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em>Mama Tried: Shifting Thinking (and Practice) in Child Welfare Cases When a Parent is Incarcerated

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MAMA TRIED: SHIFTING THINKING (AND PRACTICE) IN CHILD WELFARE CASES WHEN A PARENT IS INCARCERATED

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INTRODUCTION

On the surface, *In re* L.M.,[1] decided by the Iowa Supreme Court at the end of 2017, is a completely unremarkable case. The case involved a termination of the parental rights (TPR) of a mother, Katherine, who had a history of addiction to methamphetamines, lost her prior children in the child welfare system, and was incarcerated during the life of the case after pleading guilty to conspiracy to deliver methamphetamine.[2] The Iowa Supreme Court affirmed the juvenile court's order terminating her parental rights, finding that the State met its burden of proving the grounds for termination and that it was in the child's best interests to terminate the mother's parental rights.[3] The opinion, including a dissent, was only five pages long. Unfortunately, cases with similar facts happen all too frequently throughout the United States.[4]

A deeper look at the case, however, tells a very compelling story about mass incarceration policies and child welfare in the United States, a story one commentator has called "[t]he family separation crisis no one knows about."[5] Katherine, against the odds, was able to get the help she needed while incarcerated.[6] She took advantage of all of the services available to her.[7] She was a "model inmate."[8] She sought, unsuccessfully, to have visits with her child while she was initially incarcerated.[9] By the time of the TPR

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

2. *Id.* at 836. Cases involving two of Katherine's prior children resolved without termination of her parental rights. *See* Oral Argument at 33:00, In re L.M., 904 N.W.2d, 835 (Iowa 2017) (No. 17-0287), https://www.iowacourts.gov/iowa-courts/supreme-court/supreme-court-oral-argument-schedule/case/17-0287. One of her children was placed in the guardianship of her father, and another was already in the custody of his father.

3. *In re* L.M., 904 N.W.2d at 839.

4. In 2016, over 92,000 children were removed from their parent's custody because of drug abuse by the parent. U.S. DEPT. OF HEALTH AND HUMAN SERV., THE AFCARS REPORT, PRELIMINARY FY 2016 ESTIMATES AS OF OCTOBER 20, 2017, at 2. More than 20,000 were removed in the same year due to parental incarceration. *Id.* Rates of TPR in child welfare cases when a parent is incarcerated are over 90%.

5. Eli Hager & Anne Flagg, *How Incarcerated Parents are Losing their Rights Forever*, THE MARSHALL PROJECT (Dec. 32, 2018, 10:00 pm), https://www.themarshall project.org/2018/12/03/how-incarcerated-parents-are-losing-their-children-forever.

6. *See In re* L.M., No. 17-0287,901 N.W.2d 840 LEXIS 528 *8 (Iowa Ct. App. 2017).

7. *See id.* at *8.

8. *Id.* at *6.

9. *Id.* at 3-4. As discussed further below, Katherine's attorney requested visitation while Katherine was in jail, and later in the case, Katherine wrote to one of her workers

trial, she expected to be paroled soon, and had a plan for housing, work, and treatment.[10] Katherine progressed enough that the Iowa Court of Appeals reversed her termination, ruling that she should receive an extension of time to reunify with her child because the Iowa Department of Human Services (DHS) did not make reasonable efforts towards reunification.[11]

The Iowa Supreme Court reversed the Court of Appeals, finding not only that the termination grounds had been proven and termination was in child's best interests, but also that Katherine's reasonable efforts arguments failed because they were not properly raised.[12] The Chief Justice, however, authored a dissenting opinion stating that TPR in this case was an "injustice to the mother" and "misuse of the statute."[13] He argued that incarcerated parents, like all other parents in child welfare cases, should have a real chance to demonstrate their ability to parent the child through participation in meaningful services.[14]

The conversation (and conflict) between the juvenile court, Court of Appeals, and Supreme Court opinions raise critical issues for child welfare policy in the United States. "The United States is the world's leader in incarceration."[15] Over the last thirty years, changes in drug policy, mandatory minimum sentences, and habitual offender statutes have increased the rate of incarceration dramatically.[16] During that same time period, the number of children with an incarcerated parent has also increased rapidly.[17] In 1985, 1 out of every 125 children had an incarcerated parent.[18]

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asking for visitation when she transitioned to a residential correctional program closer to where the child was placed.

10. *See id.* at *6-7.

11. *See id.* at *11.

12. *See In re* L.M., 904 N.W.2d 835, 840 (Iowa 2017).

13. See *id.* at 840-41 (Cady, C.J., dissenting).

14. *Id.*

15. THE SENTENCING PROJECT, CRIMINAL JUSTICE FACTS, *available at* https://www.sentencingproject.org/criminal-justice-facts/ (noting that the U.S. is "the world's leader in incarceration.").

16. Jean Lawrence, *ASFA in the Age of Mass Incarceration: Go to Prison- Lose your Child?,* 40 WM. MITCHELL L. REV. 990, 991 (2014). The average length of sentence has also increased by 36% over the last twenty years. (citing PEW CTR. ON THE STATES, TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS 2 (2012)), *available at http://www.pewstates.org/uploadedFiles/PCS Assets/2012/Pew Time Served report.pdf*).

17. *Id.* In 1980, the number of people incarcerated for drug offenses was around 40,900. By 2016 there were more than 450,000 people incarcerated for drug offenses.

18. RUTGERS NAT'L RESOURCE CENTER ON CHILDREN & FAMILIES OF THE INCARCERATED CHILDREN AND FAMILIES OF THE INCARCERATED FACT SHEET, *available*

There are now upwards of 10 million children, or one in every 28 children, in the United States who have experienced parental incarceration.[19] The most recent data indicates that parental incarceration is a factor in 8% of foster care placements.[20]

Meanwhile, in an effort to prevent children from languishing in foster care, child welfare policy has changed to require parents to more quickly address the issues that led to a child's removal. The Adoption and Safe Families Act of 1997 (AFSA) required states to establish permanency more expeditiously, and set timelines limiting reunification efforts.[21] ASFA also required that states file termination of parental rights petitions when the child has been out of the home for 15 of the last 22 months.[22] Compliance with these timelines has resulted in high rates of TPR for incarcerated parents. Between 1997, when Congress passed ASFA, and 2002, the number of termination proceedings involving incarcerated parents doubled.[23] A 2012 study indicated that termination of parental rights occurred in more than 90% of cases in which a parent was incarcerated.[24] A recent analysis of 3 million child welfare cases concluded that incarcerated parents were more likely to lose their parental rights than parents who had physically or sexually abused their children.[25]

Incarcerated mothers have been disproportionately impacted by the interplay of criminal justice and child welfare policy. Incarcerated mothers are five times more likely to have their children placed in foster care than

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at https://nrccfi.camden.rutgers.edu/files/nrccfi-fact-sheet-2014.pdf. (citing Mauer, M., Nellis, A., & Schirmir S., *Incarcerated Parents and their Children- Trends 1991-2007*, THE SENTENCING PROJECT (February 2009), http://www.sentencingproject.org.

19. *Id.*

20. *See* U.S. DEPT. OF HEALTH AND HUMAN SERV., *supra* note 4.

21. MARTHA RAIMON, ARLENE LEE, & PHILIP GENTY, SOMETIMES GOOD INTENTIONS YIELD BAD RESULTS: ASFA'S EFFECT ON INCARCERATED PARENTS AND THEIR CHILDREN, IN INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT (2009).

22. *See id.*

23. Lawrence, *supra* note 16, at 993 (citing THE ANNIE E. CASEY FOUNDATION, WHEN A PARENT IS INCARCERATED: A PRIMER FOR SOCIAL WORKERS (2011), available at https://www.aecf.org/m/resourcedoc/aecf-WhenAParentIsIncarceratedPrimer-2011.pdf).

24. Lawrence, *supra* note 16, at 993 (citing KRISTIN S. WALLACE, NAT'L RES. CTR. FOR PERMANENCY & FAMILY CONNECTIONS, INFORMATION PACKET: THE ADOPTION AND SAFE FAMILIES ACT: BARRIER TO REUNIFICATION BETWEEN CHILDREN AND INCARCERATED MOTHERS, NAT'L RES. CTR. FOR PERMANENCY & FAMILY CONNECTIONS 4 (2012).

