

MEDIATION AS AN ALTERNATIVE TO LITIGATION FOR CHILD CUSTODY DISPUTES FOR INCARCERATED PARENTS

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I. INTRODUCTION

As a general trend in the field of family law, mediation is becoming a far more desirable option to litigation, especially for child custody disputes. Some jurisdictions in the United States already have provisions for mandatory mediation for child custody disputes.¹ Although mediation is not appropriate for every situation, there are circumstances where it is a much better alternative to litigation. Mediation is generally less combative and more hands-on than litigation in child custody disputes, which are already contentious. The shift from fault to no-fault divorce originally brought mediation to the family law system.² Following this shift, there was a shift in custody presumption from sole custody to joint parenting.³ This shift made custody disputes ideal for mediation, as opposed to litigation.⁴ Over time, mediation proved to be a better alternative to litigation for child custody disputes.⁵ Litigation assumes that there is one “winner” in a case, resulting in the other parent being depicted as unfit.⁶ Research has demonstrated that the tension between parents during custody litigation harms children.⁷

Mediation is an appropriate alternative to resolving disputes for families experiencing the secondhand problems associated with

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¹ Suzanne Reynolds et al., *Back to the Future: An Empirical Study of Child Custody Outcomes*, 85 N.C. L. Rev. 1629 (2007).

² JANE C. MURPHY & ROBERT RUBINSON, *FAMILY MEDIATION: THEORY AND PRACTICE* 5 (2d ed. 2015).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ MURPHY & RUBINSON, *supra* note 2, at 6.

incarceration. When a parent of a minor child is incarcerated, they are removed from important decision-making processes in the child's life. For out-of-court conversations, contact between parents and children may be limited based on the incarcerated parents' visitation or phone call allowance. This inaccessibility may result in an unintentional loss of parental rights. Mediation can facilitate regular communication and involvement in their child's life, decreasing the need for unnecessary termination or reduction of parental rights, and improving psychological outcomes for the entire family unit.

This Note will discuss the background of family law and mediation in America, including the "best interests of the child," how its vague application limits incarcerated parents' rights, and how litigation can lead to an arrangement that is not in the child's best interests. This Note will introduce the Family Dispute Resolution Act, which is legislation enacted in New Zealand that designed a framework for mediation for incarcerated parents. This Note will introduce the problems that incarcerated parents and children of incarcerated parents face in the United States and New Zealand. In the Discussion section, this Note will discuss why incarcerated parents especially warrant mediation in custodial litigation because participating in mediation can help reduce recidivism, reduce harm to their children/family, and how avoiding litigation through mediation can protect prisoners' rights to their children. This note will also argue that the New Zealand schema will not apply directly to the United States unless significant revisions to federal and state legislation occur, although mediation can fit into the current schema structured as a rehabilitative program for prisoners. This Note introduces a two-pronged proposal, applying a standard that the federal government can adopt, and additionally a standard that certain states can adopt.

II. BACKGROUND

This section will introduce child custody and visitation law in the United States, including the best interests of the child standard, when a parent should not have custody over their child, factors to consider in the best interests analysis, and specific application of custody laws in one jurisdiction. Next, this section will introduce the concept of terminating parental rights in the United States. Then, this section will introduce the Family Dispute Resolution

Act in New Zealand. Finally, this section will introduce problems that families with an incarcerated parent will experience.

A. *Child Custody and Visitation in the United States*

Child custody is divided into two concepts, legal custody and physical custody. Legal custody involves making major legal decisions regarding the child's education, health care, where the child lives, and smaller issues, including discipline and the extracurricular activities in which the child will participate.⁸ Physical custody involves the child's living and visitation arrangements with parents for periods of time.⁹ The definitions of physical and legal custody are intentionally vague and can vary based on the statutory definition in each state.¹⁰ Visitation is a term used for time spent between a noncustodial parent and child, without the custodial parent.¹¹ When two parents of a child are not married or living together, they must decide an arrangement for the child that accounts for both physical and legal custody of the child.¹² A judge can order an arrangement if the parties cannot create their own custody agreement.¹³ When parents have joint legal and/or physical custody, they each have a role in the child's life.¹⁴ Parents can spend equal time with the child and have equal decision-making power, or their power can be unequal.¹⁵ Parents may have joint physical custody, but not joint legal custody, or vice versa; there are many different options for physical and legal custody available to parents.¹⁶

1. The "Best Interests of the Child" Standard

The major custody doctrine in the United States is referred to as "best interests of the child" analysis, which means that courts

⁸ JEFF ATKINSON, *MODERN CHILD CUSTODY PRACTICE* § 6-3 (2d ed. 2012); *see also* LINDA HENRY ELROD, STEVEN C. WINDSOR & RICHARD D. BALNAVE, *FAMILY LAW AND PRACTICE* § 32.08 [2] [b] (2017) (defining "joint physical custody" versus "joint legal custody").

⁹ ATKINSON, *supra* note 8, § 6-5.

¹⁰ *Id.*

¹¹ ATKINSON, *supra* note 8, § 5-1.

¹² ELROD ET AL., *supra* note 8, § 32.08.

¹³ *Id.*

¹⁴ ATKINSON, *supra* note 8, § 6-2.

¹⁵ *See id.* (explaining that the custody agreement can assign a percentage of time spent, such as 50% of the child's time with one parent and 50% of the time with the other parent. The percentage values do not have to be 50/50 for joint custody).

¹⁶ ATKINSON, *supra* note 8, § 6-2.

should make parenting arrangements that best serve the interests of the child(ren) at issue.¹⁷ The court decides, on a case-to-case basis, whether a certain custody arrangement is in the best interests of each particular child involved.¹⁸ The court can consider many factors such as the age of the child, who the “primary parent” of the child is, how much time each parent spends with the child, socioeconomic status of the each parent, and any other factors that the court deems fit.¹⁹ Family courts are equity courts and they are concerned with making decisions based on the factors in each case, and less concerned with creating consistent legal doctrine.²⁰

The “best interests of the child” standard is intentionally broad and some scholars argue that this standard is detrimental to the parent-child relationship by focusing too heavily on the child’s needs.²¹ Some legal scholars argue that this standard ignores how the parent’s life and involvement can impact the child.²² This would be important for the legislature to consider if the argument is raised that contact with incarcerated parents is not in the best interest of the child.

Appeals of custody and visitation cases are limited. Some decisions are reversed when a judge considers one factor too heavily over the other. This suggests that incarceration should not cancel out all other factors that could be in a parent’s favor. The Mississippi Supreme Court, for example, the *Hollon* court held that the trial court judge considered the “moral fitness” of one parent over the rest of the factors, and did not explain his reasoning.²³ The judge’s role is not merely to enumerate each factor, but to weigh them and consider them.²⁴ *Hollon*’s “moral fitness” one parent’s alleged sexual orientation.²⁵ This same principle can be extended to considering whether a parent is incarcerated. Additionally, the California Supreme Court held in *In Re Marriage of Carney* that the judge should not consider a parent’s physical handicap too heavily when making a custody decision, especially when all other factors weighed in that parent’s favor.²⁶ A parent’s incarceration

¹⁷ ATKINSON, *supra* note 8, § 6–5.

