massachusetts, had been urging the Department of Corrections (DOC) to improve conditions within MCI-Framingham as well as provide alternatives for pregnant inmates and inmates with young children.<sup>7</sup> Advocates at SJW played a key role in the development of several new and innovative programs at MCI-Framingham during that time.<sup>8</sup> As *McDonald* lingered in discovery in the late 1980s, SJW teamed up with the Dimock Community Health Center and the DOC to apply for federal funding to create a

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<sup>4</sup> See Massachusetts Department of Correction (DOC) web site, <<http://www.state.ma.us/doc/facility/index.html>>. MCI-Framingham is the second oldest women's prison in the country. Lorein Stein and Veronique Mistiaen, *Mothers Behind Bars*, BOSTON HERALD, October 30, 1988, Magazine at 5 [hereinafter *Mothers Behind Bars*].

<sup>5</sup> See Braudy interview, *supra* note 3.

<sup>6</sup> *McDonald v. Fair*, No. 80352 (Mass. Super. Ct. filed Dec. 20, 1985). Pregnant and postpartum women have different sets of concerns. However, in the *McDonald* complaint, the two groups were considered one class. For the sake of efficiency in this paper, I will use the word "pregnant" to refer to both pregnant and postpartum women unless otherwise indicated.

<sup>7</sup> *Mothers Behind Bars*, *supra* note 2, at 15.

<sup>8</sup> *Id.*

new program entitled Catch the Hope (CTH).<sup>9</sup> The plan was that the CTH program would offer the prenatal and postpartum services that Braudy was seeking through *McDonald* litigation.<sup>10</sup> CTH received federal funding in 1991, and the program was initiated.<sup>11</sup>

In the early 1990s, Braudy began negotiating the *McDonald* settlement agreement, and the Massachusetts legislature also started to pay close attention to the medical services that were being provided at MCI-Framingham. Following three highly publicized deaths at MCI-Framingham in the early 1990s, Representative Barbara Gray (D-Framingham) created a special legislative committee that initiated hearings concerning health care services at MCI-Framingham.<sup>12</sup> Representative Gray was particularly concerned with how the privatization of the prison health care system in Massachusetts impacted the health services that the inmates received. This committee commissioned an independent study of the health care system at MCI-Framingham.<sup>13</sup>

When *McDonald* finally settled in April 1992, the CTH program was in its second, successful year of operation, funded by a federal grant. Representative Gray's special legislative committee had brought public attention to some of problems with the health care system at MCI-Framingham. While Braudy had not strategized with SJW or

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<sup>9</sup> Cathy Romeo, *Catch the Hope Program at Massachusetts Correctional Institution – Framingham: A Model for Providing Critical Services to Incarcerated Pregnant Women*, 24 NEW ENG. J. ON CRIM. AND CIV. CONFINEMENT 417, 418 (1998).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Peter s. Canellos, *Prison Official Hired by Firm He Oversaw*, BOSTON GLOBE, November 28, 1992, Metro at 1; Efrain Hernandez, Jr., *State Upbeat on Prison Health, Full Accreditation Predicted by '94*, BOSTON GLOBE, July 14, 1993, Metro at 22.

<sup>13</sup> Barbara Hebert, M.D., Gordon Josephson, M.D., and Roxanne G. Ritter, M.D., AN INDEPENDENT INVESTIGATION OF THE CIRCUMSTANCES SURROUNDING THE DEATH OF ROBIN PEELER (August 1992) (on file at the Massachusetts Statehouse Library) [hereinafter Peeler Report].

Representative Gray during *McDonald*, she says that the role that the community organizations and the legislature played in bringing attention to the issues at hand influenced the favorable settlement agreement that she was able to negotiate with the DOC, mandating a high level of prenatal and postpartum services for pregnant inmates.<sup>14</sup>

*McDonald* settled nearly ten years ago, and yet, the problems continue for pregnant inmates at MCI-Framingham. The DOC took over funding for the CTH program, and for several years, the program was considered highly successful at providing high quality prenatal and postpartum services to women inmates. However, in the last five years, the program has seen three different directors, and the DOC is currently considering reducing the directorship to a part-time position.<sup>15</sup> Advocates working close to and within MCI-Framingham refer to the program as a shell of what it once was.<sup>16</sup> The situation is so grave that in December 2001, a legislative working group comprised of prison reform advocates under the direction of Representative Kay Khan (D-Newton) and the Massachusetts's Women's Caucus introduced a bill that would mandate the exact same services that the DOC should already be providing under the *McDonald* agreement, and there has been some discussion among advocacy organizations about going into MCI-Framingham and doing a compliance review.<sup>17</sup> While *McDonald* had many early successes, the agreement has not resulted in lasting change for pregnant inmates.

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<sup>14</sup> Braudy interview, *supra* note 3.

<sup>15</sup> Cathy Romeo, former director of CTH, Testimony before the Massachusetts Department of Public Safety (March 15, 2001).

<sup>16</sup> Interview with Cathy Romeo, former director of CTH, (October 23, 2000); Interview with Nancy P. Rubackin, a paralegal/investigator and long term volunteer at MCI-Framingham, (October 2000).

<sup>17</sup> This information was told to me in confidence in a casual conversation. I never heard anything beyond this conversation, and there has been no compliance review to date.

Litigation and Social Activism: A Guide to Understanding *McDonald*:

Stuart Scheingold, in The Politics of Rights: Lawyers, Public Policy, and

Political Change, explains that:

The evidence suggests that litigation may be useful for providing remedies for individuals but that its impact on social policy is open to question. The implementation of social policy by court orders is likely to be slow, costly, and perhaps self-defeating.<sup>18</sup>

Building upon Scheingold's theory of the politics of rights, Michael McCann, in his study of the pay equity movement, explains that "legal mobilization is usually but one among many constitutive and strategic dimensions of most social movements."<sup>19</sup> Both Scheingold and McCann study the plaintiffs side of litigation in order to understand the role that litigation plays in social reform movements. According to McCann, litigation is most successful when it brings together advocates who use multiple strategies to create an energy that drives the movement, and litigation is only one of these strategies. While the *McDonald* litigation had several of the elements that might lead to the creation of a social reform movement--a favorable settlement agreement, community activism, and legislative support--a movement in support of women prisoners, particularly regarding prenatal and postpartum services, never really developed. As a result, what could be considered a successful result from litigation, never really brought about lasting change for pregnant inmates at MCI-Framingham.

The relationship between the plaintiffs and defendants is also important in trying to understand what happened both during and in the years since the *McDonald* litigation. Scheingold explains that a significant problem with implementation is that decisions (or

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<sup>18</sup> Stuart Scheingold, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 148 (1974)

<sup>19</sup> Michael W. McCann, *RIGHTS AT WORK: PAY EQUITY AND THE POLITICS OF LEGAL MOBILIZATION* 10 (1994).

settlement agreements) do not often change the power relationships that exist in society prior to and post judgment.<sup>20</sup> Power inequities not only affect the outcome of litigation, but they also influence the plaintiffs ability to enforce the terms of agreements or judgments. In her study of child welfare reform litigation for The Center for the Study of Social Policy, *Tying Reform to Litigation*, Ellen Borgerson looks at the relationship between the two parties. Borgerson focuses on the need for more than just a settlement agreement or court order to bring about complete reform. She explains:

But fundamental system change cannot be imposed from the outside. It must grow out of a process that engenders “ownership” of the reform plan by those charged with implementing and sustaining it. In litigation, that requires parties who have been cast as adversaries to build enough trust to embark on a long and difficult reform process: a transition, in short from litigation to effective strategic planning, which is incredibly difficult.<sup>21</sup>

The power inequities between the Massachusetts DOC and women prisoners never changed following the *McDonald* agreement for many reasons, many of which are quite legitimate. Furthermore, the DOC moves administrators around the system with great frequency, and once the administrators who negotiated the agreement moved, there was no structure in place to maintain the strength of the CTH program. Therefore, there was really no transition from litigation to long-term strategic planning and implementation.

*McDonald*, though quite successful in the short-term, never served as a catalyst for lasting institutional reform. Its greatest success was for a six to eight year time period when several women, including women administrators from the DOC, joined together for a brief period to try to improve the care given to pregnant inmates. In Part I of this paper, I will examine the *McDonald* litigation from inception to the agreement. First, I will look

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<sup>20</sup> Scheingold, *supra* note 16, at 117.

<sup>21</sup> Ellen Borgerson, The Center for Study of Social Policy, *Tying Reform to Litigation* 14 (1998).

at activities on the plaintiffs side of the litigation, including the work of the community organizations and the legislature, to try and determine why there was never a “movement” in support of pregnant inmates at MCI-Framingham. Second, I will examine Braudy’s relationship to the DOC administrators and attorneys to better understand how she was able to negotiate such a strong settlement agreement, but one that was not able to withstand changes in DOC and program administration.

In Part II of this paper, I will look at the demise of the CTH program at MCI-Framingham as well as the resulting resurgence of interest in the issue of pregnancy in prison in Massachusetts. I will ask the following question: Once litigation has succeeded and failed, can it still play some role, ten years later, in developing a movement for institutional reform? I will discuss the way that women’s prison advocates currently use the *McDonald* agreement and the reasons why I do not think that it will ever play a key role in institutional reform at MCI-Framingham.

Note:

I do not come to this project unbiased. In 1997, I worked as a fundraiser for The Women’s Prison Association, a one hundred and fifty year old non-profit organization in New York City that provides services for both incarcerated women and women who have recently been released from prison in New York.<sup>22</sup> This is a cause that I have felt committed to on a personal as well as an intellectual basis for the past several years.