25. Hager & Flagg, *supra* note 5.

incarcerated fathers.[26] Mothers also have their parental rights terminated more often.[27] And, while rates of incarceration have started to go down in the last decade for most demographic groups, women and girls are a notable exception.[28] There has been an 800% increase in the number of women in state prisons over the last 40 years.[29] There are 14 times more women in local jails than in the 1970s.[30] The experience of severe trauma is a "major contributing factor in female incarceration."[31] For example, 86% of women in jails have experienced sexual violence.[32]

Over the last twenty years or so, however, there has been a growing critique of how mass incarceration and child welfare policy have devastated families.[33] In addition, there is a better understanding of the particular challenges parental incarceration creates for children,[34] and the way preserving family relationships can mitigate harms children face, and improve outcomes for parents and children.[35] *In re* L.M. surfaces these issues in a powerful way, and provides an excellent lens through which to explore the issues and identify practical recommendations for change. Part I of the article will discuss the basic facts of the case and the different positions taken by the courts involved. Part II will identify three central

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26. *See* Sally Day, *Mothers in Prison: How the Adoption and Safe Families Act of 1997 Threatens Parental Rights*, 20 WIS. WOMEN'S L.J. 217, 226 (2005). Two percent of the children of incarcerated fathers and ten percent of the children of incarcerated mothers are in foster care.

27. Hager & Flagg, *supra* note 5.

28. Sarah Stillman, *America's Other Family Separation Crisis*, THE NEW YORKER, Nov. 5, 2018, at 2.

29. *See id.*

30. *See id.* Bail issues are part of the problem: Robin Steinberg explains: "Bail is so gendered. The data shows that much higher percentage of women can't afford it, and being the primary caretaker of your kids really puts the pressure on."

31. *See id.* at 7.

32. *See id.*

33. *See id*; *see also* Steve Christian, Children of Incarcerated Parents, NATIONAL CONFERENCE OF STATE LEGISLATURES, (March 2009); Raimon, Lee & Genty, *supra* note 21.

34. Vincent Fellitti, M.D. et al, *Relationship of Child Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults*, 14 AM. J. OF PREV. MED. 245, 248 (1998) (the Adverse Childhood Experiences Study rates parental incarceration as one of the ten "adverse childhood experiences" (ACES) that significantly increase the likelihood of health problems later in life and other ACES include physical abuse, neglect, and exposure to domestic violence).

35. ANNIE E. CASEY FOUNDATION, A SHARED SENTENCE: THE DEVASTATING TOLL OF PARENTAL INCARCERATION ON KIDS, FAMILIES, AND COMMUNITIES (2016).

challenges confronting families impacted by incarceration in the child welfare system, and the way the courts' perspectives address, or fuel, the challenges. Part III will provide practical recommendations for states to change how these issues are addressed to improve child welfare responses and reduce the impact of incarceration on families.

I. *IN RE* L.M.

A. Factual Background

L.M. was born on December 28, 2015.[36] She tested positive for methamphetamine, amphetamine, and benzodiazepines at birth.[37] Her mother, Katherine, acknowledged using methamphetamine during the pregnancy, up until the day L.M. was born.[38] While still in the hospital, the Iowa Department of Human Services removed L.M. from the custody of her mother.[39] She was placed in foster care, and DHS arranged for supervised visits for Katherine.[40]

Katherine participated in a supervised visit with L.M. on January 5, 2018.[41] During the visit, she "[a]ppeared to be loving toward L.M., . . . but seemed unsure of herself."[42] She missed opportunities for visits on January 6 when she overslept,[43] and January 8 when she failed to confirm the visit with the in-home worker.[44] On January 10, Katherine was arrested for conspiracy to deliver methamphetamine and was placed in jail.[45] At a Child in Need of Assistance (CINA) adjudication hearing on February 4, Katherine's attorney asked "[i]f there is any possible way we can have

36. *In re* L.M., 904 N.W.2d 835, 836 (Iowa 2017).

37. *See id.*

38. *See id.* at n1.

39. *See id.*

40. *See id.*

41. *See id.*

42. *In re* L.M., No. 17-0287, 2017 Iowa App. LEXIS 528 *2 (Iowa Ct. App. May 17, 2017).

43. *See id.* Her boyfriend, who was presumed to be the father at the start of the case, called to explain they had overslept.

44. *Id.* at 2-3. When parents are not consistent in attending visits, sometimes DHS workers will request that the parent confirm the visit in advance so that the in-home worker does not bring the child if the parent is not going to attend.

45. *See In re* L.M., 904 N.W.2d at 836. The Supreme Court opinion states that Katherine was in the Page County Jail. *Id.* The Court of Appeal opinion indicates she was in the Fremont County Jail. *In re* L.M., 2017 Iowa App. LEXIS 528 at *3. She may have spent time in both places.

visitation between mom and child, given the setting, I would like to ask for that. But typically, with the jail setting, it's usually impossible. But I would like DHS to look at it."[46] The DHS social worker explained that she was unsure whether in-person visits were available for children at the jail, and based on that record, the court ruled that visitation in the jail setting was not "appropriate."[47]

A dispositional hearing was held on February 18, 2016.[48] No record was made regarding visitation, and the order indicates that counsel for Katherine expressed her agreement with the recommendations in the DHS case plan, which left visitation at the discretion of DHS.[49] No visitation was arranged at the county jail, and soon after the dispositional hearing, Katherine pleaded guilty to conspiracy to deliver methamphetamine and was transferred to the Iowa Correctional Institute for Women (ICIW) on February 26.[50] She received a ten-year sentence.[51]

At a review hearing on June 2, 2018, the court inquired whether Katherine requested any additional services, and despite no visits occurring at the prison, no visitation was formally requested.[52] Katherine was not present at the hearing, but was represented by counsel.[53] The only contact between Katherine and her child was a monthly picture of L.M. sent to Katherine at

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46. *In re* L.M., 904 N.W.2d at 836.

47. *Id.* The Court of Appeals opinion cites the following colloquy between the judge and the social worker:

COURT: Ms. Nook, you are making a face over there.

CPW NOOK: I don't know what- with her being in jail, it's not like she would have face-to-face with that baby. It's – I don't know with the new jail if it's a screen TV- it's a TV screen.

COURT: I would say that the Court does not find that probably visitation in that setting is appropriate.

48. *In re* L.M., 2017 Iowa App. LEXIS 528 at *4.

49. *In re* L.M., 904 N.W.2d at 837.

50. *See id.*

51. *In re* L.M., 2017 Iowa App. LEXIS 528 at *4.

52. *In re* L.M., 904 N.W.2d at 837.

53. *See In re* L.M., 904 N.W.2d at 837, n. 2. For a host of reasons, incarcerated parents are often not physically present at child welfare hearings. The general rule is that there is a due process right to participate in the hearing, but whether the parent has a right to be personally present varies by jurisdiction. *See* Joanna Woolman, *Special Considerations Representing Clients Involved with the Criminal Justice System*, in REPRESENTING PARENTS IN CHILD WELFARE CASES 56-57 (2015). A recent Iowa Supreme Court case held that, as a general rule, parents must at least be able to participate by phone in the proceeding. M.D. v. K.A., 921 N.W.2d 229, 236 (Iowa 2018).

the prison.[54]

A permanency hearing was held on September 15, 2016.[55] DHS recommended that the juvenile court direct the state to file a termination of parental rights petition.[56] Katherine's counsel objected to the recommendation and requested that the court give Katherine a six-month extension so she could continue working on reunification.[57] Katherine had submitted a handwritten letter to the court in support of her request, acknowledging her past mistakes and expressing a desire to be reunited with her child.[58] She wrote, "[d]uring the duration of my stay here in ICIW I will be able to meet all the goals set forth in the case plan that's in place with DHS."[59] She further wrote, "[m]y daughter deserves a mother that is sober, healthy, stable, responsible, and present . . . I am making personal changes and lifestyle changes in order to be the parent she needs and deserves."[60] Katherine's counsel explained that she was already scheduled for release to a community based correctional program in October or November.[61] The court denied Katherine's request for more time, and instead directed the State to file a TPR petition.[62]

The TPR hearing was in January of 2017.[63] Katherine, participating by telephone from the prison, testified in the hearing about her progress.[64] Her conduct in prison had been exemplary, and she was able to complete a substance abuse treatment program.[65] She was even allowed to work outside the prison at the department of corrections office in Des Moines.[66] The work allowed her to gain computer and clerical skills.[67] She also completed a program aimed at helping inmates prepare for reentering the community.[68] Her progress in prison led to the parole board granting her request for parole