¹⁸ ATKINSON, *supra* note 8, § 4–1.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Sarah Abramowicz, *Beyond Family Law*, 63 CASE W. RES. L. REV. 293 (2012).

²² *Id.*

²³ *Hollon v. Hollon*, 784 So. 2d 943 (Miss. 2001).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *In re Marriage of Carney*, 24 Cal. 3d 725 (Cal. 1979).

similarly should not outweigh other factors in their favor because of the stigma surrounding incarceration, like sexual orientation or physical handicap, and says very little about that person's ability to parent. There are many factors, unrelated to parental ability, that could lead to a person's incarceration. The decision must be explained and considered, not just dismissed because a parent is incarcerated. Although it is impossible for a parent who is incarcerated to have physical custody of their child, this case suggests that if a parent is otherwise fit, a judge should not limit that parent's legal custody just because solely based on their incarceration.²⁷

It is important for attorneys and judges to recognize biases against the parent when arranging visitation, including the often-erroneous notion that it is in the child's best interest to not know that their parent is incarcerated.²⁸ There is mixed opinion among legal scholars as to which factors to consider regarding whether a parent is legally entitled to visitation during incarceration. However, it is relatively clear that incarceration alone does not terminate a parent's right to visitation, nor does it mean that a parent is absolutely legally entitled to visitation during this period. There are many ways that incarcerated parents can physically spend time with their child, and their incarceration does not necessarily bar physical contact.²⁹

2. When Custody is Not Appropriate

Custody or mediation may not be appropriate in cases where a parent is incarcerated for child abuse. This would be a factor to weigh in a best interests analysis. The best interests varies heavily depending on the consideration of a number of factors, involving both the child and the parent.³⁰ Determination about whether parental contact is in the best interests of the child is made on a case-to-case basis and is very fact specific.³¹ However, the best interests of the child standard is normally not used to completely remove a parent from a child's life in custody and visitation disputes where a parent is not incarcerated.

²⁷ *Id.*

²⁸ Lynne Reckman & Debra Rothstein, *A Voice for the Young Child with an Incarcerated Parent*, CHILDREN'S RIGHTS LITIGATION—AMERICAN BAR ASSOCIATION (Jan. 9, 2012), <https://web.archive.org/web/20170806174424/https://apps.americanbar.org/litigation/committees/child-rights/content/articles/winter2012-young-child-incarcerated-parent.html>.

²⁹ See ATKINSON, *supra* note 8, § 5–21.

³⁰ See ATKINSON, *supra* note 8, § 6–5.

³¹ *Id.*

Sometimes, incarceration and child endangerment are interrelated and create a complicated problem for the parents and the government. Parental incarceration can create obstacles for reunification, especially if the parent's criminal legal issues affect their child.³² *In re L.M.* involved a parent with a drug problem, who had her child removed from her home because she was considered an unfit parent.³³ The mother was subsequently arrested for additional drug related charges, and because of her incarceration status, she did not have time to improve her parenting in order to be reunified with her child.³⁴ Her parental rights were terminated, despite her improvements in drug treatment, because she was unable to spend physical time with her child.³⁵

Currently, there is a debate within the legal community regarding how to incorporate family law and incarceration.³⁶ Family law is a unique field because it puts the interests of the child above any other factor.³⁷ Proponents argue that the child's best interests standard should be applied when sentencing parents to a term of incarceration because of the detrimental effect that incarceration has on children.³⁸ Additionally, the prison system is slowly recognizing the importance of parent/child contact early in life. Although there are restrictions on participation, some jails and prisons in Western countries have launched programs that allow incarcerated mothers to live with their infants in prison for a short period of time.³⁹ The only jail in the United States that has this program is Rikers Island in New York.⁴⁰ Rikers Island also offered a training for inmates, where female inmates learned how to "think like a mediator" to better respond to conflicts that arise in jail.⁴¹ This class was a pilot program, and the program was designed to

³² *In re L.M.*, 904 N.W.2d 835 (Iowa Dec. 8, 2017).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Sarah Abramowicz, *A Family Law Perspective on Parental Incarceration*, 50 FAM. CT. REV. 228 (2012).

³⁷ *Id.*

³⁸ *Id.* at 2; Reckman & Rothstein, *supra* note 28.

³⁹ *A look at prison nurseries nationwide*, ASSOCIATED PRESS (May 25, 2016), <https://apnews.com/b98167faa4944029a1a194269a7b6d7b/look-prison-nurseries-nationwide>.

⁴⁰ *Id.* It is important to note that Rikers Island is in the process of being shut down, and will no longer be a jail; see Nick Corasaniti, *Rikers Island Commission Unveils Plan to Shut Down Jail Complex*, N.Y. TIMES (Apr. 2, 2017), <https://www.nytimes.com/2017/04/02/nyregion/rikers-island-jail-closure-plan.html>.

⁴¹ See Association for Conflict Resolution Greater New York Chapter, *Round Table Breakfast: Rikers Island Training: Think like a Mediator*, <https://www.acrgny.org/event-2730615> (last visited Jan. 30, 2018).

reduce recidivism by helping inmates learn how to solve their problems more effectively and without resorting to violence.⁴² There could be a possible middle-ground for incorporating all of these factors together for a custody/visitation plan when a parent is incarcerated.

Mediation is generally not appropriate when there is a power imbalance between the parties.⁴³ There is usually a power imbalance in cases where there is an alleged violation of child welfare and Child Protective Services is involved.⁴⁴ However, mediation is still feasible in some of these situations.⁴⁵ There are additional precautions that should be implemented, such as using a more skilled mediator with legal and psychological expertise.⁴⁶ Child welfare cases have the potential to be more complex than situations in which only one parent is incarcerated. Complex mediation is feasible and effective when additional procedures are implemented, like a more skilled mediator who is equipped to handle complex cases.⁴⁷

3. Other “Best Interests” Considerations for Child Custody Disputes

An important best interests factor to consider is parental involvement in the child’s life prior to incarceration. The *Troxel* Court held that grandparents do not have a fundamental right to visitation with their grandchildren.⁴⁸ The *Troxel* Court held that the statute at issue was overbroad because it stated that “any person” could petition the court for visitation of a child.⁴⁹ The Court determined that the mother’s right to parent her child was so important that it outweighed the state’s interest in letting any other person petition the court for visitation with the child.⁵⁰ This reasoning can be used in favor of incarcerated parents because any restriction placed on legal custody would be weighed against the parent’s right to their child. The *Troxel* Court set a higher bar for parental rights to access/parent one’s child.