While working on this project, I became involved in the aforementioned working group at the Massachusetts statehouse organized by the Women’s Caucus and Representative Kay Khan (D-Brookline). This Women in Prison Working Group studies

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<sup>22</sup> The Women’s Prison Association was the subject of a National Institute of Justice Program Report in 1998. See CATHERINE CONLY, NATIONAL INSTITUTE OF JUSTICE, THE WOMEN’S PRISON ASSOCIATION: SUPPORTING WOMEN OFFENDERS AND THEIR FAMILIES (1998)



and discusses all aspects of women's involvement in the criminal justice system in Massachusetts as well as drafts and supports legislation. In fall 2000, I was part of a committee that drafted H3972 An Act Relative to Pregnant and Postpartum Inmates. Thus, during much of my research, I was both the observer and part of the group being observed. If anything, this was an advantage; my peers in the working group were more open with me because they believed that I was sympathetic to their cause. At the same time, I feel that I remained able to both be critical of the litigation and to learn from the "adversaries," the DOC attorneys and administrators.

Some academics might frown upon my lack of disinterested neutrality. However, I am persuaded by anthropologists who theorize that such neutrality is either impossible or counterproductive. Feminist anthropologist Donna Haraway argues that the idea of objectivity, even in the study of biological sciences, is a false one.<sup>23</sup> Instead, she creates the notion of "situated knowledges" and explains, "[s]ituated knowledges are about communities, not about isolated individuals. The only way to find a larger vision is to be somewhere in particular."<sup>24</sup> Haraway's critique of objectivity is that learning is often a dialogic process and neither the author nor the agent/actor she studies are detached or static. Hugh Guterson, an anthropologist and former peace activist who studies the culture of nuclear weapons scientists at Los Alamos, agrees with Haraway:

Where fieldwork used to be a bounded hierarchical encounter between the knower and the known aiming to produce an authoritative summation of the observed culture, today it often has more of the qualities of an ongoing, albeit asymmetrical dialogue.<sup>25</sup>

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<sup>23</sup> Donna Haraway, *Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective*, in *FEMINISM AND SCIENCE* 249, 257 (Evelyn Fox Keller and Helen Longino, eds. 1996)

<sup>24</sup> *Id.* at 259.

<sup>25</sup> Hugh Guterson, *Becoming a Weapons Scientist*, in *TECHNOSCIENTIFIC IMAGINARIES*, ---,--- (George E. Marcus, ed. 1995)

Guterson also explains that it was his identity as a former antinuclear activist that gave him “an angle, a set of question, and a terrain of engagement” with the individuals that he studied.<sup>26</sup> I found that my background knowledge and personal commitment to the issue of pregnant inmates often gave me legitimacy with people on both sides of the cause. I was well-versed in the language of both corrections officials and prison advocates, and through my involvement in the working group, I continued to learn. And so I conclude my introduction with a statement by McCann, who provides an explanation about his own relationship to his work on social movements, that accurately reflects my own commitment to social reform and the values that underlie this project:

This commitment thus is not purely academic or disinterested, but reflects a genuine interest in, and support for, a variety of particular struggles against hierarchy and domination in our society.<sup>27</sup>

Women’s prison reform is only one of these struggles.

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

<sup>27</sup> McCann, *supra*. note 16, at 21.

## Part I: The *McDonald* Litigation

### A. A Brief History of Related Litigation

In the late 1970s, a Supreme Court and a court of appeals decision laid the groundwork for subsequent cases that focused on the needs of pregnant inmates. In *Estelle v. Gamble*, the Supreme Court established a standard of medical care that prisons were required to provide to inmates.<sup>28</sup> Justice Thurgood Marshall, writing the opinion for the Court, explained that “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain,’ proscribed by the Eighth Amendment.”<sup>29</sup> The Court concluded that it did not matter how this deliberate indifference was manifested as long as it was present.<sup>30</sup>

The first case to test *Estelle v. Gamble* in a women’s prison setting was *Todaro v. Ward*, brought on behalf of women inmates at Bedford Hills Women’s Prison in New York.<sup>31</sup> In *Todaro v. Ward*, a trial level federal court in New York acknowledged the challenge that prisons face in administering medical care due to the great need for medical care amongst prisoners.<sup>32</sup> However, the court found the “provision of essential medical care, unlike prison discipline, does not fall within the sphere of correctional concern to which great deference is due.”<sup>33</sup>

The trial court relied heavily on *Estelle v. Gamble* and concluded that the Department of Corrections was violating the women inmates’ Eighth Amendment rights.

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<sup>28</sup> *Estelle v. Gamble*, 429 U.S. 97 (1976), *reh’g denied* 429 U.S. 1066 (1977).

<sup>29</sup> *Id.* at 104.

<sup>30</sup> The Court concluded that there was an Eighth Amendment violation “whether the indifference is manifested by prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying or delaying access to medical treatment or intentionally interfering with the treatment once prescribed.” *Id.* at 104-105.

<sup>31</sup> *Todaro v. Ward*, 431 F. Supp. 1129 (S.D.N.Y. 1977), *aff’d*, 565 F.2d 48 (2d Cir. 1977).

<sup>32</sup> *Id.* at 1133.

<sup>33</sup> *Id.* at 1134.

Furthermore, the court determined that it was the policies of the prison, not just the individuals in charge of medical care, that had created the problem. In affirming the trial court's decision, Chief Judge Kaufman of the Second Circuit explained that:

while a single instance of medical care denied or delayed, viewed in isolation, may appear to be the product of mere negligence, repeated examples of such treatment bespeak a deliberate indifference by prison authorities to the agony engendered by haphazard and ill-conceived procedures.<sup>34</sup>

*Todaro v. Ward* did not specifically address the needs of pregnant inmates, but there is no doubt that an overall improvement in prison health care provision benefits pregnant inmates.<sup>35</sup> Additionally, one prison advocate noted that the decision in *Todaro v. Ward* "indicated to litigators that the courts were ready to enforce rights for women prisoners."<sup>36</sup>

Litigators began to focus specifically on pregnant inmates in the early 1980s. The first case, *West v. Manson*, was brought by women inmates against the Connecticut Correctional Institute at Niantic.<sup>37</sup> The complaint was broad and addressed many legal issues including overcrowding and a lack of privacy.<sup>38</sup> The complaint also contained several sections concerning inadequate medical treatment, and it specifically included a section on the treatment of mothers and children that addressed the needs of pregnant inmates.<sup>39</sup> *West v. Manson* resulted in a fifty seven page consent decree in 1984.<sup>40</sup> The agreement contained five pages that were devoted to the treatment of pregnant inmates,

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<sup>34</sup> *Todaro*, 565 F.2d at 52.

<sup>35</sup> Barry, *supra* note 1, at 193. See Mary Catherine McGurrin, *Pregnant Inmates' Right to Health Care*, 20 CRIM. AND CIV. CONFINEMENT 163, 166 (1993).

<sup>36</sup> Barry, *supra* note 1, at 193.

<sup>37</sup> *West v. Manson*, No. H83-366 (D. Conn, filed May 9, 1983).

<sup>38</sup> Complaint at 6-22, *West v. Manson*, No. H83-366 (D. Conn, filed May 9, 1983)

<sup>39</sup> *Id.*

<sup>40</sup> Settlement Agreement, *West v. Manson*, No. H83-366 (D. Conn. filed June 1984)

focusing specifically on nutrition, prenatal education, use of toilets, and use of restraints during pregnancy.<sup>41</sup>

Similar issues were raised in the complaint in *Harris v. McCarthy*, brought in September 1985, by Legal Services for Prisoners with Children on behalf of women inmates at the California Institution for Women in Frontera, California.<sup>42</sup> *Harris v. McCarthy* was apparently the first federal case to address solely the needs of pregnant inmates. The complaint states:

As a direct result of defendants actions, pregnant women incarcerated at the California Institution for Women have been denied adequate prenatal examinations and treatment, adequate medical care in pregnancy-related emergency and life-threatening situations, and adequate care following the delivery of babies.<sup>43</sup>

The *Harris* complaint is also unique in that it includes specific, tragic examples of inadequate care that resulted in “the death of at least one infant, and the disability of a second infant” as well causing “at least one plaintiff to have an unnecessary hysterectomy.”<sup>44</sup> In December 1985, just a few months after *Harris v. McCarthy* was filed, Anne Braudy filed the *McDonald* complaint.<sup>45</sup>

#### B. The *McDonald* Complaint

While these early stages of women’s prison litigation were progressing, the needs of pregnant inmates in Massachusetts were not going entirely unnoticed. In 1982, Betsy Smith and Lila Austin of Social Justice for Women (SJW) created the Women’s Health and Learning Center at MCI-Framingham.<sup>46</sup> This program was funded by the

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<sup>41</sup> *Id.* at 13-17.

<sup>42</sup> *Harris v. McCarthy*, No. 85-6002 (C.D. Cal. filed Sept. 11, 1985)

<sup>43</sup> Complaint at 1, *Harris v. McCarthy*, No. 85-6002 (C.D. Cal. filed Sept. 11, 1985)

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

<sup>45</sup> *Harris v. McCarthy* resulted in a settlement agreement two years later in April 1987.

<sup>46</sup> *Mothers Behind Bars*, *supra* note 3, at 16.

Massachusetts Department of Health and provided “prenatal health and parenting and nutrition classes as well as workshops in substance abuse, sexual abuse, domestic violence and AIDS.”<sup>47</sup> This program called attention to and addressed some of the needs of pregnant inmates, but it did not take care of many of the gaps in DOC policies and regulations. Most significantly, the Women’s Health and Learning Center could not get at the core of what was putting these women at risk--inadequate medical treatment. Thus, Austin concluded, “Even with the Center, there are enormous problems. It’s only a Band-Aid solution until a better one comes along.”<sup>48</sup>

In December 1985, MCLS’s Anne Braudy created the beginnings of a better solution when she filed the *McDonald* complaint. Braudy filed *McDonald* in Massachusetts state court because it was MCLS policy to file all cases in state court.<sup>49</sup> *McDonald* was the first class action lawsuit that Braudy had handled on her own, and it was the first case in Massachusetts to address this issue, but Braudy believed that the problems that her clients presented were “clearly an institutional reform issue.”<sup>50</sup> No one individual situation stood out as particularly egregious or covered a wide enough range of issues to have a larger impact.<sup>51</sup>

Braudy met with Betsy Smith and collected parts of complaints from both *West v. Manson* and *Harris v. McCarthy* before she filed the *McDonald* complaint. However, she primarily relied on the complaints that she had been receiving from pregnant inmates during individual client meetings at MCI-Framingham.<sup>52</sup> Braudy admits that she

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Braudy interview, *supra* note 3.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

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

approached the case more as a lawyer than as a social advocate. While she credits Smith with introducing her to the world of advocacy and litigation surrounding women's prison reform, she never thought of herself as part of a reform movement.<sup>53</sup> Instead, she continued to think of herself as a lawyer who needed to get the best results for her clients. This is reflected in the way that she used individual client concerns to form the basis of a broader, more comprehensive complaint.