54. *See In re* L.M., 2017 Iowa App. LEXIS 528 at *4.
55. *See In re* L.M., 904 N.W.2d at 837.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *In re* L.M., 904 N.W.2d at 837.
63. *See id.* at 838.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *See In re* L.M., 2017 Iowa App. LEXIS 528 at *6-7.

a few days before the TPR hearing.[69] Within the next 30 days, she expected to be transferred to a community-based program, where she would remain only three months.[70] The State called no witnesses in the hearing.[71] Neither the state nor Guardian *ad Litem* cross-examined Katherine.[72] The State relied solely on written reports from the DHS worker and other professionals.[73]

In spite of Katherine's progress, the court terminated her parental rights.[74] The court terminated under three grounds: (1) that Katherine had abandoned L.M.; (2) that she had not maintained consistent and meaningful contact with L.M. and had not made reasonable efforts to resume care of the child despite being given the opportunity to do so; and (3) that the child had been out of the home more than six months and could not be returned to the parent at the time of the TPR hearing.[75] Katherine appealed.[76]

B. Court of Appeals Decision

On May 17, 2017,[77] the Court of Appeals reversed the juvenile court order and granted Katherine's request for more time.[78] The court cited her "remarkable progress" in prison, concluding that DHS had not made reasonable efforts to reunify L.M. and Katherine.[79] The court explained that Katherine's incarceration did not excuse DHS from providing reasonable efforts of reunification, which included considering visitation.[80] In a prior case, *In re* S.J.,[81] the Iowa Court of Appeals laid out the factors courts should

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69. *See In re* L.M., 904 N.W.2d at 838.

70. *Id.*

71. *See In re* L.M., 2017 Iowa App. LEXIS 528 *6-7.

72. *Id.* at *7.

73. *Id.*

74. *Id.*

75. *See* IOWA CODE §§232.116(1)(b), (e), and (h) (2019).

76. *See In re* L.M., 2017 Iowa App. LEXIS 528 at *6.

77. The Court of Appeals decision was approximately four months after the TPR hearing. Iowa, like many other states, expedites appeals for child welfare cases, but four months is still a long time in the life of an infant.

78. *See In re* L.M., 2017 Iowa App. LEXIS 528 at *12 n1. Katherine challenged whether the statutory grounds for termination had been met, as well as whether termination was in L.M.'s best interests, but the Court of Appeals did not reach those questions because it ruled that reasonable efforts had not been provided and Katherine should be provided with more time to reunify with L.M.

79. *See id.* at *8-9.

80. *Id.*

81. *In re* S.J.& K.J., 620 N.W.2d 522 (Iowa Ct. App. 2000).

consider when assessing the appropriateness of visitation when a parent is incarcerated.[82] With regard to L.M., the Court of Appeals noted the record was devoid of any meaningful assessment of the appropriateness of visitation.[83] DHS reports simply stated, "[t]he mother has not been offered visitations due to being incarcerated."[84]

The court rejected attempts by the State to shift responsibility to Katherine for the lack of visitation.[85] The State claimed that DHS had no control over visitation policies in the jails or prison, and that the distance from L.M.'s foster home to the prison was prohibitive — especially in the winter.[86] The court rejected this argument, noting that there was no testimony offered indicating that the jail or prison policies were a problem for visitation, and distance, on its own, was not enough to rule out contact between L.M. and Katherine.[87] The fact that Katherine had only been able to have one visit with L.M. during the case was not only Katherine's fault, it was also the fault of DHS for not properly considering the appropriateness of visitation as required by *In re* S.J.[88]

C. The Iowa Supreme Court Opinion

The Guardian *ad Litem* for L.M. sought further review by the Iowa Supreme Court.[89] The court, in a 5-2 decision, vacated the Court of Appeals decision and affirmed the juvenile court's order terminating parental rights.[90] First, the court rejected Katherine's argument that L.M. could have been returned to her at the time of the TPR hearing, or "[i]n the near future."[91]

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82. *See id.* at 525. The factors, which will be discussed further below, include the parent's relationship with the child, length of sentence, and availability of visitation at the facility.

83. *See In re* L.M., 2017 Iowa App. LEXIS 528 at *12.

84. *See id* at *11.

85. *See id.*

86. *See id.* at *10.

87. *See id.* at *10-11.

88. *See id.* at *11.

89. *In re* L.M., 904 N.W.2d 835, 836 (Iowa 2017).

90. *See id.* at 840. The Supreme Court affirmed under Iowa Code Section 232.116(1)(h) only it did not mention the other grounds (abandonment, desertion, and lack of meaningful contact) found by the Juvenile Court. *See id.* At oral argument, Justice Appel questioned whether a parent's incarceration could lead to a finding of abandonment. *See* Oral Argument at 15:00, In re L.M., 904 N.W.2d 835, 836 (Iowa 2017) (No. 17-0287) available at: https://www.iowacourts.gov/iowa-courts/supreme-court/oral-argument-videos/17-0287-in-the-interest-of-lm-minor-child-kl-mother/.

91. *In re* L.M., 904 N.W.2d at 839.

Given her incarceration at the time of the hearing and her history of substance abuse, Katherine "[w]ould have much to prove after the discharge of her sentence" before the child could be returned to her.[92]

The court recognized that the state has an obligation to show reasonable efforts "[a]s a part of its ultimate proof the child cannot be safely returned to the care of a parent."[93] The Court also recognized that reasonable efforts include visitation "[d]esigned to facilitate reunification while protecting the child from the harm responsible for removal."[94] But, the Court noted, the parent has an obligation to object when the services provided were inadequate.[95] "In general, if a parent fails to request other services at the proper time, the parent waives the issue and may not later challenge it at the termination proceeding."[96] As a result, Katherine's objections at the TPR hearing came too late.[97] At each hearing after adjudication, the juvenile court inquired whether any additional services were needed, and on every occasion Katherine's counsel made no objection regarding the lack of visitation opportunities for her.[98] Thus, her objections on appeal were untimely.[99] In a footnote, the court explained that it was not ruling that reasonable efforts, including visitation, are not required for cases where a parent is incarcerated.[100] Instead, courts should address the issue on a case by case basis when raised in a timely manner.[101]

D. Chief Justice Cady's Dissent.

In a dissent joined by Justice Wiggins, the Chief Justice called the termination an "[i]njustice to the mother" and "[m]isuse of a statute" designed to terminate parental rights when parents "fail to respond to reasonable efforts[.]"[102] He recognized the practical problems with

92. *Id.*

93. *Id.*

94. *Id.* (quoting *In re* M.B., 553 N.W.2d 343, 345 (Iowa Ct. App. 1996)).

95. *In re* L.M., 904 N.W.2d at 839-40.

96. *Id.* at 840 (citing *In re* C.H., 652 N.W.2d 144, 148 (Iowa 2002)).

97. *In re* L.M., 904 N.W.2d at 840.

98. *Id.*

99. *Id.*

100. *See id.* at n 9.

101. *See id.*

102. *Id.* at 840-41. At oral argument, Justice Cady asked the State whether the (h) ground should really ever be used to terminate the rights of an incarcerated parent, given the way in which parents are "handcuffed" when it comes to participating in reunification services while they are in prison. *See* Oral Argument at 14:00, *In re* L.M., available at: https://www.iowacourts.gov/iowa-courts/supreme-court/oral-argument-videos/17-

providing services to incarcerated parents, and that parents must alert DHS to the inadequacy of services, but DHS still has an obligation to provide services in the first place, and in this case no services were provided.[103]

Justice Cady explained that another ground available to the state, one based solely on the length of the prison term, might have applied, but only if the parent was likely to remain in prison for five years.[104] That ground was not alleged, and Katherine expected to be released well in advance of the five-year timeline. Katherine did "[w]hat she could under the circumstances to improve her life," but DHS failed to provide reunification services, so Justice Cady would have given Katherine more time "to demonstrate rehabilitation and fitness."[105] While "the best interests of the child is the polestar" in child welfare cases, Chief Justice Cady explained that "we cannot ignore parental rights, even those of a mother who used and trafficked drugs during her pregnancy."[106]

II. VIEWING CHILD WELFARE CASES THROUGH THE LENS OF L.M.

The clearest lesson from *L.M.* for parents' counsel in child welfare cases was about their important role in preserving reasonable efforts issues for appeal. The Iowa Supreme Court's majority opinion was correct to criticize Katherine's lawyer for not raising the visitation issues more strongly in the hearings leading up to termination. There is a long line of cases ruling that when reasonable efforts issues are not raised formally until the termination hearing, they are too late.[107] At oral argument, the attorney "owned up" to his part in the record being less than robust.[108]

0287-in-the-interest-of-lm-minor-child-kl-mother/.