⁴² *Id.*

⁴³ MURPHY & RUBINSON, *supra* note 2, at 76.

⁴⁴ MURPHY & RUBINSON, *supra* note 2, at 75.

⁴⁵ *Id.*

⁴⁶ MURPHY & RUBINSON, *supra* note 2, at 76.

⁴⁷ *Id.*

⁴⁸ *Troxel v. Granville*, 530 U.S. 57 (2000).

⁴⁹ *Id.*

⁵⁰ *Id.*

However, some courts are hesitant to extend visitation time to accommodate visitation to an incarcerated parent. For example, *In re Huff* held that a trial court abused its discretion when it exceeded the amount of visitation time that it would award an incarcerated parent, so the child could stay with a third-party outside of the father's weekend prison visit.⁵¹ The court found that this unfairly restricted the mother's visitation with the child, considering the fact that neither parent was found to be legally unfit.⁵²

According to the Uniform Marriage and Divorce Act, the standard for parental visitation is that it should not be restricted or modified unless "visitation would endanger seriously the child's physical, mental, moral, or emotional health."⁵³ It is possible in some cases that visitation with an incarcerated parent would not ever damage a child this seriously.

These are trial court considerations and mediation is more favorable to a middle ground approach. Mediation is a better forum to adequately weigh all of these concerns, giving the knowledgeable parties an active voice. Also, mediation eliminates the chance that a judge could make a biased decision favoring one parent because of one factor. The best interests factors need to be weighed against a parent's right to parent their child. In general, some courts are hesitant to disturb the parent/child bond, which can benefit incarcerated parents.⁵⁴ There is no guarantee that a judge will rule this way. The Supreme Court has routinely affirmed the existence of a fundamental liberty interest in parent's right to parent their child.⁵⁵

4. Example of Specific Child Custody Laws in a State Jurisdiction

New York state requires judges to consider whether the custody arrangement would be in the child's best interests, but there is no statutory explanation of which factors should be considered.⁵⁶ Parents' rights are often unnecessarily diminished because of one

⁵¹ *In re Huff*, 969 A.2d 428 (N.H. 2009).

⁵² *Id.*

⁵³ Uniform Marriage and Divorce Act, §§ 407 (a)–(b). The Uniform Marriage and Divorce Act is a model that was created in 1970 by the National Conference of Commissioners on Uniform State Laws, due to the need of uniformity in divorce proceedings. See Marti E. Thurman, Note, *Maintenance: A Recognition of the Need for Guidelines*, 33 U. LOUISVILLE J. FAM. L. 971, 975, 976 (1995).

⁵⁴ *L.L. v. People*, 10 P.3d 1271 (Colo. 2000).

⁵⁵ *Id.*; see also *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

⁵⁶ N.Y. Dom. Rel. § 240 (2018).

judge's perception of the familial situation.⁵⁷ Judges are left to base their decisions on existing case law and any judgements or biases that they might have about the case.⁵⁸ New York Domestic Relations Law requires judges to consider the following:

(a) In any action or proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to obtain, by a writ of habeas corpus or by petition and order to show cause, the custody of or right to visitation with any child of a marriage, the court shall require verification of the status of any child of the marriage with respect to such child's custody and support, including any prior orders, and shall enter orders for custody and support as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child and subject to the provisions of subdivision one-c of this section.⁵⁹

Many of the New York cases regarding child custody for incarcerated parents only discuss physical custody (visitation as well) and not legal custody. It is important to examine cases of visitation for parents who are incarcerated because visitation is an attainable goal for the parent that can be achieved through mediation. Incarceration alone is not enough to deny a parent visitation with their children.⁶⁰ In one case, for example, an incarcerated father was improperly denied visitation solely based upon the mother's procedural concerns, such as cost, when a psychologist testified at trial that even limited visitation would be beneficial to the child.⁶¹

There are clear cases when visitation with incarcerated parents is inappropriate. For example, in *Cesar A.R. v. Raquel D.*, the 1st Department denied visitation to an incarcerated parent when the father was convicted of murdering the children's mother.⁶² Similarly, visitation of an incarcerated father was properly denied after the father kidnapped his child's mother at gunpoint and left the child in a motel with an elderly relative for three days.⁶³ The child was clearly traumatized by witnessing his mother being kidnapped

⁵⁷ Nicole Lapsatis, *In The Best Interests of No One: How New York's "Best Interests of the Child" Law Violates Parents' Fundamental Right to the Care, Custody, and Control of Their Children*, 86 ST. JOHN'S L. REV. 673 (2012).

⁵⁸ *Id.* at 687.

⁵⁹ N.Y. Dom. Rel. § 240 (2018).

⁶⁰ *Vann v. Vann*, 187 A.D.2d 821 (3d Dep't 1992).

⁶¹ *Rhynes v. Rhynes*, 242 A.D.2d 943 (4th Dep't 1997).

⁶² *Cesar A. R. v. Raquel D.*, 179 A.D.2d 574 (1st Dep't 1992).

⁶³ *Simpson v. Finnigan*, 202 A.D.2d 592 (2d Dep't 1994).

by his father, according to court testimony by his therapist.⁶⁴ Although these cases seem to provide some answers, none of them are completely controlling in the state of New York and they turn heavily on the facts involved. The legislature should create guidelines that help judges and lawyers formulate custody plans to benefit the best interests of the child, while not unnecessarily restricting incarcerated parents' rights. Due to the adversarial nature of court and the vagueness of the "best interests" standard, the best interests of the child are often not met when a custody dispute is litigated in court.⁶⁵

B. *Termination of Parental Rights in the United States*

Generally, parental rights are only terminated when there are certain acts of relinquishment, abandonment, or prolonged neglect.⁶⁶ These are situations in which the child's welfare is clearly endangered. Some have interpreted involuntary incarceration in prison or a mental hospital abandonment of their child.⁶⁷ These cases were originally brought to the court's attention because they either involved a child with no suitable physical custodian (i.e. no parent was physically present to care for the child) or there was an additional case of child endangerment and no alternative physical custodian.⁶⁸ The purpose of terminating one's parental rights is either for the state to have the authority to place the child in foster care or elsewhere or for the child to be adopted.⁶⁹

A California appellate court held that an incarcerated parent's rights were improperly terminated because the agency did not give the mother an appropriate amount of time to facilitate a relationship with her daughter prior to her release. Another California court held that a boilerplate reunification plan was inappropriate when a mother was incarcerated because there was no way she

⁶⁴ *Id.* "The therapist stated that the child had been greatly traumatized by the father's kidnapping of his mother at gunpoint, the incident for which he was incarcerated, during which time the father left the 12-year old boy with a 95-year-old aunt in a motel room for three days."

⁶⁵ Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79 (1997).