The pregnant inmates at MCI-Framingham had several complaints similar to those in California and Connecticut. Their issues ranged from a lack of nutritious food and maternity clothing to women being restrained to their labor beds during childbirth. Unlike some of the more dramatic examples in *Harris* complaint, Braudy did not point to any specific tragic events in the *McDonald* complaint. Instead, she relied on the "moral and legal" obligation that the DOC has to pregnant inmates because pregnant inmates are totally dependent upon the DOC for their health care needs. Braudy wrote:

The moral and legal duty to ensure that pregnant inmates receive competent and adequate medical care lies with the Department of Correction. The failure of the Department of Correction to provide adequate medical care to pregnant inmates of MCI Framingham has subjected the health and well-being of inmates and their unborn children to grave and immediate danger. The level of care provided constitutes deliberate indifference to the needs of the pregnant women placed in the Department of Correction's custody and violates federal and state prohibitions against cruel and unusual punishment, fundamental principles of due process and equal protection, and state statutory and regulatory schemes designed to protect the health and welfare of incarcerated women in Massachusetts.<sup>54</sup>

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<sup>53</sup> Braudy acknowledges that this was a major weakness in her approach to this case. She partly blames this approach on the former executive director at MCLS who she describes as a "lawyer's lawyer." She explains that the attorneys at MCLS held meetings every week to talk about their individual cases, but they never talked about a proactive approach that would combine both case work and social activism. *Id.*

<sup>54</sup> Complaint at 2-3, *McDonald v. Fair*, No. 80352 (Mass. Super. Ct. filed Dec. 20, 1985) [hereinafter *McDonald* Complaint]

In the complaint, the plaintiffs seek relief from “defendants’ gross, wanton, systematic, and continuing failure to provide adequate prenatal medical care to pregnant inmates confined at MCI Framingham.”<sup>55</sup> The plaintiffs did not seek monetary relief beyond attorney’s fees and costs, and it is clear from the claims for relief that this complaint was about a systemic overhaul. Braudy attacked several DOC regulations that put women inmates at great risk for harm during the three stages of childbirth—pregnancy, delivery, and the immediate postpartum period, and she called attention to the daily needs of pregnant inmates.<sup>56</sup>

### C. The Early Stages of Litigation

At any one time, the DOC can have as many as six thousand outstanding pieces of litigation filed against them.<sup>57</sup> When the administrators at the DOC first saw the *McDonald* complaint, they had mixed feelings.<sup>58</sup> On the one hand, the administration did not think that the DOC had any liability.<sup>59</sup> The administrators thought that MCI-Framingham was taking good care of the pregnant inmates primarily because the women were receiving far better medical care in prison than they would if they were still out in the community.<sup>60</sup> On the other hand, the DOC realized that if *McDonald* resulted in a consent decree, they would be able to use the agreement to argue against future legislative budget cuts because the decree would mandate a certain level of care.<sup>61</sup> The

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

<sup>56</sup> *Id.* at 9-11.

<sup>57</sup> Telephone Interview with Kathleen Dennehy, Deputy Commissioner of the Massachusetts Department of Corrections and former Superintendent of MCI-Framingham (January 3, 2001).

<sup>58</sup> Interview with Michelle Kaczynski, Massachusetts Assistant Attorney General--Trial Division (October 19, 2000).

<sup>59</sup> Kaczynski maintains that if the plaintiffs had insisted on damages, the DOC never would have settled because they did not feel that the plaintiffs stated a valid claim. *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*



DOC chose to follow this second position fairly early on in the litigation and decided to try to settle *McDonald*.<sup>62</sup>

The DOC's decision to try to settle fit well with Braudy's approach to the case. Braudy spent the early part of the litigation in discovery and did not find any strong material. She knew this would be an extremely difficult case to try.<sup>63</sup> Additionally, by Braudy's own account, she is much better at preparing a case behind the scenes, but not as confident when it comes to going before the court.<sup>64</sup> Thus, Braudy was quite willing to enter into settlement negotiations with the DOC.

#### D. Developments Beyond Litigation

While the *McDonald* litigation was ongoing, Betsy Smith and the prison advocates at SJW were moving ahead with their own agenda. In 1989, SJW began to compile information from all of the people who were running groups for inmates at MCI-Framingham, especially around issues concerning pregnancy.<sup>65</sup> Their plan was to apply for federal funding from the Office of Substance Abuse Prevention to "provide comprehensive health services, substance abuse treatment, education, and child development/parenting services to poly-substance abusing pregnant women committed"

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<sup>62</sup> When I say "fairly early on," I am referring to years. Both sides acknowledge that this case went on for an excruciatingly long period of time. Braudy admits that there were periods of time when she just let the litigation sit because she was confused as to how to proceed. See Braudy interview, *supra* note 3. Kaczynski recalls that the litigation went in spurts, depending on how busy the attorneys were. She said that at the time this case was litigated it was not unusual for cases to go on for this length of time because the suit was not in any time standards setting. See Kaczynski interview, *supra* note 56. I think that the length of time also had to do with the fact that neither Braudy nor Kaczynski had ever handled a consent decree prior to *McDonald*. In fact, the *McDonald* agreement was the first and only time Kaczynski has ever negotiated a consent decree. *Id.*

<sup>63</sup> Braudy interview, *supra* note 3.

<sup>64</sup> *Id.*

<sup>65</sup> Romeo interview, *supra* note 15.

to MCI-Framingham.<sup>66</sup> The program, which included both a prison component and a community follow-up component, would be entitled Project Catch the Hope (CTH), and it would be the first program in the nation to provide this kind of treatment to incarcerated, pregnant and postpartum women and their families.<sup>67</sup>

The proposal hinged on whether or not the DOC would agree to have the program in the prison if funding was awarded. In late 1989, the DOC agreed. There are several different explanations as to why the DOC agreed. The first is that the DOC felt pressure because of the *McDonald* litigation and the impending settlement.<sup>68</sup> The administration believed that if it had the CTH program in place, the DOC might have a stronger bargaining position in the settlement negotiations because they were proactively addressing the problem.<sup>69</sup> This argument shows how litigation can impact other social reform activity. McCann explains that “a useful theory of legal mobilization should give considerable attention to the interaction and interdependence among these various tactical dimensions of movement activity.”<sup>70</sup> Thus, SJW benefited from the *McDonald* litigation by getting the DOC to support the CTH proposal, even though SJW was acting independent of those involved in the litigation.

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<sup>66</sup> Dimock Community Health Center, Social Justice for Women, Massachusetts Department of Corrections, PROJECT CATCH THE HOPE: AN OSAP DEMONSTRATION PROJECT PROVIDING SERVICES TO PREGNANT, INCARCERATED WOMEN IN MASSACHUSETTS (unpublished grant proposal) (on file with Social Justice for Women).

<sup>67</sup> *Id.*

<sup>68</sup> Cathy Romeo, former director of CTH, firmly believes that the DOC felt pressured to participate in the program because of *McDonald*. She suggests as much in her journal article about the program. See Romeo, *supra* note 8, at 420. She stated more firmly in our interview that she completely believes that the DOC felt that they had to agree to the program because of the way that the litigation was progressing. She explains, “I think they recognized, at least I think the senior DOC folks recognized that they had to do something...” See Romeo interview, *supra* note 15.

<sup>69</sup> This argument could also work against them because in some sense they were admitting that there was a problem.

<sup>70</sup> McCann, *supra* note 18, at 11.

The second explanation for why the DOC agreed to support the CTH program is that the force of the plaintiff's position in the *McDonald* litigation lead the DOC to the opinion that there actually was a problem in the provision of care at MCI-Framingham. Borgerson explains that "litigation can force agency and elected officials to acknowledge the magnitude of the problem and pay attention to resolving it," and as a result, the officials commit to long-terms solutions to institutional problems.<sup>71</sup> It follows that because of the *McDonald* litigation, the DOC realized the inherent value of a federally funded CTH program. The CTH program would establish a new structure for the provision of care to pregnant inmates, at no cost to the DOC, and the DOC could learn and benefit from this structure.

Both of these explanations are plausible, but neither is logically necessary. The DOC, at least, does not admit that they were influenced in any way by *McDonald* in the decision to support the CTH program. Kathleen Dennehy, then-Superintendent of MCI-Framingham, explains that they specifically separated CTH from the *McDonald* litigation. CTH was a medical, clinical program, but it did not have control over clothing, access to appointments, and some of the other issues that the *McDonald* litigation was attempting to resolve.<sup>72</sup> Therefore, it is hard to apply the McCann and Borgerson theories to understand why the DOC decided to support the CTH program in relation to their position in the *McDonald* litigation.

In any event, the DOC may have decided to support the CTH program on paper, but when OSAP awarded the funding, and the program was initiated in 1991, the DOC

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<sup>71</sup> Borgerson, *supra* note 20, at 3.