103. *In re* L.M., 904 N.W.2d at 841.

104. *Id.* (referencing Iowa Code Section 232.116(1)(j)).

105. *In re* L.M., 904 N.W.2d at 841.

106. *Id.*

107. *In re* C.H., 652 N.W.2d 144, 148 (Iowa 2002). To be fair, however, numerous cases also explain that while the state need not prove reasonable efforts as an element of the termination grounds, the failure to provide reasonable efforts can undermine the state's argument that a child cannot be returned to the parent's custody at the time of the TPR hearing. *In re* C.B., 611 N.W.2d 489, 493 (Iowa 2000). In this case, there was little dispute that the child could not be returned to the custody of the parent at the time of the TPR hearing because she was still incarcerated. The better way to frame the reasonable efforts argument is that the lack of reasonable efforts supported an extension of the time period for working toward reunification.

108. *See* Oral Argument at 24:00, *In re* L.M, available at: https://www.iowacourts.gov/iowa-courts/supreme-court/oral-argument-videos/17-0287-in-the-interest-of-lm-minor-child-kl-mother/.

To be fair, however, Katherine's lawyer did request visitation at the adjudication hearing, advocated for more time for his client at the time of permanency, was the only attorney who presented testimony at the termination hearing, and successfully appealed the juvenile court order. He had also represented the mother in two prior cases and avoided termination of parental rights. While quality of lawyering for children and parents remains a troubling problem in child welfare cases,[109] focusing solely on the lawyer's performance as the determinative factor in the case skirts the larger questions raised by the case about child welfare policy in an age of mass incarceration.

This article will focus on three central problems facing child welfare policy when a parent is incarcerated, each of them nicely illustrated by *L.M.* First, too often, the state's obligation to provide reasonable efforts, especially visitation with the child, is not taken seriously enough when a parent is incarcerated. This problem is compounded by decisions like *L.M.*, which resolved the absence of any record regarding visitation against the parent, rather than the State. Second, the challenges facing incarcerated parents are multi-system problems that require multi-system solutions. The lack of coordination between the child welfare and correctional systems works to the detriment of children and families. Third, the combination of long sentences and short-timelines for reunification leads too frequently to the assumption that termination of parental rights is unavoidable.

A. Taking Reasonable Efforts Seriously When a Parent Is Incarcerated.

1. Reasonable Efforts and Incarcerated Parents

The requirement that states provide reasonable efforts to reunify children with their parents was first discussed in the Child Welfare Act of 1980.[110] Although inclusion of the reasonable efforts requirement in early child welfare legislation was evidence of the importance of both preventing removal and promoting reunification, federal law did not define reasonable

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109. *See* Vivek Sankaran, *Moving Beyond Lassiter: The Need for a Federal Statutory Right to Counsel for Parents in Child Welfare Cases*, 44 J. LEGIS. 1, 3 (2017) (explaining that lack of competent counsel for parents is a "significant impediment to a well-functioning child welfare system."). *See also* Donald Duquette, *Looking Ahead: A Personal Vision of the Future of Child Welfare*, 41 U. MICH. J. L. REV. 317, 354 (2007). (explaining that solutions to the problem include, among other things, better training, more specialty law offices for parent representation, and holistic representation strategies).

110. FRANK E. VANDEVOORT, FEDERAL LEGISLATION PROTECTING CHILDREN AND PROVIDING FOR THEIR WELL BEING, CHILD WELFARE LAW AND PRACTICE 238 (3d ed. 2016).

efforts in a particular way—leaving it to states to determine how to implement the requirements.[111] The reasonable efforts requirement is fundamental to child welfare law. A finding on whether reasonable efforts are being provided has to be made at every child welfare hearing.[112] In 1997, the Adoption and Safe Families Act (ASFA) narrowed the requirement by permitting reasonable efforts to be waived under certain circumstances, as well as setting timelines that limited the length of time they have to be made.[113]

Several commentators have written recently about the challenge ASFA created for families impacted by incarceration.[114] For example, the timelines for provision of reasonable efforts may be shorter than the sentence imposed on parents, even for non-violent offenses.[115] Further, many of the reasons states can waive reasonable efforts, like lack of meaningful contact with the child, implicate incarceration.[116] In some states, the mere fact of incarceration is a basis for waiving reasonable efforts.[117] Under these circumstances, it is no wonder that rates of TPR are high for incarcerated parents, or that less consideration is given to reasonable efforts in their cases.

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111. Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259, 260 (2003). Prior to 1980, states were reimbursed by the federal government for foster care expenses, but not for prevention and reunification services.

112. Kathleen Bean, *Reasonable Efforts: What State Courts Think*, 36 U. TOL. L. REV. 321, 325 (2005).

113. *See id.* at 326.

114. Courtney Serrato, *How Reasonable are Reasonable Efforts for the Children of Incarcerated Parents*? 46 GOLDEN GATE U. L. REV. 177, 180-81 (2016); Lawrence, *supra* note 16 at 994-96.

115. Raimon, *supra* note 21, at 125; *see also* Lawrence *supra* note 16 (explaining that even nonviolent offenders fall victim to the short timelines for reunification under ASFA); Day, *supra* note 26 at 224.

116. *See* WOOLMAN, *supra* note 53 at 53 (explaining that, "[i]nvoluntary absence and institutional barriers to contact - both factors beyond an incarcerated parents' control - are too often misconstrued as abandonment."). In *L.M.*, the state petitioned for termination under abandonment grounds, and the trial court terminated under that ground. *See In re* L.M., 904 N.W.2d 835, 937-938 (Iowa 2017). At oral argument, Justice Appel questioned the merits of abandonment as an applicable ground. *See* Oral Argument at 15:50, *In re* L.M., 904 N.W.2d, 835 (Iowa 2017) (No. 17-0287), https://www.iowacourts.gov/iowa-courts/supreme-court/supreme-court-oral-argument-schedule/case/17-0287. The Supreme Court did not affirm only on ground (h). *In re* L.M., 904 N.W.2d 835, 840 (Iowa 2017).

117. *See* WOOLMAN, *supra* note 53 at 58; *See e.g.* ALASKA STAT. ANN. § 47.10.080(o) (2018).; KY. REV. STATE. ANN. § 600.020(3)(b) (2018); N.D CENT. CODE ANN. § 27-20-02(3)(f).

Parents are not the only ones hurt when reasonable efforts are not taken seriously in child welfare cases. The impact of parental incarceration on children is much better understood today than it was before mass incarceration became part of criminal justice policy in the United States.[118] Parental incarceration is associated with greater risk of post-traumatic stress disorder, academic and school discipline problems, and future juvenile and criminal justice system involvement.[119] There is also a growing consensus that contact between children and incarcerated parents can mitigate those harms.[120] Visits can improve the child's self-esteem and lower anxiety, as well as help reduce recidivism and promote successful reentry into the community for parents.[121]

2. Thinking More Carefully About Reasonable Efforts When a Parent Is Incarcerated: In re S.J.

L.M. highlights a more specific problem with reasonable efforts and incarcerated parents: too often, critical decisions made about issues like visitation are made based on assumptions, rather than assessment. In the record that was made in *L.M.* about visitation, the court and social worker summarily determined that face-to-face visits were not appropriate because it might not have been available in the initial jail where Katherine was held.[122] Later in the case, DHS case plans simply stated "[m]other has not been offered visitations due to being incarcerated."[123]

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118. *See* 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, 30 (2013).

119. *A Shared Sentence: The Devastating Toll of Parental Incarceration on Kids, Families, and Communities*, Policy Report, ANNIE E. CASEY FOUNDATION POLICY REPORT 3 (2016).

120. Ross D. Parke & K. Allison Clarke-Stewart, *Effects of Parental Incarceration on Young Children* 7-9 (2001), https://aspe.hhs.gov/basic-report/effects-parental-incarceration-young-children; *see also* the Children of Incarcerated Parents Bill of Rights, San Francisco Children of Incarcerated Parents Partnership, http://sfonline.barnard.edu/children/SFCIPP_Bill_of_Rights.pdf (including the right "to speak with, see and touch my parent.").