⁶⁶ *Parent's involuntary confinement, or failure to care for child as result thereof, as evincing neglect, unfitness, or the like in dependency or divestiture proceeding*, 79 A.L.R.3d 417 (originally published in 1977).

⁶⁷ *M.N.M. v. G.L.M.*, 906 S.W.2d 876 (Mo. Ct. App. 1995); *State ex rel. Q.P.*, 649 So. 2d 512 (La. Ct. App. 1994); *Loar Adoption*, 56 Pa. D. & C.2d 618 (Pa. 1972).

⁶⁸ See *Loar Adoption, M.N.M., & Q.P.*, *supra* note 67.

⁶⁹ *Id.*

could comply with the visitation requirements to prevent social services from terminating her parental rights. Conversely, Iowa courts have held that parental rights should not be terminated because of the barriers to the relationship placed by incarceration. Gradually building up to more frequent visitation is a reasonable goal and should be considered in light of the unique circumstances the family is facing. These two scenarios suggest that the court recognizes the extenuating circumstances of incarceration and is capable of working with an incarcerated parent to ensure that the procedural obstacles are considered when parental rights are at issue.

Parents are often incarcerated for issues that would, in a court's opinion, make them unfit parents. For example, an appellate court in New York terminated a father's parental rights and found a case of permanent neglect for a child because he was incarcerated and could not be reasonably reunified with the child. The mother of the child was addicted to drugs and the child could not be placed with her. The father of the child was incarcerated for six to twelve years for drug charges as well. In making its decision, the court noted:

[w]hile the parental rights of even an imprisoned father must not be disregarded, the best interests of the child must be kept paramount. The courts should evaluate the incarcerated parent's planning efforts without setting unrealistically high standards, but at the same time without indefinite continuation of foster care where the parent cannot provide an alternative living arrangement.⁷⁰

The father's parental rights were an obstacle to permanent adoption and the child needed to have a physical placement in a home.⁷¹ If a parent's rights are not terminated for any of these reasons, a parent has the right to legal custody and legal visitation of their child. Incarceration attracts governmental intervention, which is why mediation is a favorable alternative to solving custody and visitation disputes in court.⁷² Litigation leads to unnecessary termination of parental rights because the court has unrealistic expectations of an incarcerated parent's capabilities, although an incarcerated parent can be suitable despite their physical absence.⁷³

⁷⁰ *Sasha R.*, 675 N.Y.S.2d 605.

⁷¹ *Id.*

⁷² Deseriee A. Kennedy, *Children, Parents & the State: The Construction of a New Family Ideology*, 26 BERKELEY J. GENDER L. & JUST. 78, 84 (2011).

⁷³ *Id.*

One legal scholar proposes changing the standard that courts use for incarcerated parents to whether the incarcerated parent is a “suitable parent,” instead of an “ideal parent.”⁷⁴

C. *New Zealand’s Family Dispute Resolution Act*

The Family Dispute Resolution Act (hereafter “FDRA”) is a law in New Zealand that enables all parents—including those in prison—and caregivers to have access to mediation.⁷⁵ The flexible process of mediation means that all parties have an active voice in formatting a parenting plan. The purpose of the FDRA is to enable families to resolve their disputes out of court and that the best interests of the child are the primary concern.⁷⁶ The FDRA allows mediators in New Zealand to go to greater lengths to reach clients and provide mediation.⁷⁷ Some of the issues that the New Zealand Family Dispute Resolution Centre suggests resolving through mediation include schooling, religious upbringing, health issues, safety, and extracurricular activities.⁷⁸ The purpose of the FDRA is as follows:

[F]amily dispute resolution means family dispute resolution provided by a family dispute resolution provider for the purposes of—(a) assisting parties to a family dispute to resolve the dispute without having to pursue court proceedings; and (b) ensuring that the parties’ first and paramount consideration in reaching a resolution is the welfare and best interests of the children.⁷⁹

The Family Dispute Resolution Centre also adopted a rule that makes mediation more accessible to parents who are incarcerated: “The Mediator may conduct the mediation in person, or by telephone, or by any other electronic medium that the Mediator considers is appropriate to use in the circumstances of the family or

⁷⁴ *Id.*

⁷⁵ Keri Morris, *Improving the Lives of Children by Delivering Family Dispute Resolution into New Zealand Prisons*, *MEDIATE* (Sept. 2016), <https://www.mediate.com/articles/MorrisKbl20160902.cfm>.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Nigel Dunlop, *A Straightforward Guide to Family Dispute Resolution*, *AUCKLAND DISTRICT L. SOCIETY* (June 13, 2014), <http://www.adls.org.nz/for-the-profession/news-and-opinion/2014/6/13/a-straightforward-guide-to-family-dispute-resolution/>.

⁷⁹ Family Dispute Resolution Act 2013, N.Z. LEGIS. <http://www.legislation.govt.nz/act/public/2013/0079/latest/whole.html>.

relationship dispute.”⁸⁰ This provision means that parents do not have to physically be present for their mediation session, which removes any procedural barriers pertaining to the parent’s production at a court or mediation proceeding.⁸¹ The parent can remain incarcerated and still participate in mediation, as long as they have access to a telephone.⁸² This legislation makes mediation easier for parents to exercise their legal right to parent their child.⁸³ The FDRA removes barriers that parents would have faced, such as the cost of pursuing legal remedies for child custody and physical barriers of being incarcerated.⁸⁴

Unlike the United States, New Zealand law enumerates which factors should be weighed in determining a child’s best interests.⁸⁵ Furthermore, these factors lend themselves to continuing contact with the incarcerated parent, while specifically taking into consideration that it would not be in the child’s best interests to be involved with a parent who perpetrates domestic violence.⁸⁶ According to the New Zealand government, it is in the child’s best interests to have parents or guardians who cooperate, have continuity in their care, and have a continued relationship with all family members/parents/guardians.⁸⁷ The revised Care of Children Act replaced legislation that existed since 1968.⁸⁸ The purpose of the overhaul was to “put children first” by changing the legal language to encourage parents to resolve disputes outside of courts, and recognize that they have certain responsibilities for the care of their child.⁸⁹

⁸⁰ New Zealand Family Dispute Resolution Centre, *Mediation Rules* (Sept. 2017), <http://www.fdrc.co.nz/resources/mediation-rules>.

⁸¹ Morris, *supra* note 83.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Care of Children Act 2004, pt. 5, N.Z. LEGIS., <http://www.legislation.govt.nz/act/public/2004/0090/67.0/DLM317241.html>.

⁸⁶ *Id.* at (a).

⁸⁷ *Id.* at (c)–(f).

⁸⁸ New Zealand Government, *Care of Children Act—Putting Children First*, SCOOP INDEP. NEWS (June 30, 2005, 11:36 AM), <http://www.scoop.co.nz/stories/PA0506/S00711.htm>.