<sup>72</sup> Dennehy interview, *supra* note 55.

did not provide support in kind.<sup>73</sup> This provides further evidence that the DOC was not feeling pressure from *McDonald* and had not bought into the idea that institutional reform was necessary to resolve this particular problem. Cathy Romeo, then-director of CTH, describes how she initially did not have office space or a desk, and she would interview women about extremely private issues in the corridor of the Health Services Unit, taking notes on a clipboard.<sup>74</sup> She was also forced to run two of the exact same prenatal groups in two different locations because women were not allowed to cross certain prison boundaries, depending on where they were housed.<sup>75</sup> She continues, “I was ultimately given space where women did not have easy access and some women had no access... That was how initially unsupported the project was.”<sup>76</sup>

#### E. The Settlement Process

Despite the DOC’s reluctance to embrace the reform that CTH foreshadowed, both Anne Braudy and Michelle Kaczynski agreed that they had an excellent working relationship with each other while negotiating the *McDonald* consent decree in the early 1990s. Braudy describes Kaczynski as “fair, sympathetic, and representing the state’s public interest” and doing a good job at “balancing the three.”<sup>77</sup> Kaczynski liked Braudy and stated, “I thought I got along well with the plaintiff’s attorney.”<sup>78</sup> While Kaczynski often consulted with a DOC attorney, Sondra Korman, most of the negotiations took place over the telephone solely between Braudy and Kaczynski.<sup>79</sup> Braudy explains that they were both “left alone in a good way,” and she concludes that they both felt that they

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<sup>73</sup> Romeo interview, *supra* note 15.

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

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Braudy interview, *supra* note 3.

<sup>78</sup> Kaczynski interview, *supra* note 56.

<sup>79</sup> Braudy interview, *supra* note 3.

“had a mission.”<sup>80</sup> The strength of this relationship, in the end, lead both sides to feel that they had succeeded in their own agendas and had accomplished something really positive.

The good will between the two attorneys is genuine, but it is curious why the bulk of the settlement negotiations did not take place until six years after *McDonald* was filed. One argument for why this happened is the development of CTH. Once the program was funded, and Cathy Romeo was capably directing the program, the DOC was willing to take the step of “institutionalizing” the new program. Romeo explains that the DOC did start to warm up to her presence once they realized that she was not breaking rules and that she might even act a safeguard against litigation for the DOC by catching problems in their early stages.<sup>81</sup>

The second argument is that the DOC was under heavy criticism from the media and from the Massachusetts state legislature for three deaths that had occurred at MCI-Framingham in 1991 and early 1992. In January 1992, the DOC changed its health care provider from Goldberg Associates, a locally contracted service provider, to Emergency Medical Services Associates (EMSA) a “for-profit professional corporation with national headquarters in Florida.”<sup>82</sup> The DOC claimed that they made the switch for both cost and quality reasons.<sup>83</sup>

The most publicized of the three deaths was that of Robin Peeler, a young woman who died of AIDS-related illness. Peeler was admitted to MCI-Framingham in September 1991 and was cared for by both Goldberg Associates and EMSA, implicating

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<sup>80</sup> *Id.*

<sup>81</sup> Romeo interview, *supra* note 15.

<sup>82</sup> Peeler Report, *supra* note 12, at 3.

<sup>83</sup> *Id.* at 4.

both providers in her death.<sup>84</sup> Peeler's death was of great concern to state representative Barbara Gray, a representative from Framingham. Representative Gray was so concerned that she initiated an independent investigation of Peeler's death that focused on the health care services that were being provided at MCI-Framingham. The investigation was conducted by three physicians--two experts in emergency medicine and one obstetrician-gynecologist.<sup>85</sup>

The Peeler Report concluded that there were several steps along the way to Peeler's death where the health care system at MCI-Framingham failed her. For example, prison officials never questioned a note in her prison medical record stating that she was HIV negative, even though she was an injection drug user and had undergone testing, one month after her incarceration, that revealed that she had a compromised immune system.<sup>86</sup> The investigators explained that MCI-Framingham health care providers never bothered to obtain Peeler's records from her previous health care providers, even though they would have been easy to obtain.<sup>87</sup> If they had done so, they would have found documentation of her HIV positive status, supported by their own clinical findings, and known that she was at risk for serious illness. There are several examples like this that reveal errors on the part of both Goldberg Associates and EMSA.

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<sup>84</sup> *Id.* The *Boston Globe* reported two additional deaths during the same time period related to health services at MCI-Framingham. The two women did not receive as much attention as Peeler, though, because one woman, Donna Jean Hamilton, committed suicide, and the other, Maureen McGaughey Nicholson, did not die at MCI-Framingham. She was an AIDS patient who was so sick upon her release from prison that she died just one month after her release. See Canellos, *supra* note 11, at Metro 1.

<sup>85</sup> Peeler Report, *supra* note 12, at cover page.

<sup>86</sup> Peeler received tuberculin and candida skin testing, which revealed that she was anergic, "lacking a competent immune system." *Id.* at 5. The investigators explained: "Injection drug users are particularly vulnerable to infections which result from an immunocompromised state such as AIDS. Anergy implies an immunocompromised state." *Id.* at 6. Thus, health care providers at MCI-Framingham should have been on notice that Peeler might be HIV positive or have full-blown AIDS and was at serious risk for infections.

<sup>87</sup> *Id.* at 5-6.

The ultimate outcome of the investigation was a scathing criticism of the health care services provided at MCI-Framingham. The investigators wrote, “The Commonwealth may achieve its goal of cost containment within the prison system, however, there is no evidence that quality will improve and it will likely deteriorate.”<sup>88</sup> They noted that there were “too many impediments and deficiencies to realize an improvement,” and they criticized the DOC for placing security and cost concerns above basic health concerns; for not having an acceptable strategy for getting women prisoners outside help when it is needed; and for having an inadequate health care facility at MCI-Framingham.<sup>89</sup> Finally, they concluded their report with several suggestions on how the health care services at MCI-Framingham could be improved.

It was in this political climate that the DOC was negotiating the *McDonald* agreement. Peeler died in February 1992, and the *McDonald* consent decree was completed in April of that year. While Peeler’s death was a tragedy, it is possible that it influenced the DOC’s decision to bring *McDonald* quickly to a close. Kaczynski does not acknowledge that Peeler’s death played any part in the *McDonald* settlement, but it is evident that the DOC had reason to be quite concerned about its health care services and facilities at that time.<sup>90</sup> Dennehy, then-superintendent of MCI-Framingham, told a local magazine:

I have felt subject to inquiry and held accountable, but I have not felt unfairly criticized. Obviously, I am a public official. I am also a taxpayer. Throw in that I was a student of government, and not for one minute do I have any issues about people holding us accountable.<sup>91</sup>

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<sup>88</sup> *Id.* at 14.

<sup>89</sup> *Id.* at 14-17.

<sup>90</sup> Kaczynski interview, *supra* note 56.

<sup>91</sup> Susan Simpson, *Commitment*, WHEATON QUARTERLY, Fall 1993, at 10.

The possibility that the DOC was responding to the publicity surrounding the Peeler death and was not entirely motivated by wanting “to see something good come of” *McDonald* is problematic.<sup>92</sup> As discussed earlier, Borgerson explains that the success of institutional reform litigation is dependent upon the administrative agency buying into the idea of reform. She explains, “But fundamental system change cannot be imposed from the outside. It must grow out of a process that engenders ‘ownership’ of the reform plan by those charged with implementing and sustaining it.”<sup>93</sup> While I posed the idea above that the DOC’s participation in the CTH grant process indicated their readiness to embrace change at MCI-Framingham, the timing of the settlement seems to provide further evidence that the DOC was only trying to appease its critics and stave off further litigation. In essence, the pressure to create a consent decree was coming from the outside and not from an internal desire to see long-lasting change for pregnant inmates.

#### F. The Settlement Agreement

Regardless of why *McDonald* settled, the resulting decree favored the plaintiffs. Braudy describes the settlement as “mostly in her favor” and described feeling “elation” and “relief” when the case finally settled.<sup>94</sup> Kaczynski was equally positive:

It was something that actually makes you feel good. It’s like a lot of times you end up, in my line of work, defending the Commonwealth, and you may defend it, most of the time you feel good. But there are certain cases that you say, ‘Gee, I wish I hadn’t defended that as well as I did.’ But this one case, the way it ended up, it made you feel good. I think it made everybody feel good.”<sup>95</sup>

Both sides felt like there were issues that they compromised on, but for the most part, both parties were satisfied.

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<sup>92</sup> *Id.*

<sup>93</sup> Borgerson, *supra* note 20, at 3.

<sup>94</sup> Braudy interview, *supra* note 3.

<sup>95</sup> Kaczynski interview, *supra* note 56



The settlement agreement addressed seven main issues: diet and vitamins, exercise, prenatal and postpartum counseling, prenatal clothing, medical screening, transportation, and prenatal and postpartum medical examinations.<sup>96</sup> The inmates themselves were especially pleased with the maternity clothing and diet provisions because these aspects of daily living were not addressed by the CTH program. Prior to *McDonald*, pregnant inmates were not regularly receiving any type of maternity clothing, including larger sized underwear.<sup>97</sup> Additionally, women had to scrape together their own money and take money from their family to buy additional food at the canteen.<sup>98</sup> To address these concerns, the agreement provided for “maternity tops, maternity slacks or jeans, and larger sizes of underwear” as well as a consultation with a dietician within two days of receiving their pregnancy diagnosis and assurance that they would receive an appropriate diet.<sup>99</sup>

The primary weakness of the consent decree was in the transportation section. The DOC was still allowed to restrain pregnant inmates with waist restraints during their second trimester.<sup>100</sup> Braudy explains that Kaczynski would not budge on this issue because the DOC once had a woman escape during transportation.<sup>101</sup> Cathy Romeo, who had been directing the CTH program for over a year when *McDonald* settled, felt that there were some additional weaknesses in the agreement, primarily because the attorneys

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<sup>96</sup> Settlement Agreement at 5-10, *McDonald v. Fair*, No. 80352 (Mass. Super. Ct. settled April 7, 1992) [hereinafter *McDonald* Agreement]

<sup>97</sup> Braudy interview, *supra* note 3.

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

<sup>99</sup> *McDonald* Agreement, *supra* note 94, at 5 and 7.