121. *A Shared Sentence*, *supra* note 119 at 9. Preparing children for visits is a critical part of their success. Caseworkers should talk with the child, the parent, and the child's caregiver about their expectations for the visit to ensure it is a positive experience for the child. *See Child Welfare Practice with Families Affected by Parental Incarceration*, CHILDREN'S BUREAU BULLETIN FOR PROFESSIONALS at 11 (Oct. 2015).

122. *In re* L.M., No. 17-0287, 2017 Iowa App. LEXIS 528 *3 (Iowa Ct. App. May 17, 2017).

123. *See id.* at *4.

The lack of a record about visits in *L.M.* was important to the Court of Appeals in light of *In re* S.J, an older Iowa Court of Appeals case that provided guidance on the factors to consider when determining reasonable efforts due to an incarcerated parent.[124] In *S.J.*, a parent appealed termination of his parent rights and complained that the state did not provide him with reasonable efforts.[125] The state conceded it had not provided reasonable efforts but argued that his incarceration made him "unavailable" for services.[126] Although the court ultimately upheld the termination, the Iowa Court of Appeals rejected the state's argument that incarceration made a parent unavailable for services, and held that the reasonable efforts due to an incarcerated parent must be assessed on a case-by-case basis.[127] In determining what services are available, the court should consider factors such as: the age of the child, the child's relationship (or lack thereof) with the parent, clinical or other recommendations regarding visitation, the physical locations of the child and parent, limitations related to the place of confinement, services available in the prison setting, the nature of the offense, and length of the sentence.[128] These factors may not always lead to visitation, but they are an antidote to making decisions without meaningful analysis, and the Court of Appeals relied on *S.J.* when it reversed the trial court's decision.[129]

A small number of states have tried to improve delivery of reasonable efforts to incarcerated parents by giving clearer guidance about what kinds of services should be considered when a parent is incarcerated, or even requiring services like visitation unless there is clear and convincing evidence it would be detrimental to the child.[130] The factors California requires courts to consider when determining detriment are similar to the factors the Iowa Supreme Court identified in *S.J.*: the age of the child, degree of bonding, length of sentence, and degree of detriment to the child.[131] The California statute also appropriately keeps the burden on the state to justify

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124. 620 N.W.2d 522, 522 (Iowa 2000).

125. *See id* at 524.

126. *See id.*

127. *See id.* at 525.

128. *Id.*

129. The Court of Appeals explained "[h]ere, the DHS failed to follow the mandate from *In re S.J.* to make a record concerning the reasonableness of facilitating visitation or other contact between L.M. and her mother while the mother was incarcerated." *In re* L.M., No. 17-0287, 2017 Iowa App. LEXIS 528 *9 (Iowa Ct. App. May 17, 2017).

130. CAL. WELF. & INST. Code § 361.5(a), (b), € (2017); N.Y. SOC. SERV. Law § 384-b (McKinney 2016).

131. CAL. WELF. & INST. Code § 361.5(e)(1) (2017).

a lack of services, ensuring the state meets its reasonable efforts requirement, and parents like Katherine get a meaningful chance to regain custody of their children.[132]

3. Did Katherine "Waive" Reasonable Efforts?

The Court of Appeals resolved the lack of record about visitation against DHS, and, as noted above, found that DHS failed to consider the important factors in *S.J.* But the Supreme Court resolved the lack of record against Katherine and her counsel explaining that it was up to her counsel to formally object to DHS and the Court's assumptions about visitation.[133] The Supreme Court explained that even though DHS has an obligation to provide reunification services, parents must "[o]bject when they claim the nature or extent of services is inadequate."[134] Objections need to be made "[e]arly in the process so appropriate changes can be made."[135] Failing to request services at the proper time can waive the issue and prevent the court from addressing DHS failures at the time of termination.[136]

The Supreme Court's approach, although rooted in precedent, fuels the problems incarcerated parents face in child welfare cases by not requiring DHS to meaningfully address visitation unless the parent makes a formal objection to services. The approach is troubling because, as Justice Cady indicated, DHS has the obligation to provide services in the first place.[137] Federal child welfare law has required that states make reasonable efforts to reunify children with their parents since the 1980s.[138] At each hearing in the child welfare process, the state court must make a finding that reasonable efforts have been made to comply with federal law.[139] As Justice Cady explained, when the state "[s]eeks to use the parent's failure to achieve reunification as the grounds for termination, it is obligated to provide reunification services to the parent."[140] Absent those services, "[t]he mother

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132. *Id.* (stating that "the court shall order reasonable services unless the court determines, by clear and convincing evidence, those services would be detrimental to the child.").

133. *In re* L.M., 904 N.W.2d at 839-40.

134. *Id.*

135. *Id.* at 840.

136. *Id.*

137. *See id.* at 841 (Cady, C.J. dissenting).

138. *See* VANDEVOORT, *supra* note 109, at 110.

139. JUDGE LEONARD EDWARDS, REASONABLE EFFORTS: A JUDGE'S PERSPECTIVE (2014).

140. *In re* L.M., 904 N.W.2d at 841 (Cady, C.J. dissenting) (citing *In re* C.B., 611 N.W.2d 489, 493 (Iowa 2000)).

was therefore deprived of any opportunity to prove she is able to care for the child[.]"[141] Justice Cady simply could not support terminating under a ground related to the parent's lack of response to services when services were not provided in the first place.

While incarcerated parents are not the only parents who risk waiving a challenge to reasonable efforts if they fail to object to a lack of services on the record, incarcerated parents are at greater risk due to challenges they face with participation in their cases. Incarcerated parents may be invisible to the court because there is no absolute right to be personally present during the hearing.[142] Often, the best parents can do is participate by phone in hearings.[143] It is unclear whether Katherine was present for any of the hearings in her case.[144] She wrote a letter that was admitted as an exhibit in the Permanency Hearing and participated in the TPR hearing by phone.[145]

In addition, a parent's communication with the social worker and counsel is made more difficult by their incarceration. The prison may be located far from where the social worker and lawyer work.[146] Restrictive visitation and phone policies complicate communication as well.[147] Even communicating by electronic or postal service mail with lawyers can be challenging for inmates.[148]

In some other states, Katherine would not have faced an argument that she "waived" her right to reasonable efforts by not objecting to the services

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141. *Id.*

142. *See e.g. In re* J.S., 470 N.W.2d 48, 52 (Iowa Ct. App. 1991) (explaining a parent is provided due process in a TPR hearing when she is given notice of the hearing, has counsel who is present, and is afforded the opportunity to present testimony by deposition).

143. M.D. v. K.A., 921 N.W. 2d 229, 236 (Iowa 2018) (asserting that the Court ruled that, as a general rule, parents should be allowed to participate by phone in the entire hearing); *see also* Mimi Laver, *What You Should Know When Handling an Abuse or Neglect Case*, 20:10 ABA CHILD LAW PRACTICE 146 (Dec. 2001) (stating how the Iowa Supreme Court case recently held that a parent's due process rights were violated when she was only allowed to participate in part of a TPR hearing by phone).

144. *In re* L.M., 904 N.W.2d at 837 n.2, 838 n.6. (indicating that she was not present at the dispositional hearing, and that she participated in phone at the termination hearing).

145. *See id.* at 838 n6.

146. Raimon *supra* note 21, at 125.

147. *See id.*

148. Stephanie Clifford, *Prosecutors are Reading Emails from Inmates to Lawyers*, NY TIMES, (July 22, 2014), https://www.nytimes.com/2014/07/23/nyregion/us-is-reading-inmates-email-sent-to-lawyers.html (explaining how exchanging mail with inmates, or setting up a phone call can be daunting even for lawyers communicating with their clients).

provided prior to the TPR hearing. For example, in California, services like visitation must be provided to incarcerated parents unless the state can prove detriment to the child.[149] In Washington, a recent city code change now requires courts to consider whether reasonable efforts were provided to incarcerated parents at TPR hearings.[150] Even in states without special protection for incarcerated parents, some courts have allowed parents to challenge whether necessary services were provided even if the parents failed to object to the case plan prior to TPR.[151] As a Colorado Court of Appeals explained, an inappropriate service plan does become appropriate merely because the parent fails to object.[152]

B. Lack of System Coordination Fuels the Problem.

Another way in which *L.M.* is instructive is the disconnect it illustrates between the child welfare and criminal justice systems. The first evidence of this problem was at the very start of the child welfare case. Katherine was in the Page County Jail, and the brief discussion about visits at the jail in the adjudication hearing reveals that no party understood what kind of visits were possible at the jail, although Katherine's lawyer asked DHS to investigate it. Whether in-person visits were possible is a critical consideration for a newborn,[153] but there was no record of clarification or follow-up on this point.[154] The social worker simply explained "I don't know with the new jail if [visits are through] a TV screen."[155] The criminal case and child welfare case were not in the same county, adding to the challenge of system coordination.