⁸⁹ *Id.*

D. *Familial Problems Associated with Incarceration*

New Zealand and the United States have some of the highest rates of incarceration in the world.⁹⁰ Being incarcerated poses serious risks to the children of that individual.⁹¹ There are many negative psychological implications associated with incarceration for both parent and child.⁹² These implications include being at risk for committing the same crimes as their parent, confusion about why their parent is no longer present in their life, and parents reporting that they do not know information about their child, such as where they are attending school.⁹³ Children with incarcerated parents are also at greater risk than other children for having trouble with externalizing behaviors, such as truancy.⁹⁴ These problems put an unnecessary strain on the parent-child relationship and cause unnecessary detachment in the relationship.⁹⁵

More than five million children in America have a parent who is or has been incarcerated at some point in their life. Approximately half of the inmates in state prison and two-thirds of the inmates in federal prison report that they are parents of minor children. American children who are black and who come from impoverished families are more likely to have a parent who is incarcerated. Although there is data regarding how many parents spend time in prison, there is less data showing how many parents spend time in jail, indicating that the number of children who may be affected by an incarcerated parent are higher than projected.

Separation of families because of incarceration has its own unique social and psychological impacts.⁹⁶ Incarceration increases the state expenditure for welfare and foster care.⁹⁷ New York State

⁹⁰ Nicola M. Hartfield, "Behind the Bars" *A Family Mediation Initiative in New Zealand Prisons*, AM. BAR ASS'N (Sept. 2017), https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/newsletter/sept2016/hartfield_behind_the_bars.authcheckdam.pdf.

⁹¹ *Id.*

⁹² Creasie Finney Hairston, *Focus on Children with Incarcerated Parents: An Overview of the Research Literature*, THE ANNIE E. CASEY FOUND. (Oct. 2007), http://www.aecf.org/m/resource/doc/aecf-FocusonChildrenwith_ncarceratedParentsOverviewofLiterature-2007.pdf.

⁹³ Hartfield, *supra* note 98.

⁹⁴ JULIE POEHLMANN ET AL., NAT'L INSTS. OF MENTAL HEALTH, CHILDREN'S CONTACT WITH THEIR INCARCERATED PARENTS: RESEARCH FINDINGS AND RECOMMENDATIONS (NOV. 12, 2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4229080/>.

⁹⁵ *Id.*

⁹⁶ Teresa Wiltz, *Having a Parent Behind Bars Costs Children, States*, STATELINE (May 24, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/05/24/having-a-parent-behind-bars-costs-children-states>.

⁹⁷ *Id.*

recognizes the problem of familial separation and started a pilot program to relocate parents to jails closer to their family.⁹⁸ Additionally, the New York State Legislature introduced legislation that recognizes that families who maintain contact during incarceration have lower rates of recidivism.⁹⁹ More than 88,000 children in the state of New York have a parent who is currently incarcerated.¹⁰⁰ Although the pilot program did not pass, the attempted legislation demonstrates that state legislatures recognize the problem of separation during incarceration, and the positive potential impact of reunification.

III. DISCUSSION

Mediation is a better alternative to litigation for child custody disputes. This section will first analyze why incarcerated parents especially warrant mediation because mediation reduces harm to the whole family, reduces recidivism, and can increase parental rights. Next, this section will discuss custodial disputes specific to incarcerated parents that can be solved through mediation. This section will also discuss viewing mediation as a rehabilitative program for prisoners. Finally, this section will analyze potential systemic and jurisdictional obstacles for implementing a mediation program, including what would happen if a parent is non-compliant with mediation.

A. *Why Prisoners Especially Warrant Mediation*

Incarcerated people in the United States experience high levels of conflict and turmoil.¹⁰¹ One program, called Prisoner Facilitated Mediation, allows prisoners to become trained mediators, and work through problems that arise in prison through mediation, instead of violence.¹⁰² Mediation for disputes in prison empowers inmates to resolve their disputes in a non-violent manner, which in turn can reduce recidivism.¹⁰³ This principle can be applied to fam-

⁹⁸ *Id.*

⁹⁹ S.B. 1474, 2015 Legis. Bill Hist., 238th Legis. Sess. (N.Y. 2015).

¹⁰⁰ *Id.*

¹⁰¹ See Laurel Kaufer et al., *Prisoner Facilitated Mediation: Bringing Peace to Prisons and Communities*, 16 *CARDOZO J. CONFLICT RESOL.* 187, 189, 190 (2014).

¹⁰² *Id.* at 187–88.

¹⁰³ *Id.* at 188.

ily law disputes, and can empower prisoners to effectively resolve disputes within their own family. When prisoners become trained mediators, prison can become less violent.¹⁰⁴ Some mediation programs are conducted as a class for prisoners, where the prisoners explore their thought processes, backgrounds, and motivations to learn how to be better problem-solvers.¹⁰⁵ This would be an ideal program to implement in the overwhelmed prison system in the United States because it could help reduce the violence and aggression associated with incarceration. Even though the prisoners themselves would not be mediators—they would be participants in the mediation—the same principles could be applied because they could learn to better solve their disputes through the skills that the mediator uses. Although these custody disputes could be solved in court, mediation is a better process for prisoners because mediation gives them a more active voice for their own advocacy. The additional effect of improving problem-solving skills for prisoners, coupled with the fact that custodial issues are ideal for mediation, makes mediation the preferred choice over litigation for prisoners involved in custody determination proceedings.¹⁰⁶

1. Lowering Recidivism

Familial contact during incarceration is associated with lower rates of recidivism in many studies. The primary ways that families maintain contact is through letters, phone calls, and visitation. One study in particular highlighted the value of visitation with family members:

[a]ny visit reduced the risk of recidivism by 13 percent for felony reconvictions and 25 percent for technical violation revocations, which reflects the fact that visitation generally had a greater impact on revocations. The findings further showed that more frequent and recent visits were associated with a decreased risk of recidivism.

Reducing recidivism has social benefits for the individual family and also for society as a whole. A child may get the opportunity to have more quality time with their parent if the parent is not incarcerated, and society will benefit by having less people in jail. It is estimated that 95% of people currently incarcerated in state prisons will return back to their community at some point in time.

¹⁰⁴ Mieke H. Bomann, *Prison Tensions Cool When Inmates Seek Training as Mediators*, MEDIATE, <https://www.mediate.com/articles/prison.cfm> (last visited Jan. 30, 2018).

¹⁰⁵ *Id.*

¹⁰⁶ See Kaufer et al., *supra* note 113.

Facilitating family connections while incarcerated can help reduce the strain of parental separation, increasing the likelihood of successful reentry.

Even though incarcerated parents will not be awarded physical custody of their children while in prison, mediation can also assist in improving visitation by allowing parents to work out a scheduled regular visitation time to see their child. The parent would be legally entitled to spend time with that child through the mediation agreement. Working this schedule through mediation allows the parent to have an active role in planning visits with their children without the burden of filing petitions in court. The parent also has an active voice in planning their child's life, and a judge does not have to intervene with biases against the parent.