<sup>100</sup> Braudy interview, *supra* note 3.

<sup>101</sup> *Id.*

had never consulted someone who was an expert in pregnancy.<sup>102</sup> Romeo was particularly concerned because the DOC was still allowed to put restraints on women during labor, a time when women were least likely to attempt an escape.<sup>103</sup>

The part of the agreement that had the largest impact was the medical screening section. Prior to the agreement, all women sentenced to MCI-Framingham were housed together. Thus, inmates with infectious diseases exposed the pregnant inmates and their unborn children to “seriously communicable diseases in their living, eating, sleeping, and work environments.”<sup>104</sup> The agreement required that:

The on-site medical personnel shall perform a Medical Entrance Screen upon each inmate upon her entrance for confinement into MCI-Framingham, whether she is awaiting trial or sentenced. Before each inmate entering MCI-Framingham is placed in any housing area, the Medical Entrance Screen shall be completed.<sup>105</sup>

This was a change in policy that would benefit the general population at MCI-Framingham, not just the pregnant inmates. Thus, the impact of *McDonald* was perhaps even greater than the attorneys realized.

#### G. Implementation

The implementation of the *McDonald* agreement was closely monitored by Cathy Romeo and Tracey Hutton, a paralegal at MCLS. The two collaborated to make sure that the DOC was instituting the changes mandated by the agreement. The CTH program became a DOC program in early 1993, during the first year of the implementation of

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<sup>102</sup> Romeo interview, *supra* note 15. Brady did consult Betsy Smith, director of SJW, but Smith was a professional prison advocate, not an expert on pregnancy and the postpartum period.

<sup>103</sup> *Id.*

<sup>104</sup> *McDonald* Complaint, *supra* note 52, at 8.

<sup>105</sup> *McDonald* Agreement, *supra* note 94, at 7.

*McDonald*, when the federal funding period came to an end.<sup>106</sup> At that time, Romeo became an employee of the DOC, and it was part of her position as director of CTH to monitor the agreement. In contrast to Romeo's daily presence at MCI-Framingham, Hutton's only case there was *McDonald*, but she claims that the DOC gave her "free rein" to enter the prison and monitor the agreement.<sup>107</sup>

Hutton believes that Romeo and the CTH program played a critical role in the implementation and monitoring of the agreement. Hutton would always visit Romeo first to discuss inmates that were having problems and to talk about potential violations.<sup>108</sup> Additionally, Romeo was critical in notifying the inmates who were covered by the agreement when Hutton was going to visit and where she would be holding office hours.<sup>109</sup> Finally, Hutton concluded that she believed that the presence of the CTH program made MCI-Framingham more compliant than they would have been otherwise.<sup>110</sup>

Romeo has similar feelings about the symbiosis between her and Hutton. For example, Romeo explained that the signed agreement and Hutton's monitoring of the agreement greatly impacted the strength of the CTH program.<sup>111</sup> She stated:

I was certainly told by the Administration that if I noticed anything that was out of line, that wasn't being provided, that I could have access to the

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<sup>106</sup> The federally funded CTH program was given awards by both the Massachusetts and National March of Dimes and by the National Association of Perinatal Addiction Research and Education. The final federal report indicated that "project goals were successfully met." This meant that "pregnant inmates were identified early and closely medically managed; birth outcomes were quite good; inmates were cooperating and participating at nearly one hundred percent; and the Discharge Plan compliance rate, consistently averaging ninety percent was almost four times better than the federal underwriters expected." See Romeo, *supra* note 8, at 419.

<sup>107</sup> Interview with Tracey Hutton, former paralegal at Massachusetts Correctional Legal Services (November 16, 200).

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

<sup>109</sup> *Id.*

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

<sup>111</sup> Romeo interview, *supra* note 15.

deputy superintendent by phone to immediately request whatever I needed in order to remedy whatever the situation was.

Former Superintendent Dennehy agrees with Romeo that the *McDonald* settlement did give some definition to part of the CTH program.<sup>112</sup>

Hutton found that the DOC was quite cooperative during her compliance reviews. She does not think that MCI-Framingham “put on a show” for her visits because she was able to walk around freely, and she did not do the same thing every time she came for monitoring visits.<sup>113</sup> Initially, she focused on the whole agreement, but she admits that her focus narrowed as she became more familiar with the agreement and its weaknesses.<sup>114</sup> The biggest problem that Hutton found with compliance was the diet provision.<sup>115</sup> She attributes this to a lack of communication between the DOC administration and the line staff.<sup>116</sup> The kitchen staff was skeptical when women claimed that they were pregnant in order to receive more food.<sup>117</sup> Thus, a pregnant woman’s success in getting enough meat and milk depended on how aggressive she was. Hutton feels that this problem should have been easily solvable, but it was in practice never really resolved.<sup>118</sup>

In addition to Hutton and Romeo’s careful monitoring, a change in administration also affected the DOC’s cooperative attitude towards compliance with the consent decree. Dennehy took over the position of superintendent at MCI-Framingham in January 1992, the year of the agreement. She was appointed superintendent when her predecessor left

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<sup>112</sup> Dennehy interview, *supra* note 55.

<sup>113</sup> Hutton interview, *supra* note 105.

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

<sup>115</sup> *Id.*

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

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

on sick leave, so she assumed the job “within five minutes” and there was no briefing.<sup>119</sup> She first became aware of *McDonald* when she was asked to review a draft of the settlement agreement, and although she had never worked with female offenders prior to this position, she immediately realized that women’s concerns, especially regarding pregnancy, were unique.<sup>120</sup> Thus, she knew the importance of settling *McDonald* and taking over the CTH program. She explained, “This is a population that, for the most part, has not engaged in preventative care—from gynecological care to dental care. That creates problems, particularly if an inmate is pregnant.”<sup>121</sup>

Both Hutton and Romeo praised Dennehy. Romeo describes Dennehy as “one of the more forward-thinking people” at the DOC. Dennehy instituted weekly triage meetings where directors of the physical and mental health programs met with prison officials to discuss the concerns of the inmates, and she also organized a conference of prison administrators from around the country and asked Romeo to speak about *McDonald* and other lawsuits that had brought about change in prison systems.<sup>122</sup> Dennehy used this opportunity to tell other prison administrators that if prisons instituted change themselves, they could have more control over the outcome.<sup>123</sup>

Thus, the first year of implementation and compliance review ended on a high note. Dennehy, Romeo, and Hutton all played critical roles in making sure the DOC was complying, if not going beyond, the terms of the agreements, and there seemed to be a positive approach to change amongst all of the key players.

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<sup>119</sup> Dennehy interview, *supra* note 55.

<sup>120</sup> *Id.*

<sup>121</sup> Simpson, *supra* note 90, at 10.

<sup>122</sup> Romeo interview, *supra* note 15.

<sup>123</sup> *Id.*

## H. Conclusion – Part I

Notwithstanding its status as litigation, the judicial system provided only a skeletal background to the *McDonald* case. The parties almost never went to court, and the litigation was not particularly exciting or dramatic.<sup>124</sup> In fact, the more dramatic events during the years of the litigation that impacted the rights of pregnant inmates, like the creation of CTH and Robin Peeler's death, had little to do with the litigation itself.

These outside events influenced the *McDonald* litigation, but it is unclear as to what extent. Certainly, Peeler's death created a great degree of concern about adverse publicity and litigation within the DOC, but Kaczynski did not seem to get too much direction regarding this concern from the DOC. Betsy Smith, CTH's founder, did introduce Braudy to pregnant inmate's litigation from around the country, and the presence of CTH made it significantly easier for the *McDonald* agreement to be implemented. However, Smith did not strategize with Braudy when she started CTH, and Braudy did not consult Romeo when she negotiated the settlement decree. While the events are all highly related, the parties involved never seemed to form any sort of organization, let alone a cohesive movement, to bring about long-lasting change.

Scheingold and McCann both talk about the important role that litigation can play in a social reform movement to bring about lasting change, but implicit in their theory is that there *is* a social reform movement. While *McDonald* and the surrounding events reveal how inter-related litigation and social reform activity can be, I do not believe that there was ever a movement for which *McDonald* was going to be a mobilizing force.

*McDonald* was filed at a time when the body of pregnancy-related prison reform

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<sup>124</sup> When I asked Kaczynski if there were any judges who influenced the outcome of this case, she told me that "This was more between the parties." See Kaczynski interview, *supra* note 56.

litigation was beginning to grow on a national level, but the national movement never really expanded throughout the country with any great zest. There are only a handful of cases that Legal Services for Prisoners with Children (LSPC), a leading organization in this field, consider to be significant, and I was told that these kind of cases are no longer filed.<sup>125</sup>

In Massachusetts, Braudy was extremely compassionate and committed to the cause of pregnant inmates, but she seemed to be the least aware of or concerned about the bigger picture. The bigger picture did encompass the activities of SJW and the concern of the legislature, but Betsy Smith only met with Braudy a couple times during the eight years that the litigation was ongoing; the legislature did not seem to know much about the litigation (it was never mentioned anywhere in the Peeler Report); and it is unclear if the legislature ever approached SJW to see what kind of programs they were developing at MCI-Framingham.

At the same time, all parties seemed to achieve their goals. CTH was developed and was a success. The Peeler Report called attention to the need for change in the medical services at MCI-Framingham. And Braudy negotiated a settlement agreement that was favorable to pregnant inmates that was relatively easy to implement because of the pre-existing presence of CTH. Part of these successes can be attributed to the fortuitous timing of all three, and part can be attributed to the strength of individual key

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<sup>125</sup> In addition to *West v. Manson* and *Harris v. McCarthy*, see also *Jones v. Dyer*, No. H-114154-0, (Cal. Super. Alameda County filed February 25, 1986) and *Yeager v. Smith*, No. CV-F-87-493-REC (E.D. Cal. filed September 8, 1987). I spoke several different times with various people at LSPC. Most of my conversations were never really of any significant length or significantly helpful. They did, however, send me the complaints and agreements in several of the aforementioned cases.

players. However, this second part is much better understood when one looks at what has happened to CTH and the *McDonald* agreement in the ten years since the decree.