The next evidence of the problems with coordination arose six weeks later when Katherine was sentenced to ten years in prison at the Iowa Correctional Institute for Women in Mitchellville, Iowa. The Supreme Court opinion notes that the record does not reveal whether facilities suitable for visitation

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149. CAL. WELF. & INST. Code § 361.5(e)(1) (2017).

150. WASH. REV. CODE §13.34.180(1)(f) (LexisNexis 2017).

151. W.A. v. Calhoun Cnty. Dep't of Human Res., 211 So.3d 849, 853 (Ala. Civ. App. 2016) (reversing TPR even though the parent made the reasonable efforts argument for the first time at TPR); *but see In re* A.A., 112 P.3d 993 (Mont. 2005) (upholding TPR because the parent failed to object to reasonable efforts until the TPR hearing).

152. *In re* B.J.D., 626 P.2d 727, 730 (Colo. App. 1981).

153. Megan McMillen, *I Need to Feel Your Touch: Allowing Newborns and Infants Contact Visitation with Jailed Parents*, 2012 U. ILL. L. REV. 1811, 1824 (2012).

154. *In re* L.M., 2017 Iowa App. LEXIS 528, at *9 (noting that "[i]t appears the State did nothing to actually investigate the jail's policies or to follow up on the mother's request in any other manner.").

155. *Id.* at *3.

existed at the ICIW,[156] but the ICIW does have child-friendly spaces for visits and even programs that allow for children to spend the night.[157] Unfortunately, though, there were never any visits arranged for Katherine and L.M. The State justified the lack of visitation in two ways, both implicating basic problems with system coordination. First, the prison for women is almost two and one half hours away from where L.M. was placed.[158] The state complained that a five hour round-trip car ride, especially in the winter months, was not appropriate for an infant.[159] Second, the state argued "DHS is not granted input into the prison's policies associated with visitation for prisoners and newborn babies."[160] Even though DHS and DOC are both state agencies, the state's position was that their lack of coordination supported DHS's failure to provide visits. In fact, the State criticized Katherine for not providing "[a]ny basis for how relevant visitation with a baby could have occurred give [sic] the circumstances and restrictions of the Mitchellville prison system."[161] Notably, the state presented no evidence that DOC policies prevented any visitation.

The final example of the lack of coordination between DHS and DOC was at the TPR hearing. The uncontested testimony was that Katherine was a model prisoner.[162] In spite of a ten-year sentence, Katherine had been paroled by the time of the TPR hearing.[163] She had completed a six-month substance abuse treatment program.[164] The Department of Corrections allowed her to live outside the prison walls in a less-restrictive housing unit.[165] During her incarceration she travelled to Des Moines daily to work at the DOC central office.[166] She was awaiting transitional housing in

156. *See In re* L.M., 904 N.W.2d at 840.

157. *See* Amanda Lewis, *Softer, Gentler Prison to open at Mitchellville*, KCCI DES MOINES, https://www.kcci.com/article/softer-gentler-prison-to-open-at-mitchellville/6885202. (last updated October 26, 2013, 9:27 AM); *Iowa State students design, build children's garden at Iowa women's prison*, IOWA STATE UNIVERSITY NEWS SERVICE, https://www.news.iastate.edu/news/2018/05/08/prison-childrens-garden. (last updated May 8, 2018 8:30am).

158. *See In re* L.M., 2017 Iowa App. LEXIS 528, at *9-10.

159. *Id.* at *10.

160. *Id.* (citing state's briefing).

161. *Id.*

162. *See id.* at *6.

163. *See id.* at *7.

164. *See id.* at *6.

165. *See id.*

166. *See id.*

Council Bluffs, which was much closer to where L.M. was placed.[167] In other words, DOC offered Katherine services and support when DHS did not, and she thrived. The ten-year sentence that seemed to make reunification impossible within the timelines required by ASFA was ultimately not an insurmountable obstacle.

The challenges Katherine faced in *L.M.* are far from unusual in child welfare cases involving an incarcerated parent. Too often, social workers are unfamiliar with prison regulations, resources, and programming.[168] The distance between Katherine's correctional placement and L.M.'s foster home is also not unusual. The vast majority of parents in state and federal prison are imprisoned more than 100 miles from their homes.[169] And, even though some jails and prisons offer suitable visitation spaces for family contact,[170] setting up a visit can be challenging for families, caregivers, and even child welfare agencies.[171]

These system coordination problems require multi-system solutions. In states that have attempted to address these issues, interdisciplinary task forces have helped improve communication and coordination. For example, in Washington, an advisory committee made up of legislators, child welfare workers, corrections staff, educators, and community members made recommendations for improving parental proximity during incarceration, increasing information sharing, and increased flexibility for parents in child welfare cases.[172] In Iowa, Iowa Children's Justice has developed a project with Drake University Law School to help bridge the gaps in the systems. Multidisciplinary training of social workers and corrections staff is occurring, as well as changes to the way visitation is arranged when child welfare agencies are involved.

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167. *See id.* at *7.

168. KRISTEN F. WALLACE, NAT'L RES. CTR. FOR PERMANENCY & FAMILY CONNECTIONS, INFORMATION PACKET: THE ADOPTION AND SAFE FAMILIES ACT: BARRIER TO REUNIFICATION BETWEEN CHILDREN & INCARCERATED MOTHERS, at 2 (May 2012).

169. *Id.*

170. Lindsey Cramer et al, *Parent-Child Visiting Practices in Prisons and Jails: A Synthesis of Research and Practice*, URBAN INSTITUTE at 14 (April 2017).

171. Children in child welfare cases may be the least likely to visit their parents in prison because visits must be arranged and authorized by caseworkers "who carry high caseloads and who may be inclined to 'abandon' the prospect of reunification with an imprisoned parent." Steve Christian, *supra* note 33 at 6.

172. Louisa Erickson, *Children and Families of Incarcerated Parents Advisory Committee Annual Report*, STATE OF WASH. OFFICE OF SUPERINTENDENT OF PUBLIC INSTRUCTION (2009), *available at*, http://www.k12.wa.us/IncarceratedParents/pubdocs/CFIP2008CommitteeReport.pdf.

In some ways, correctional systems appear to be ahead of child welfare agencies in their efforts to reduce the impact of incarceration on families. Correctional facilities have developed family visiting programs, including opportunity for overnight visits.[173] Some prisons have even developed prison nurseries where infants are able to spend their first months or even years.[174] These policies reflect growing awareness of how visitation can mitigate the harms children face due to parental incarceration, as well as reduce recidivism and maintain bonds that help the inmate successfully reintegrate into the community upon release.[175] These reforms provide opportunities for collaboration in cases where DHS is involved, but cases like *L.M.* demonstrate that collaboration is not happening.

Another compelling proposal for improved coordination potentially impacting child welfare cases is considering the needs of children when making decisions about a parent's pretrial release and ultimate sentence.[176] One commentator argues persuasively that adding a "best interests of the children" factor in the context of pretrial release, sentencing, and visitation policies is an important way to mitigate the harms parental incarceration causes children.[177] Another commentator argues in favor of amending the United States Sentencing Guidelines to include a family impact statement.[178] What if the judge in Katherine's case had been able to order pretrial release to a substance abuse treatment program closer to L.M.? Or if she could have been placed in a transitional program earlier in the case in light of her good behavior and ongoing child welfare matter? Better system coordination can lead to these important questions being answered and potentially bettering child welfare outcomes.

C. Fighting the Momentum Towards TPR.

Another important problem *L.M.* surfaced is the way in which TPR

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173. Lindsey Cramer et al, *Parent Child Visiting Practices in Prisons and Jails*, URBAN INSTITUTE RESEARCH REPORT at 11 (April 2017).

174. *See id.* at 12.