Mediation would also improve the quality of time that the parent and child(ren) spend together. Family contact for people who are incarcerated is often burdened by the fact that it is difficult. The parent-child relationship can be improved by special visitation programs, where parents are encouraged to play with their children during extra visitation hours. One study showed that when incarcerated parents were allowed to play with their children during visitation, the quality of their conversations and relationships with their children improved. Parents who participated in these studies found their time more rewarding and decreased their fears about their ability to parent. Although maintaining contact while in prison may be difficult, having no contact can result in serious psychological impacts on young children, including problems forming attachment relationships and problems with peers. Incarcerated parents warrant mediation to protect their parental rights. This is a time during which incarcerated parents are in danger of unnecessarily losing access to their child and their rights. Although being incarcerated does not guarantee access or legal custody over one's children, it should not be a bar to any type of custody.

2. Harm Reduction

A parent's incarceration can negatively impact a child and family structure.¹⁰⁷ Legal scholars have recognized the problem having dependent children places on incarcerated parents.¹⁰⁸ The harm is pronounced when the primary caretaker parent or the psy-

¹⁰⁷ See *id.*

¹⁰⁸ Tamar Lerer, *Sentencing the Family: Recognizing the Needs of Dependent Children in the Administration of the Criminal Justice System*, 9 *Nw. J. L. & Soc. POL'Y* 24 (2013).

chological parent is incarcerated.¹⁰⁹ To help alleviate this problem, the criminal justice system could consider the status of the primary caregiver when creating bail, sentencing, and visitation policies.¹¹⁰ Mediation for the physical caretakers of the child could help alleviate these problems as well. Although mediation would not restore physical custody, mediation could be a better tool for parents who become incarcerated, enabling them to have an active role in planning their child's life. Another factor to consider when deciding which parents should receive access to mediation is whether the incarcerated parent is the primary caretaker or psychological parent. This would be easy to implement in states that have a primary caretaker presumption and the legislatures in those states have already recognized the impact that the primary caretaker has on the family and child.

Mediation is a better alternative to court because it is less combative. Children of prisoners will suffer less from the turmoil and conflict in their life if their parents can care for them collaboratively. Children with incarcerated parents are more likely to have experienced domestic violence, substance abuse or mental health problems, and the psychological consequences of losing an attachment figure.¹¹¹ Mediation could be a way to reduce the combativeness of parental conflicts in these homes.

3. Prisoner's Rights to Parent their Children

Prisoner's access to mediation could be limited due to a variety of factors, both legal and procedural. If mediation is viewed as a rehabilitative program, jails that are already underfunded might not have the resources to bring mediation to their inmates. A method of circumventing this obstacle is to extend mediators jobs if a mediation program already exists through the state court system. The mediator would come during normal visitation hours and is funded through the state court system, not through the jail itself. Additionally, prisoners could argue that restricting their access to mediation is not reasonably related to any important penological interest.¹¹² One could even make the argument that access to me-

¹⁰⁹ *Id.* at 39. "A psychological parent is one who 'on a continuing day-to-day basis through interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs.'"

¹¹⁰ *Id.* at 56-57.

¹¹¹ Amy Alexander, *Why Children with Parents in Prison Are Especially Burdened*, ATLANTIC (Dec. 14, 2015), <https://www.theatlantic.com/politics/archive/2015/12/why-children-with-parents-in-prison-are-especially-burdened/433638/>.

¹¹² *Turner v. Safley*, 482 U.S. 78 (U.S. 1987).

diation is reasonably related to the penological interest of reducing recidivism and improving outcomes for children.

B. *Custodial Problems that can be Alleviated through Mediation*

Mediation may also be appropriate for short periods of incarceration to arrange a physical custody agreement between the parties for when the incarcerated parent is released. Although resources may not be available through the jail, the incarcerated parent could mediate with a third party neutral and the custodial parent during normal visitation hours to determine a custody arrangement. It would be in the best interests of the child to avoid litigation in court, and to make the incarcerated parent's transition back into society easier. Mediation would allow the family structure to return to a normal standard for the child quickly and would minimize the amount of change that has occurred in the child's life.

Mediation is more cost-effective than litigation in family court.¹¹³ It is estimated that litigating a full divorce in family court could cost nearly \$33,000, whereas mediation should only cost approximately \$2,500.¹¹⁴ This cost is pronounced for incarcerated parents. These parents may have had to pay for a criminal trial and they are unable to make money while incarcerated. The reduction in cost helps the physical custodian of the child while the other parent is incarcerated as well, since the financial burden of the child is shifted to the non-incarcerated child.

Although parents who are incarcerated cannot financially provide for their children, they can provide psychological support to their children.¹¹⁵ Mediation would be a tool for these parents to access rights to visitation and legal custody. Some legal scholars believe that the current legal system places too much emphasis on the father's role to provide for their family financially.¹¹⁶ This burden to provide disproportionately affects low-income families, especially when the father is incarcerated.¹¹⁷ One solution is to equalize parental obligations for each gender in terms of child sup-

¹¹³ Diane L. Danois, *The Cost of Litigation Versus Mediation in Family Law*, HUFFINGTON POST (Dec. 27, 2012, 12:16 PM), https://www.huffingtonpost.com/diane-l-danois-jd/post_4201_b_2318483.html.

¹¹⁴ *Id.*

¹¹⁵ Laurie S. Kohn, *Money Can't Buy You Love: Valuing Contributions by Nonresidential Fathers*, 81 BROOKLYN L. REV. 53 (2015).

¹¹⁶ *See id.*

¹¹⁷ *Id.*

port obligations, and make the caretaking role a more valuable consideration in determining support obligations.¹¹⁸ Although it would be difficult for a parent who is incarcerated to physically care for their child for more than the allotted visitation time, it would ground their argument in that their emotional role in the child's life (to visit, make decisions, etc.) has tangible value equal to the non-incarcerated parent's contribution.

C. *Mediation as a Rehabilitative Program*

Mediation can be equated to other educational or rehabilitative programs already offered in jails and prison. The Federal Bureau of Prisons allows federal prisoners to have access to some rehabilitative programs, such as religious, mental health, and educational programs.¹¹⁹ New York State offers a variety of services for prisoners, from mental health counseling, to vocational training.¹²⁰ New York even offers Family Services where, if eligible, parents and children can receive counseling to help their relationship and children can receive community mentoring about having a parent who is incarcerated.¹²¹

Many rehabilitative programs throughout the country focus on treating prisoners' drug problems or giving prisoners a high school/college education so they can thrive when they are released.¹²² These programs are more costly upfront, but they reduce costs on the prison system because prisoners who utilize these programs do not reoffend and come back to prison.¹²³ This would be an incentive for state and federal prison systems to allocate money to mediation, if they cannot secure outside funding for the program.