## PART II: *McDONALD* TEN YEARS LATER

### A. The Fall of Catch the Hope

When I first started researching *McDonald* in the fall of 1999, I had trouble finding many of the people, discussed in Part I, who were responsible for the success of CTH and the implementation of the *McDonald* agreement. The first woman I spoke with, state representative Kay Khan, had little to do with *McDonald* and CTH. However, she was able to provide me with the beginning of an answer as to what is currently going on at MCI-Framingham. She is the most knowledgeable and active state representative on the issue of women in prison.<sup>126</sup>

One of Representative Khan's primary concerns is that the DOC publicly lists several programs at MCI-Framingham that have very low participation rates and are often unsupported by the DOC.<sup>127</sup> The DOC, Representative Khan explains, does a good "selling job" talking about their programs to legislators, and therefore, most legislators assume that the amount of the programming is fine.<sup>128</sup> It is only a selective group of female legislators who have bothered to take a closer look at what is actually going on in the state prisons, especially at MCI-Framingham.<sup>129</sup>

CTH is one of the programs that the DOC publicly lists as available at MCI-Framingham,<sup>130</sup> but it is no longer the successful program described at the end of Part I.

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<sup>126</sup> When Representative Khan was elected to state office, she became involved with the prison system because the Center for Public Representation asked her to take a look at mental health issues at the Bridgewater State Hospital. Her background is as a psychiatric nurse. Representative Khan also "inherited" the legislation that Representative Gray filed during her years in office, most of which had to do with women in prison. *See* Interview with Representative Kay Khan (D-Newton)(October 12, 2000)

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> Massachusetts Department of Corrections website, *supra* note 3.

During the past three years, there have been three different directors of CTH.<sup>131</sup> Cathy Romeo, who has stayed in contact with the program since her departure in 1998, believes that the program has lost much of its substance with each hire because the DOC has not committed to hiring people with expertise in the prenatal and postpartum periods.<sup>132</sup> Instead, the directors have had backgrounds in substance abuse treatment, nursing, and social work. These backgrounds are helpful for certain aspects of the job, but “too many things can happen during pregnancy that if you don’t know really know what you’re looking for, it’s putting both the person and the woman she is taking care of at risk.”<sup>133</sup> If the person who is directing CTH is not able to communicate this risk to the DOC, it “makes the program less powerful and effective, and... less able to keep everybody safe. Everybody—across the board—the baby, the mother, and the prison system itself.”<sup>134</sup>

Another reason that Romeo believes that the program has lost some of its strength is that the inmates are less aware of their legal rights than they were during the period when MCLS was monitoring *McDonald* and Romeo was directing the program. When Romeo was directing the program, she would let pregnant inmates know “that they had rights, and these are what the rights are, and this is the process to follow if you feel that your rights are not being honored or met.”<sup>135</sup> Romeo does not feel that the current directors are as aware of this rights frameworks because of the length of time its been since the agreement and/or because the DOC administration has not made them aware of their responsibilities to monitor the agreement.

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<sup>131</sup> During a brief period in 2000, the directorship of the program was vacant, but the DOC did decide to fill the position as a full time position. See Jessica Fein, *Hope for Pregnant Women in Prison*, BOSTON GLOBE, June 4, 2000, West Weekly at 2.

<sup>132</sup> Romeo interview, *supra* note 15.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

When I asked Tracey Hutton, the former MCLS paralegal responsible for monitoring *McDonald*, if she would be surprised to learn that CTH was not as successful as it once was, she replied that she would not because there is no one who is on-site monitoring the agreement and no legal oversight from the outside.<sup>136</sup> Hutton also believes that the frequent staff and administrative changes at MCI-Framingham results in a general lack of knowledge amongst staff and administrators about the various programs and the services that they are supposed to be providing.<sup>137</sup> She feels that unless there is someone at MCI-Framingham who is continually looking at the issues in *McDonald*, the DOC will get further and further away from the terms of agreement.<sup>138</sup>

When I posed the same question to Kathy Dennehy, now the Deputy Commissioner of the DOC, she stated that she believes that the services are the same “if not better.”<sup>139</sup> However, she did acknowledge that one change in the CTH staff did seriously affect the program. She explains:

Cathy Romeo was extremely caring and compassionate, but also quite capable of setting boundaries, which is an unusual blend in the corrections community. She was able to see the big picture and operate effectively, and she gave her heart and soul to the program. She made a major commitment and contribution. So, yes, the services are the same, but the program will never quite be the same without Cathy Romeo.<sup>140</sup>

Prison advocates put the same amount of emphasis on the loss of Dennehy as the superintendent of MCI-Framingham. She left that position in 1994 to move up in the DOC. Nancy Rubackin, a paralegal/investigator, who has studied the history of MCI-Framingham, explains that the DOC, for many years, has followed a policy that cycles

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<sup>136</sup> Hutton interview, *supra* note 105.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Dennehy interview, *supra* note 55.

<sup>140</sup> *Id.*

administrators through various positions, never keeping them in the same position for more than a couple of years.<sup>141</sup> This means that a liberal, forward-thinking superintendent, like Dennehy, can be followed by a hard-line, conservative superintendent, and support for a particular program can dramatically shift over a short period of time. When Dennehy assumed the position as superintendent of MCI-Framingham, she had no prior experience with women prisoners and no transitional training period.<sup>142</sup> The fact that the DOC would put someone in this position speaks to their lack of concern for a continuity in correctional philosophy and in care.

Perhaps it was not inevitable that these personnel changes would have such a large impact, but the *McDonald* agreement simply did not establish a sustainable structure that could survive the loss of the key players involved in its settlement and implementation. There are additional reasons why the implementation of *McDonald* was not long-lasting. First, there is inherent “wiggle room” in the scope and meaning of the agreement.<sup>143</sup> As Romeo explains, “I know that it’s very possible to fill the letter of the law, the letter of the agreement, and not the spirit, and I would definitely say that the spirit is not being met right now.”<sup>144</sup> For example, it would be possible for a director to say that she is holding prenatal workshops, but really she is holding substance abuse support groups and handing out flyers on pregnancy and delivery. Romeo asks, “Are they in violation technically? I don’t know.”<sup>145</sup>

Another larger problem with the long-term implementation of *McDonald* is that the agreement did not change the power relationship between the DOC and the women

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<sup>141</sup> Rubackin interview, *supra* note 15.

<sup>142</sup> Dennehy interview, *supra* note 55.

<sup>143</sup> Scheingold, *supra* note 17, at 119.

<sup>144</sup> Romeo interview, *supra* note 15.

<sup>145</sup> *Id.*

inmates.<sup>146</sup> Prison inmates are by definition one of the most powerless groups in society. While prisoners do have rights, these rights are often more limited than the rest of society because of public safety concerns. In Massachusetts, Representative Khan feels that the DOC thinks their primary mission is security, and this position is completely overpowering.<sup>147</sup> The DOC does not place too much importance on rehabilitation.<sup>148</sup> Thus, the inmates have little power to challenge the DOC on this issue regardless of *McDonald*.

Another problem is that the DOC has much more financial power than the women inmates.<sup>149</sup> The DOC has lawyers on staff who are continually looking out for their interests. In contrast, women inmates can only try to bring the DOC into compliance if they catch the attention of advocates and are able to obtain counsel. Most of the women do not have independent means to hire lawyers to investigate violations. Thus, they are dependent upon the same justice system that has imprisoned them to provide them with free legal services, and they must rely on the benevolence of the DOC in allowing advocates to come into the prison to speak with the inmates. For the past several years, since Braudy and Hutton left MCLS and Romeo left CTH, no one has been monitoring compliance with *McDonald*. The *McDonald* files are gathering dust in a box in storage at MCLS, as MCLS has gone through its own staff and administrative changes.

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<sup>146</sup> Scheingold, *supra* note 17, at 117.

<sup>147</sup> Khan interview, *supra* note 126.

<sup>148</sup> In a 1993 interview, Dennehy told a reporter that the mission at MCI-Framingham is “crystal clear: protecting society from criminal offenders.” See Simpson, *supra* note 91, at 9. And Dennehy was considered to be extremely liberal. Dennehy added that “prisons should provide rehabilitation ‘to the extent possible,’ but clearly, rehabilitation was not her first priority. *Id.*”

<sup>149</sup> Stuart Scheingold develops a compliance calculation to determine how successful reform litigation will be. The three part calculation includes the accessibility of the parties, the allocation of resources amongst the parties, and the will of the parties to resist the decision/agreement. Scheingold, *supra* note 17, at ---.

Additionally, women inmates at MCI-Framingham have little incentive and motivation to confront the staff and administration at the prison. They are often at MCI-Framingham for short periods of time, and many of these women already feel powerless and victimized by the system. The women inmates are often victims of domestic violence, substance abusers, prostitutes, and medically vulnerable (HIV+, infected with Hepatitis-C). Even with the help of pro-active legal counsel, it can be difficult for these women to understand their rights and feel up to challenging the DOC.

Finally, there is no official legislative oversight of the DOC in Massachusetts. During the Michael Dukakis administration, there was an advisory committee that oversaw the activities of the DOC, but they were not particularly active beyond collecting data.<sup>150</sup> William Weld eliminated the advisory committee, and since that time, Representative Khan has been fighting, with little success, to reestablish such a committee.<sup>151</sup> Thus, the DOC is currently an independent agency that has a lot of power, but one that few in the legislature are watching with any great degree of scrutiny.

If one looks at all of these factors, it is not surprising that the *McDonald* agreement has not brought about lasting change at MCI-Framingham.

#### B. Proposed Legislation and the Revival of *McDonald*

This does not mean that women's prison advocates have given up hope. In fall 2000, Representative Khan and the Women's Caucus formed the Working Group on Women in Prison. The Working Group's purpose is to propose legislation that will better the lives of women in prison and women being released from prison. The Working Group also brings in speakers to discuss the most current information available on

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<sup>150</sup> Khan interview, *supra* note 126.