175. *See id.* at 11. Studies in the 1980s of the New York Family Reunion Project demonstrated lower recidivism rates and higher likelihood of inmates living with family upon release.

176. 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 ,44 (2013).

177. *Id.*

178. Amy Cyphert, *Prisoners of Fate: The Challenges of Creating Change for Incarcerated Parents*, 77 MD. L. REV. 385, 420 (2018). Federal sentencing guidelines currently indicate that family ties and responsibilities "are not ordinarily relevant."

appeared to be inevitable from the start of the case. There was no meaningful record made about visitation between Katherine and L.M. at the initial adjudication hearing, and the social worker was "[o]bviously predisposed against the idea[.]"[179] DHS case plans merely stated she was not offered visits "[d]ue to being incarcerated."[180] The long sentence imposed in her criminal case, right at the start of the child welfare case, was also a likely source of apathy. There is no indication in the court opinions of any meaningful contact between DHS and Katherine while she was incarcerated.[181] At the TPR hearing, the state and Guardian *ad Litem* (GAL) were so confident in their recommendation of TPR that they did not present any witnesses or even cross-examine Katherine.[182]

Katherine's invisibility at the hearings must have also fueled this sense of inevitability. As discussed above, it is unclear from the court opinions whether she was personally present at any of the hearings in her case. At the permanency hearing, where Katherine's lawyer argued the court should give her more time for reunification instead of setting a TPR hearing, Katherine did not testify.[183] Instead, her handwritten letter was offered as an exhibit.[184] She appeared by phone at the TPR hearing. Like many other incarcerated parents, the judge terminated Katherine's parental rights without ever meeting her.[185]

Although Katherine's history of prior child welfare cases may have also factored into DHS's approach to the case,[186] the rate of TPR in cases involving an incarcerated parent suggest that there is reason to worry that TPR is inevitable. In the five years after ASFA was enacted, termination

179. *In re* L.M., No. 17-0287, 2017 Iowa App. LEXIS 528 *9 (Iowa Ct. App. May 17, 2017).

180. *Id.* at *11.

181. *See* Christian, *supra* note 33, at 6. (describing this unfortunately common scenario: "Some studies have found that caseworkers rarely communicate with parents in prison, inform them of hearings or involve them in case planning").

182. *In re* L.M., 2017 Iowa App. LEXIS 528, at *6-7.

183. *In re* L.M., 904 N.W.2d 835, 837 (Iowa 2017).

184. *Id. See also In re* L.M., 2017 Iowa App. LEXIS 528 at *5 (noting that the handwritten letter is quoted at length in the Court of Appeals opinion. In the letter, Katherine takes full responsibility for her involvement with DHS, and reports she is making "personal and lifestyle changes" to be the parent L.M. deserves).

185. Hager & Flagg, *supra* note 5.

186. *See supra* note 2. (Katherine's prior cases resolved without termination of parental rights. One child was placed with the father, and one was placed in the guardianship of Katherine's father).

proceedings involving incarcerated parents went up dramatically.[187] A study around the same time noted that parental rights were terminated in over 90% of the cases where one parent was incarcerated, and 100% in cases where both parents were incarcerated.[188]

In cases like L.M.'s, concerns about permanency for the child also push the case toward TPR. L.M. lived in the same foster home during the entire case.[189] Katherine never provided physical care for L.M., and L.M. was nearly two years old at the time of the Iowa Supreme Court's decision.[190] Research supports that establishing permanency for infants and toddlers needs to happen quickly.[191] As Professor William Dwyer has explained, the obstacles parents like Katherine face are huge, and he argues courts should not "hold a child hostage to what should exist in a fair world."[192] In addition, while some parents are successful after returning to the community, Professor Elizabeth Bartholet notes "[y]ou never know if they'll just go right back to a life of crime; and kids deserve better than that."[193]

Although cases like L.M.'s appear to squarely pit the parent's rights against the child's best interests,[194] the reality is much more complicated. Meaningful efforts to reunify families are made, not only because fairness demands it, but because it is also in the child's best interests.[195] Even if

187. Lawrence, *supra* note 16, at 993.

188. *See* Kristen S. Wallace, *The Adoption and Safe Families Act: Barrier to Reunification between Children and Incarcerated Mothers*, NATIONAL RESOURCE CENTER FOR PERMANENCY AND FAMILY CONNECTIONS at 4 (June 2012).

189. *See* Oral Argument at 7:00, *In re* L.M., 904 N.W.2d 835, 836 (Iowa 2017) (No. 17-0287) available at: https://www.iowacourts.gov/iowa-courts/supreme-court/supreme-court-oral-argument-schedule/case/17-0287.

190. *In re* L.M., 904 N.W.2d 835, 840 (Iowa 2017).

191. Candice Maze, *Advocating for Very Young Children in Dependency Proceedings: The Hallmarks of Effective, Ethical Representation*, ABA CENTER ON CHILDREN AND THE LAW 37, 37 (2010).

192. Hager & Flagg, *supra* note 5.

193. *See id.* at 4.

194. In his dissent, Justice Cady noted that "[t]he best interests of the child is the polestar, but we cannot ignore parental rights, even those of a mother who used and trafficked drugs during her pregnancy." 904 N.W.2d at 841.

195. "Research shows preserving a child's relationship with a parent during incarceration benefits both parties." ANNIE E. CASEY FOUNDATION, A SHARED SENTENCE: THE DEVASTATING TOLL OF PARENTAL INCARCERATION ON KIDS, FAMILIES, AND COMMUNITIES (2016). Even infants and toddlers benefit from contact with their incarcerated parent. Megan McMillan, *I Need to Feel Your Touch: Allowing Infants and Newborns Contact Visitation with Jailed Parents*, 2012 U. ILL. L. REV. 1811, 1823-25 (2012).

children cannot be reunified with their parents, termination will not always be in the child's best interests— especially when the child is older and has a meaningful relationship with the parent.[196] As one commentator notes, "[i]n most cases, kids are better off by all kinds of metrics when they have a relationship with their birth families."[197]

To push back against the momentum towards TPR in these kinds of cases, a handful of states have changed their child welfare codes to require a more meaningful assessment of TPR's appropriateness in cases when a parent is incarcerated. For example, Washington amended its TPR statute in 2013 to require courts to consider a set of special factors when a parent is incarcerated, including whether the parent maintains a meaningful role in the child's life, whether reasonable efforts were made, and where there were barriers to the parent keeping the state apprised of her location and accessing visitation.[198] A recent Washington Supreme Court case reversed a termination when the trial court failed to consider those factors in making its decision.[199] Under this provision, Katherine would have received a more meaningful review of her appeal issues as well.

In California, the court may decline to change the permanency goal—i.e. the termination of parental rights, and instead continue reunification efforts for up to 24 months when a parent is recently discharged from incarceration.[200] Given Katherine's parole status at the time of the TPR hearing, and the progress she was making, her argument for additional time would have been strongly supported by statute.

Reforming child welfare codes in these ways will not necessarily lead to a drastic increase in family reunification. Even if the Iowa Supreme Court had ruled in favor of Katherine in this case, reunification was not assured. She and L.M. would have just had additional time to work toward

196. Deborah Gibbs et al., U.S. DEP'T OF HEALTH AND HUMAN SERVICES, TERMINATION OF PARENTAL RIGHTS FOR OLDER CHILDREN: EXPLORING PRACTICE AND POLICY ISSUES 6-18 (2004) (explaining that "TPR may force an adolescent to separate from their family before they are developmentally ready to do so.").

197. The Marshall Project at 9/12.

198. WASH. REV. CODE Sec. 13.34.180(1) (f) (2017).

199. *In re* K.J.B., 387 P.3d 1072, 1081-82 (Wash. 2017). Justices Madsen and Gonzalez filed strong dissents arguing that the special factors to consider for incarcerated parents were discretionary, that the basis for the TPR was the parent's substance abuse problems, not the parent's incarceration, and that the issue was not properly preserved for review. Justice Gonzalez also noted that the young child had been in foster care for 22 months by the time of the TPR hearing, and that the reversal unduly lengthened the time before she could be adopted into a permanent home.

200. CAL. WELF. & INST. Code 361.5(a) (4); 366.22(b) (requiring the parent to make significant progress towards reunification).

reunification. Reforms like these will, however, help keep some families together and address the fairness concerns that Justice Cady and the Iowa Court of Appeals raised in their dissents. These reforms are also structural barriers to the "injustice" [201] recognized by Justice Cady. It gives parents like Katherine hope that if they get the help they need, their incarceration does not have to lead inevitably to termination of their rights.