Some states already offer mediation for people who are incarcerated. Maryland provides a re-entry mediation program for peo-

¹¹⁸ *Id.*

¹¹⁹ BUREAU OF PRISONS, *Education Programs*, https://www.bop.gov/inmates/custody_and_care/education.jsp (last visited Oct. 24, 2017).

¹²⁰ See NEW YORK STATE DEP'T OF CORRECTIONS AND COMMUNITY SUPERVISION, *Program Services* (Nov. 24, 2017), <http://www.doccs.ny.gov/ProgramServices/index.html>.

¹²¹ NEW YORK STATE DEP'T OF CORRECTIONS AND COMMUNITY SUPERVISION, *Ministerial, Family, and Volunteer Services*, <http://www.doccs.ny.gov/ProgramServices/ministerial.html#fsp> (last visited Nov. 24, 2017).

¹²² See Jacob Reich, *The Economic Impact of Rehabilitation Programs* (Aug. 17, 2017), <https://publicpolicy.wharton.upenn.edu/live/news/2059-the-economic-impact-of-prison-rehabilitation-for-students/blog/news.php>.

¹²³ *Id.*

ple who are about to be released from jail or prison.¹²⁴ According to the program, inmates are allowed to have mediation sessions with their family prior to their release, and this helps reduce recidivism.¹²⁵ Some examples of cases that have been mediated through this program are a father and son, where the father was incarcerated for fourteen years and his son had many negative feelings toward his father.¹²⁶ Their mediation session helped mend their relationship and they even worked out an agreement for the father's behavior for his son to accept him back into his life.¹²⁷ This program could be a useful example for people who are skeptical about mediation being in the best interests of the child. A younger child will have the forum to have a conversation with their parent about incarceration later in life when it is appropriate. Mediation gives families a safe forum and an outcome that benefits everyone who is involved.

D. *Potential Systemic and Jurisdictional Obstacles for a Mediation Program in the United States*

The Family Court system in the United States is different from the Family Court system in New Zealand. In the United States, family court laws vary from state-to-state. It is unlikely that a federal bill would be effective without significant reform to existing family law legislation in the United States. The bill would have to apply to fifty unique jurisdictions. Also, the prison system in the United States is more stressed for resources than the prison system in New Zealand.¹²⁸ Although the prison systems in the United States and New Zealand are similar, capacity is not an issue in New Zealand. The capacity of the entire New Zealand prison system is

¹²⁴ *Re-Entry Mediation*, COMMUNITY MEDIATION MARYLAND, <http://re-entrymediation.org/> (last visited Jan. 30, 2018).

¹²⁵ *Re-Entry Mediation Overview*, COMMUNITY MEDIATION MARYLAND, <http://re-entrymediation.org/index.php/general-information/re-entry-mediation-overview/> (last visited Jan. 30, 2018).

¹²⁶ *Examples of Re-Entry Mediation Cases*, COMMUNITY MEDIATION MARYLAND, <http://re-entrymediation.org/index.php/general-information/examples-of-re-entry-mediation-cases/> (last visited Jan. 30, 2018).

¹²⁷ *Id.*

¹²⁸ *Highest to Lowest—Prison Population Rate*, WORLD PRISON BRIEF, http://www.prison-studies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All (last visited Nov. 24, 2017).

about 10,060 inmates.¹²⁹ As of 2017, the entire prison population was 10,260 and in 2015, the prison system was at 106.1% capacity.¹³⁰ In the United States the occupancy level was 103.9% as of 2014.¹³¹ Comparatively, New Zealand is ranked 109 in the world for highest prison occupancy and the United States is ranked closely behind at 111.¹³² However, the United States has the second highest incarceration rate in the world, while New Zealand is ranked 63rd highest.¹³³ This means that more of the American population will be incarcerated than the population in New Zealand.¹³⁴

It would not be advisable to try this program in states that have higher rates of incarceration, such as Louisiana.¹³⁵ The prison systems in these jurisdictions are likely strained from the capacity. These jurisdictions would be theoretically ideal for mediation. These states could implement a program after studying existing programs in smaller jurisdictions. New York would be a suitable jurisdiction to begin implementing this program because New York state already has rehabilitative programs in place for prisoners, and New York has a relatively low incarceration rate compared to other states.¹³⁶ States with higher rates of incarceration can study these mediation programs in other states to learn how to adapt their program for optimal function in their state. States with high rates of recidivism can implement this legislation as a social tool to help reduce recidivism.¹³⁷ One study sampled incarcerated people from thirty states and found that within five years of release, about 75% of people were rearrested.¹³⁸ This demonstrates a national

¹²⁹ *New Zealand 2013 Human Rights Report*, <https://www.state.gov/documents/organization/220430.pdf> (last visited Nov. 24, 2017).

¹³⁰ *New Zealand*, WORLD PRISON BRIEF, <http://www.prisonstudies.org/country/new-zealand> (last visited Nov. 24, 2017).

¹³¹ *United States of America*, WORLD PRISON BRIEF, <http://www.prisonstudies.org/country/united-states-america> (last visited Nov. 24, 2017).

¹³² *Highest to Lowest—Occupancy Level (based on official capacity)*, WORLD PRISON BRIEF, http://www.prisonstudies.org/highest-to-lowest/occupancy-level?field_region_taxonomy_tid=All (last visited Nov. 24, 2017).

¹³³ *Highest to Lowest—Prison Population Rate*, WORLD PRISON BRIEF, http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All (last visited Nov. 24, 2017).

¹³⁴ See *New Zealand 2013 Human Rights Report*, *supra* note 151.

¹³⁵ *State-by-State Data*, SENTENCING PROJECT, <http://www.sentencingproject.org/the-facts/#rankings?dataset-option=SIR> (last visited Nov. 24, 2017).

¹³⁶ New York has the 41st highest state incarceration rate in the United States. See *id.*

¹³⁷ See *supra* Section III.A.1.

¹³⁸ MATTHEW R. DUROSE, ALEXIA D. COOPER & HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN*

interest in implementing a program, since more than half of the nation has a problem with recidivism.

1. When a Parent is Unwilling to Mediate

A situation may arise where a parent may choose not to mediate. This could be the incarcerated parent, or the non-incarcerated parent. In New Zealand, a mediator may terminate the mediation process at a pre-mediation assessment when a parent is unwilling to participate effectively, the mediator believes that there is domestic violence within the family, or one parent refuses to attend.¹³⁹ In jurisdictions in the United States where mediation is mandatory for a first time child custody case, like North Carolina, the court can impose sanctions if a parent refuses to attend their first mediation session.¹⁴⁰ In the event that no agreement is reached, the mediator will give the court a report about why an agreement could not be reached.¹⁴¹ It is unlikely that a judge would view a report of an uncooperative parent favorably. A mediator could inform a parent about how the judge would view them if they are simply uncooperative in mediation, or if they do not attend.