<sup>151</sup> *Id.*

women inmates in Massachusetts in order to educate those working in the field. The Working Group is open to legislators, advocates, the legal community, academics, the Office of Community Corrections, the Department of Public Health, the Department of Social Services, the Executive Office on Public Safety, and many others.<sup>152</sup>

On September 21, 2000, Cathy Romeo spoke to the Working Group. The notes from the meeting state that “Cathy Romeo, founder of the Catch the Hope Program, made a plea for the working group to take appropriate action to help restore the program to its original high level of operation.” Romeo firmly believes that legislation is the only way to bring the DOC back on board with *McDonald* and CTH. She explains:

I don't see another way. I really don't. I think since the Department (DOC) clearly has lost some sense of focus here or maybe thinks that it's okay because it's still called CTH. I think unless someone takes some initiative that it will probably keep going down this road. There are too many possibilities for changing peoples lives that can't possibly be being met right now. I hope legislation. I hope maybe even just the focus, once again, just bringing some attention to bear could do something somewhere.<sup>153</sup>

This presentation heralded a new era for CTH and the *McDonald* agreement.

When I began to attend the Working Group meetings in October 2000, the group was forming a legislative sub-committee to draft legislation that Representative Khan would submit, and the group would actively support. I joined the legislative sub-committee and teamed up with Romeo and Jamie Suarez-Potts, a prison rights advocate from the American Friends Service Committee office in Cambridge, to work on drafting An Act Relative to Pregnant and Postpartum inmates in State Prisons, County Houses of Correction, and Jail.

Romeo produced the first draft of this Act, and it opened by invoking *McDonald*:

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<sup>152</sup> The DOC was not invited to participate in the Working Group.

<sup>153</sup> Romeo interview, *supra* note 15.

Although pregnancy services at MCI-Framingham are mandated by the *McDonald* Agreement (1992), there is currently no oversight to assure the delivery of those services, nor are inmates routinely made aware of the services they could expect. Thus, there is a need for legislative directive to assure the safest possible environment and service delivery for pregnant and postpartum inmates and detainees as well as unborn babies and to assure a level of service and continuity of service critical to the health and well being of these women and infants.<sup>154</sup>

Romeo, Suarez-Potts, and I met twice to go over the substance of the Act, which was similar in many ways to the *McDonald* agreement. One major difference between the Act and the agreement was the addition of several new anti-restraints policies. According to our bill, the DOC would not be able to use waist restraints at any point during an inmate's pregnancy, and pregnant inmates would only be handcuffed in front, so that if they fall, they will not endanger themselves or their fetuses. For similar reasons, the DOC would not be able to shackle pregnant inmates during transportation after the first trimester. Finally, the DOC would not be allowed to chain women to their beds during labor and delivery. Each of these policies would go further than the terms of *McDonald*.

A second significant difference between the proposed Act and the agreement is that the Act called for "on site monitoring and evaluation" provided by the Department of Public Health (DPH) to "assure the adequate provision of these critical services to pregnant and postpartum inmates." As discussed earlier, one of the reasons that *McDonald* failed in the long-term was that no one was serving as a *McDonald* watchdog once MCLS stopped monitoring the agreement and Cathy Romeo left the directorship of CTH. By giving oversight authority to the DPH, we hoped to create a structure that

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<sup>154</sup> Much of the information in this section comes from worksheets handed out at Working Group meetings and personal notes that I took at those meetings. I will try to cite as much material as I can as accurately as I can, keeping in mind that much of this material only exists in my personal files.



would survive changes in DOC staff and administration, but one that did not require legislative oversight.

The legislative sub-committee and the Working Group supported our final draft of the Act, and Representative Khan submitted the Act with the signatures of fourteen other state representatives and senators. The preamble that mentioned *McDonald* was removed in the final draft. It simply stated that this Act was to replace Mass. Gen. Laws ch.127, §118, the part of the Massachusetts code that discusses pregnant inmates.<sup>155</sup> The Act, now known as H 3972, was referred to the Department of Public Safety (DPS) committee for review. The Working Group had hoped for a more liberal committee placement, such as the Department of Public Health, but began to prepare for a DPS public hearing.

The Working Group sent out fact sheets on the several pieces of legislation that it had proposed. The fact sheet for H 3972 explained that each year one thousand women are sentenced to MCI-Framingham, and 150-180 of these women are pregnant. Approximately eighty five percent of these women are substance abusers, and a majority are incarcerated for non-violent crimes. The fact sheet explains that this bill is necessary because it will create statutory guidelines that “assure that such services are delivered and that they meet standards for adequacy, health, safety and continuity.”

The DPS held a public hearing on March 15, 2001. That morning, the *Boston Globe* ran a story on H 3972 that opened with a vivid description:

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<sup>155</sup> *Mass. Gen. Laws ch.127, §118 Pregnant females.* Whenever it appears that a female confined in any correctional facility, is about to give birth to a child, the physician of the institution where the inmate is confined shall send to the commissioner a certificate of her condition, and the commission shall thereupon order her removal to a hospital near the institution where she is confined, but in no case shall such female be removed to the Tewksbury hospital or to any penal or reformatory institution for the purpose of giving birth. An inmate so removed shall be kept in such hospital until the physician thereof shall certify to said commissioner that she may safely be removed, whereupon the commissioner shall issue an order for her to return to the correctional facility.

The images sound positively medieval: a pregnant woman with a swollen belly trying to walk in leg irons, her wrists handcuffed behind her back. A woman shackled to a hospital bed, writhing in pain, as she prepares to give birth.<sup>156</sup>

The author, Erica Noonan, interviewed both Representative Khan and Cathy Romeo for her article. Representative Khan stated that the bill was important because it would “get the rules established by state law in case of future staff cutbacks in the program or other prison services,” and Romeo concurred that “Khan’s legislation would help guarantee quality of care for the future.”<sup>157</sup>

Noonan also looked at the proposed bill from the perspective of the DOC. She noted that in April 1999, the DOC did officially forbid the use of leg and waist restraints on women in their second and third trimesters.<sup>158</sup> Furthermore, a DOC spokesperson, Justin Latini stated that “the prison had no intention of bringing back leg restraints or behind-the-back handcuffing for heavily pregnant women, or cutting nutrition and education programs.”<sup>159</sup> Latini was obviously aware that the DOC had some responsibility to pregnant inmates when he stated that the prison would never make these changes because ““We are mandated to do this.””<sup>160</sup>

At the same time, Latini once again affirmed the DOC’s position that MCI-Framingham must balance the inmates health needs with public safety. He explains, “You do have women who are incarcerated for murder or a manslaughter charge. Some are awaiting trial and are not allowed bail by a court, which means there is risk of

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<sup>156</sup> Erica Noonan, *Bill Aid Pregnant Inmates*, BOSTON GLOBE, March 15, 2001 at W1.

<sup>157</sup> *Id.*

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

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

flight.”<sup>161</sup> This concern with flight risk is the primary reason why the DOC has never agreed to go further in the area of restraints. According to Romeo, even though the prison has made “great strides in its policies concerning pregnant inmates,” it has not gone far enough.<sup>162</sup>

At the public hearing, Representative Khan spoke first on behalf of H 3972. She explained that CTH was established ten years prior, and while it was successful for a period of time, there are concerns that the program will not continue. Because there is an increasing number of pregnant and postpartum inmates at MCI-Framingham, H 3972 is necessary to insure that services continue and are restored to a high standard of care. Finally, she explained that this bill will benefit Massachusetts as a whole because both inmates and babies will be released back in to society in a healthier state with less medical needs if women inmates have received adequate medical care during their incarceration.

Several others spoke in favor of H 3972. First, Cathy Romeo implored the DPS to focus on the serious health care needs of mothers and their unborn children. She also emphasized that this bill was simply restating what was already required of the DOC per the *McDonald* agreement. Several students from Salem State College School of Social Work also invoked *McDonald* and spoke in support of the bill. Sylvia Mignon, an Assistant Professor at the University of Massachusetts Boston in the College of Public and Community Service Criminal Justice Center, explained to the DPS that this bill was necessary in order to preserve women’s rights, that the physical and mental health of women and babies is what is at stake. Peggy Garland, a nurse midwife with the Urban

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

Midwives Association, spoke specifically about the physical and emotional impact of restraints, and she also noted that correctional officers do not all interpret policies in the same way, so there are inconsistencies in the way that pregnant women are treated during delivery. Finally, Tina Williams, who currently works for the Multicultural AIDS Coalition, but who was once a pregnant inmate at MCI-Framingham, gave an impassioned speech about her own experiences in prison, and the impact that these experiences have had on her own life and family. The testimonials were all impassioned and raised all the important reasons why H 3972 is necessary.

While H 3972 was still in committee, the Working Group hosted a report to the legislature, in July 2001, on the bills that it had proposed. The entire legislature was invited, and many senators and representatives sent their staff. Cathy Romeo and Tina Williams spoke again on behalf of H 3972 with the same passion that they had during the public hearing, and it was obvious during the question and answer period that many of the young, legislative staff was moved by the plight of women inmates.

In the end, though, the passion of the Working Group and its supporters was not enough. H 3972 never made it out of committee. I did not attend Working Group meetings in the fall of 2001, but according to Romeo, the DOC put on a major public relations campaign and came out in force during a legislative hearing to testify against all the prison initiatives.<sup>163</sup> As Romeo explains, “Catch the Hope was probably the least of their concerns, but all were jettisoned anyway.”<sup>164</sup> Thus, the fate of future pregnant inmates once again rests on the strength and/or weakness of the *McDonald* agreement and the support or lack thereof of the CTH program on the part of the DOC.

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<sup>163</sup> E-mail Communication with Cathy Romeo (March 28, 2002).

<sup>164</sup> *Id.*

### C. The Effects of *McDonald* on the Legislative Process

Michael McCann explains that “the indirect, ‘radiating’ effects of litigation are often the most important over time.”<sup>165</sup> That is why it is necessary to study reform litigation not only for its success in the short-term, but also for the role it plays in the continuing political struggle for social change.<sup>166</sup> Certainly, *McDonald* did play a significant role, nine years following its settlement, in the legislative process described above. At the most basic level, we relied on the terms of the agreement for the substance of H 3972. The fact that we already had a workable document made the legislative drafting process much easier than it might have been otherwise.

While drafting H 3972, we also had the valuable perspective of hindsight. For example, Romeo had always been concerned with the anti-restraint policy in *McDonald* because she felt that it was not strong enough. Nine years of implementation revealed that the DOC was still endangering the health of pregnant inmates and fetuses with restraints, even though the DOC had made some changes in their policies. We used this information to create a stronger anti-restraints policy in our bill.

Additionally, we realized that the *McDonald* agreement did not take into account the need for long-term oversight. Administrative and staff changes at MCI-Framingham had weakened the CTH program and reduced the monitoring of the *McDonald* agreement. As a result, pregnant inmates were no longer able to rely on the level of care promised to them in the consent decree. Thus, we learned from the nine years of implementation that the rights of pregnant inmates were at risk if the DOC was not closely monitored and not accountable in some way to another governmental agency.

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<sup>165</sup> McCann, *supra* note 18, at 285.

<sup>166</sup> *Id.* at 287-288.

Finally, *McDonald* was used by prison advocates during the legislative process to make a point about rights: The DOC is already supposed to be providing these services because the established rights of pregnant inmates are at stake. Romeo and others continually emphasized that the purpose of this bill was to legislate something that was already supposed to be happening at MCI-Framingham. Technically, we were not asking for anything new. We hoped to convince the public that if the DOC and/or the legislature viewed the enactment of H 3972 as a burden, then in a way, they were admitting that they were not providing the level of care required by the *McDonald* agreement. Thus, the DOC was actually in violation of a court order, and the legislature should pass the H 3972 to protect the DOC as well as the pregnant inmates.

The problem with using *McDonald* to make this point about rights is that there was no real threat to the DOC, even if they were in violation of the agreement. While there had been rumblings during the legislative process about going in to MCI-Framingham and doing a compliance review of *McDonald*, it became clear that none of the legal service providers were going to take this initiative. I never quite understood why, although one reason might be that Braudy was no longer practicing law, and she was the attorney who was closest to the case. If advocates, like Romeo, were able to stand before the Department of Public Safety committee and threaten that if they did not approve this legislation, we would be forced to send attorneys into MCI-Framingham to review the DOC's compliance with *McDonald*, I think we might have had more power to influence the legislature's decision. Therefore, *McDonald* was important to the legislative process, but we never fully realized the potential power that it had to bring to the entire process.

#### D. Conclusion – Part II

Ellen Borgerson believes that “class action litigation has often been highly effective in opening public institutions to excluded voices.”<sup>167</sup> And Scheingold and McMann both explain how reform litigation can be a useful political tool, even when implementation is problematic. Unfortunately, neither of these things really happened in the *McDonald* litigation. First, the short-term success of *McDonald* seems to have had more to do with several key players involved in the case than with an openness or receptiveness on the part of the DOC and the administration at MCI-Framingham to hear the voices of the pregnant inmates and see the value of their human rights.

Second, *McDonald* was useful as a political tool, as explained above, but not nearly to the extent possible. The injustices of the DOC’s non-compliance with *McDonald* did not rally a public outcry or convince a conservative DPS committee to support H 3972. Instead, *McDonald* served as a backbone for a piece of legislation that was ultimately unpopular with a small group of state representatives that was swayed by a strong, financially powerful DOC.

The saddest part of this story is that what was once a highly successful program partly stemming from institutional reform litigation is no longer providing the same kind of services to a population that desperately needs rights protection. Cathy Romeo describes the current CTH program:

I think that the best way to describe what it has become is really just a discharge planning program... I have talked to nurse practitioners at the prison, so I know that this isn’t just my guesstimate, but I have spoken with a woman that I actually worked with for a couple of years on CTH, and she was at the time one of the nurses who worked directly with the

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<sup>167</sup> Borgerson, *supra* note 20, at 4.

program, and the quote that I keep hearing, and they say it in different ways, that it's a shell of what it used to be.<sup>168</sup>

Fortunately, there are prison advocates like Romeo and Representative Khan who continue to care about women inmates and keep watch over MCI-Framingham.

However, until the administration in Massachusetts changes, it is unlikely that there is too much hope for an improvement in services for women inmates as a whole, and pregnant inmates in particular. As Representative Khan concludes, "change is a slow process."<sup>169</sup>

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<sup>168</sup> Romeo interview, *supra* note 15.

<sup>169</sup> Khan interview, *supra* note, 126.



## CONCLUSION

When I first started researching *McDonald* in fall 1999, I did not expect that such a quiet case would still be in the hearts and minds of those involved. I was surprised to learn that this case is still very important for those who are interested in the rights of pregnant inmates. What I learned through this paper, though, is that there are not many people who are interested rights of pregnant inmates, especially in Massachusetts. Those who are interested bring great passion to the struggle, but they know that in order to improve conditions for pregnant inmates, the Massachusetts administration needs to change. Additionally, prison reform advocates need to create a much broader base of support for the cause. As Representative Khan explains, a pro-prison reform stance is a losing position for legislators in Massachusetts: “No one is going to campaign on doing things better in prison.”<sup>170</sup>

Moreover, the DOC in Massachusetts is a formidable adversary. As McCann explains, “Official state institutions define just one—although obviously a very important—factor imposing boundaries on effective legal mobilization.”<sup>171</sup> While there are those in the DOC, like Deputy Commissioner Dennehy, who are forward-thinking, for the most part, it is a conservative group of men. The DOC has never accepted the need for institutional reform, and the *McDonald* litigation was never a strong enough threat to force them into that position. The best programs at MCI-Framingham have been brought in from the outside, from groups such as SJW. The good news is that the DOC allows these programs into the prison. The bad news is that when the programs lose

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<sup>170</sup> Khan interview, *supra* note 126.

<sup>171</sup> McCann, *supra* note 18 at 284.

strength either because of personnel changes or changes in funding, the DOC does not often come in to rescue the programs, realizing their value to the women inmates.

In Massachusetts, the women who champion the cause of pregnant inmates are amazingly tireless, and they were able to achieve great short-term success with *McDonald* and CTH. However, they were never quite able to create a structure whereby pregnant inmates had some degree of power over the DOC to insure that their rights were being preserved. According to Borgerson, this is the fundamental challenge of class action institutional reform litigation. She explains:

More fundamentally, class action litigation is often the last best hope for disempowered constituencies with no other means of access to institutions that profoundly shape their lives. The challenge is to make litigation a vehicle for genuine empowerment, a means of institutionalizing a voice for these constituencies that will be capable of holding the agency accountable over time without court support.<sup>172</sup>

Class action litigation, like *McDonald*, can also be extremely helpful when it brings together different groups of activists for social reform. During the *McDonald* litigation and in the years since, the cause of pregnant inmates has brought together many different types of advocates--litigators, legislators, and non-profit leaders. This is a large part of what has made this study so interesting. However, *McDonald* never created a groundswell of support amongst those outside this group of interested advocates, and once again, I believe that the problem is that society is not particularly concerned about the rights of women prisoners. As Scheingold explains, "Given additional variations according to issue area, it is clear that legal tactics are no panacea."<sup>173</sup>

Thus, the rights of pregnant inmates at MCI-Framingham are left in the hands of the DOC. Women's prison advocates in Massachusetts have not given up, but the budget

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<sup>172</sup> Borgerson, *supra* note 20, at 4.

<sup>173</sup> Scheingold, *supra* note 17, at 209.

crisis and the security concerns since September 11, 2001 have made it hard, if not impossible, for advocates to think that it would even be possible to bring this issue to the forefront of anybody's attention given the current political climate. However, women's prison advocates feel that it is necessary to continue to meet and discuss ways to improve the situation. As Cathy Romeo explains:

I think its very possible for a program to exist that satisfies everybody's needs, including prisons. And I think that's important. Adversarial situations rarely work well. But I think that it's too bad when all sides don't see the big picture and see how there's a real benefit all around when a program is really strong and really effective. And I think that is an ongoing battle that people who want to see change within the prison system need to keep working on.<sup>174</sup>

Like Romeo, I believe there is reason to continue this work. I am hopeful that someday, when the administration changes, Massachusetts can once again look towards improving the care given to women inmates at MCI-Framingham. This paper has encompassed three years of my life, and it has only made me more convinced that the rights of women prisoners is a cause to which it is worth devoting time and energy. Some might call it a losing cause, but I do not agree.

I also do not believe that we have seen the last of *McDonald*. *McDonald* has been around now for seventeen years, and while it is certainly not a case that garnered national attention, it continues to be important for women's prison advocates. As discussed earlier, I think that there is a potential power that can come from the settlement agreement if legal advocates are ever willing to go back to MCI-Framingham to do a compliance review. My opinion is that this should be the next step in the struggle for the rights of pregnant inmates.

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<sup>174</sup> Romeo interview, *supra* note 15.

McCann explains that “Far from being a uniform code that binds citizens, therefore, law is better appreciated as a continuously contested terrain of relational power among citizens.”<sup>175</sup> It is clear from my research that pregnant inmates’ rights will continue to be contested issue in Massachusetts, and that *McDonald* will always play a role in this struggle. McCann continues, “Although judicial victories often do not translate automatically into desired social change, they can help to redefine the terms of both immediate and long-term struggles among social groups.”<sup>176</sup> Therefore, the real value of the *McDonald* litigation and the community activism that was and is related to the cause is still yet to be determined, and I will continue to keep my eye on this case even though this paper is complete.

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<sup>175</sup> McCann, *supra* note 18, at 283.

<sup>176</sup> *Id.* at 285.