IV. PROPOSAL

The structure of the FDRA would be an effective model for a mediation program in the United States, if there are a few modifications to account for the difference in governmental structure between the U.S. and New Zealand. It is important to consider a two-pronged solution to implement mediation for incarcerated parents in the United States. The first prong will propose a federal solution that would establish mediation guidelines that all states must follow. The second prong will propose a solution for state legislatures to establish more in-depth legislation, specific to their state laws.

2005: PATTERNS FROM 2005 TO 2010 (Apr. 2014), <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>.

¹³⁹ *Mediation Rule 3.3*, FAMILY DISP. RESOL. CTR. (Sept. 2017), <http://www.fdrco.co.nz/resources/mediation-rules>.

¹⁴⁰ N.C. Unif. Rules Custody and Visitation Mediation, Prog. Rule 7.01.

¹⁴¹ N.C. Unif. Rules Custody and Visitation Mediation, Prog. Rule 12.06.

A. *Federal Proposal*

Congress could set a federal standard to provide a mediation option throughout the country for parents who are incarcerated to work through their child custody disputes in mediation. It is possible to eventually establish a national standard for mediation in prisons. Congress could model the mediation bill after the federal guidelines for setting child support orders.¹⁴² This federal law sets certain guidelines that state legislatures must follow when creating child support provisions.¹⁴³ Some of these guidelines include that state laws must consider the noncustodial parent's earnings/income, address how the child's medical insurance will be provided, and that laws must be based on specific numeric criteria.¹⁴⁴ This specific federal law already mandates states about how to view parental incarceration regarding child support modification.¹⁴⁵ If a state does not have legislation that matches these requirements, they will not receive federal grants for their child support program.¹⁴⁶ This would be an effective way to structure federal guidelines for a mediation program for incarcerated parents. Each state would be required to establish legislation in accordance with federal guidelines. Once they do, they will receive a federal grant which would likely be an incentive for them to continue the program.

Federal mediation legislation is the only way to target the massive federal prison system. Without national legislation, federal prisons will be absent from receiving the benefits of mediation. Since there are many factors that affect recidivism and the crime rate, enacting a federal statute could contribute to a lower rates of recidivism.¹⁴⁷ Families exist throughout the entire country and familial issues transcend race and socioeconomic status, although some groups suffer more than others.¹⁴⁸

Additionally, Congress could enact a federal standard to help guide states in determining what factors should be considered for a best interests analysis.¹⁴⁹ This would model the legislation from

¹⁴² Guidelines for Setting Child Support Orders, 54 C.F.R. § 302.56 (LexisNexis 2018).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at (c).

¹⁴⁵ See *id.* at (c)(3) (stating that parental incarceration should not be treated as voluntary unemployment for the purposes of child support modification).

¹⁴⁶ See Grants, 54 C.F.R. § 301.15 (LexisNexis 2018).

¹⁴⁷ See THE NATIONAL REENTRY RESOURCE CENTER, *supra* note 122.

¹⁴⁸ *Id.*

¹⁴⁹ See also Care of Children Act 2004, *supra* note 93.

New Zealand, giving incarcerated parents a chance to have custody over their children while ensuring that the child's interests are paramount.¹⁵⁰ This would affect every state in a profound way, but is a welcome change in ensuring that incarcerated parents have rights to their children. This would also ensure that families are not unnecessarily broken apart simply because one parent is incarcerated.

B. *State Proposal*

Since custody law depends on state statutes, this schema would not be effective if there was not a provision to try adapting it to certain states. The United States would likely not have a uniform law like New Zealand because of the size and the nature of the United States government.

Mediation would likely be successful in jurisdictions that already have court-ordered mediation for family court disputes. These would be states with legislation favoring family court proceedings out of court resolutions.¹⁵¹ New York would be an ideal state to test legislation because New York already allows for court-ordered mediation once a petition is filed.¹⁵² New York also has an abundance of programs for prisoners to address family issues and the psychological implications of those issues.¹⁵³ North Carolina also has a state rule that all cases involving custody and visitation must be mediated before trial.¹⁵⁴ Some scholars were concerned that this would cause cases to be unfair and favor a disposition of joint custody.¹⁵⁵ This rule was studied over time and the studies showed that was not the case.¹⁵⁶ In these states, it is easy to modify the already existing statute to add mandatory mediation in the case that a parent is incarcerated. These states likely have resources in place to accommodate mediation to incarcerated parents.

¹⁵⁰ *Id.*

¹⁵¹ See *Custody & Visitation Mediation*, NYCOURTS.GOV, <https://www.nycourts.gov/court-help/family/mediation.shtml> (last visited Nov. 27, 2017).

¹⁵² *Id.*

¹⁵³ Morris, *supra* note 83.

¹⁵⁴ N.C. Unif. Rules Custody and Visitation Mediation, Prog. Rule 7.01.

¹⁵⁵ See Reynolds, *supra* note 1.

¹⁵⁶ *Id.*

V. CONCLUSION

Providing mediation to incarcerated parents in the United States would aid the lives of children and families where one parent is incarcerated. There would be significant legal obstacles to enacting this schema in the U.S. Incarcerated people may not have the legal right to access mediation in prison, although they have the legal right to custody over their children. Although many parents could argue that contact with an incarcerated parent is not in the child's best interests, there is evidence to support that continued contact with the incarcerated parent (in certain circumstances) is in the child's best interests. Incarceration alone is not a bar to legal custody and parents have a legal right to parent their children.

Mediation is necessary to protect children's welfare and parental rights in a situation where they are at risk. Litigation for child custody disputes is combative by nature. The aim of litigation in child custody disputes is to present one parent as unfit.¹⁵⁷ With incarcerated parents, there is already a burden of having the stigma as an unfit parent because of their incarceration status. Judges could weigh this factor too heavily in awarding legal custody. Mediation gives parents a forum to privately resolve these disputes in a non-combative way.

Mediation is the better solution to the problems that incarcerated parents face because it decreases the amount of conflict in an already tumultuous situation. Families experiencing incarceration are less stable than other families. In general, mediation is beneficial for prisoners to become better problem-solvers. Improving problem-solving skills and also improving connections within the prisoner's family could help reduce recidivism. Each jurisdiction would have unique obstacles for implementation. These obstacles are not insurmountable. The federal government can implement mediation guidelines and incentivize states to comply with the guidelines by funding compliant states. This would be an effective method to integrate a federal standard into the United States, even when family law varies greatly between states. Reducing familial conflict and strengthening the family unit can benefit families and society as a whole. Mediation is simply a vehicle for productive communication and reducing conflict.

¹⁵⁷ See MURPHY & RUBINSON, *supra* note 2.