III. RECOMMENDATIONS FOR REFORM

There are several practical ways states can address the challenges raised by *L.M.*

A. Clarifying Reasonable Efforts and Safeguarding their Provision.

States should follow California's lead and provide guidance on what constitutes reasonable efforts when a parent is incarcerated. California's code provides a non-exhaustive list of services, including maintaining contact via telephone, arranging visitation, providing necessary transportation, and services to extended family or foster parents providing care for the child.[202] Similarly, New York law defines needed efforts to include: making "suitable arrangements" for visitation and transportation, informing the parent about the child's progress, providing "social or rehabilitative services", and providing information about their legal rights.[203]

While both federal and state law does not define reasonable efforts, it still makes sense to provide more guidance for state agencies and courts in cases where parents are incarcerated.[204] As discussed above, major barriers to services and challenges of serving incarcerated parents persist, and too often these barriers prevent needed services. The high rate of TPR in cases with an incarcerated parent further justifies a focus on needed services. The Indian Child Welfare Act (ICWA) provides guidance on what "active efforts" are required to achieve reunification for Native American parents.[205]

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201. *In re* L.M., 904 N.W.2d 835, 841 (Iowa 2017).

202. CAL. WELF. & INST. CODE §361.5(e)(1). The code also clarifies that incarcerated parents can be ordered to participate in services "if actual access to these services is provided."

203. NY SOC. SERV. LAW §384-b(7)(f).

204. There are potential benefits to all parents, and social workers too, when states define reasonable efforts more clearly in state law. *See* Jeanne Kaiser, *Finding a Reasonable Way to Enforce the Reasonable Efforts Requirement in Child Protection Cases*, 7 RUTGERS. J. L. & PUB. POL'Y 100, 128-29 (2009).

205. Matthew Fletcher & Kathryn E. Fort, The Indian Child Welfare Act, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 326-27 (Donald N. Duquette

Although the sovereignty issues underlying ICWA are not present, ICWA was also partly a response to the high rates of removal and termination of parental rights in cases involving Native American families.[206]

Providing more guidance about reasonable efforts in this context will not always be enough to ensure that it happens, but California's code provides safeguards that make it much more likely. The statute requires the court to order reasonable services for the parent unless the court determines, by clear and convincing evidence, that those services would be detrimental to the child.[207] It lists a set of non-exclusive factors to guide analysis of that question, including age of the child, bond with the parent, length of sentence, length and nature of treatment needed, nature of the crime leading to incarceration, and, if the child is aged 10 or over, the child's perspective.[208] This section is an antidote to the problems the Court of Appeals had with DHS in *L.M.* Instead of blaming the lack of services on Katherine and her attorney, it places the obligation to consider services squarely where it belongs: on the state and the juvenile court judge.

B. Challenging the Inevitability of TPR.

There are also several practical ways states can modify child welfare codes to ensure incarcerated parents are given a fair shot when a court decides how to best establish permanency for the child. TPR does not have to be a foregone conclusion in these cases, and state child welfare codes can help make sure it is reserved for cases where it is necessary.

For example, New York allows for a discretionary exception to filing of a TPR petition when a parent is incarcerated.[209] The exception only applies when the parent's incarceration is a significant factor in the child's placement in foster care and the parent has been maintaining a "meaningful role" in the child's life.[210]

California law also allows courts to consider the "special circumstances" of incarcerated parents when deciding whether to authorize an extension of permanency up to 24 months past the date of removal.[211] In making that

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et al. 2016). The Act provides 15 different examples of "active efforts" to guide practice, and emphasizes that these efforts are above and beyond the reasonable efforts requirement. *Id.* at 327.

206. *See id.* at 316.

207. *See* CAL. WELF. & INST. CODE § 361.5(e)(1) (2017).

208. *Id.*

209. *See* NY SOC. SERV. LAW § 384-b(l) (Mckinney 2016).

210. *Id.*

211. CAL. WELF. & INST. CODE §361(a)(3-4).

decision, the court can consider barriers to the parent's access to services and efforts to maintain contact with the child.[212] The extension still cannot be granted unless it can be shown that the child can be "returned and safely maintained in the home within the extended time period."[213] This change might have helped Katherine strengthen her case for a little more time to see how she did after she was paroled. By making explicit that courts can consider the special circumstances of incarcerated parents, it also forces all parties in the child welfare case to focus attention on the problem.

States can also follow Washington State's lead and require juvenile courts to assess whether TPR is really necessary when a parent is incarcerated.[214] Under Washington law, the court must consider whether the parent has maintained a meaningful role in the child's life in spite of incarceration, and whether there were barriers to visitation or other meaningful contact.[215] The court might still terminate, but the statute requires an assessment of the factors prior to TPR.[216]

It is also time to rethink code provisions that allow reasonable efforts to be waived, or TPR to be imposed, simply because of incarceration. They are more understandable when the child, or another child in the home, was the victim of the criminal act that led to incarceration, but in this era of mass incarceration for drug offenses like Katherine's, states should be moving away from this approach. Even provisions that are in play when long periods of incarceration are contemplated are suspect. Katherine received a ten-year sentence, but did so well that she was expecting to be paroled after serving less than a year. The length of sentence should not, on its own, be the reason for termination.

Changes like these are important because they inject hard thinking, as well as a measure of fairness, into permanency decision-making. Thinking harder about whether termination is necessary in these cases also makes sense because terminations of parental rights do not always lead to a child having a permanent family. In fact, as Joanna Woolman points out, "[c]hildren of incarcerated parents are more likely [than children from families that have not been impacted by incarceration] to remain in foster care until they age

212. *Id.* §361.5(e)(1).

213. *Id.* §361(a)(3).

214. WASH. REV. CODE 13.34.180(1)(f) (2017).

215. § 13.34.180(1)(f)(2).

216. *In re* K.J.B., 387 P.3d at 1080. Interestingly, Iowa law already has a discretionary exception to TPR for cases where the parent's absence is due to placement in an "institution", but it would not have applied to Katherine because courts have interpreted that jails and prisons are not the kind of institutions contemplated by the exception. *See In re* J.V., 464 N.W.2d 887 (Iowa App. 1990).

out of the system at age 18."[217] Unlike L.M., many children languish in foster care instead of achieving true permanency.

C. Improving System Coordination.

Improving outcomes for families impacted by incarceration requires a multidisciplinary approach and better system coordination. States should follow the lead of Washington and Oklahoma and create task forces to learn more about the problem, fostering the creation of state-specific solutions. A quick review of the composition of the task forces in Washington or Oklahoma provides guidance for creating a task force in any jurisdiction.[218] The need for a multidisciplinary approach cannot be overemphasized. Ultimately, changing child welfare policy will never be enough to address the challenges raised by *L.M.*; jail and prison visitation policies, access to services for incarcerated parents, transportation regulations, and even sentencing and pretrial release practices are all part of the solution.

While "reform by task force" may sound like a painfully slow response to an urgent problem, our experience with the Incarcerated Parent Representation Project in Iowa so far is that there is an appetite for improved coordination between the different systems than was expected, and that some changes can come quickly. With just a handful of meetings, improved protocols for family visitation and social worker contact with inmates have been developed.[219]

Finally, it is important to remember that improving coordination can take place at the local level as well. For example, presiding judges of each juvenile court in California have the power to "convene representatives of the county welfare department, the sheriff's department, and other appropriate entities for the purpose of developing and entering into protocols for ensuring the notification, transportation, and presence of an incarcerated

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217. Joanna Woolman, SPECIAL CONSIDERATIONS IN REPRESENTING CLIENTS INVOLVED WITH THE CRIMINAL JUSTICE SYSTEM, in Representing Parents in Child Welfare Cases (2015) at 54 (citing Marilyn C. Moses, *Correlating Incarcerated Mothers, Foster Care, and Mother-Child Reunification*, 68 CORRECTIONS TODAY 98, 98 (2006)); and Diane Scherky, *et al*, *Parents who Fail: A Study of 51 Cases of Termination of Parental Rights*, 18 J. AM. ACAD. CHILD PSYCH. 366, 367 (1979).

218. *See* Children of Incarcerated Parents Task Force (Jan 1, 2012), http://oica.org/wp-content/uploads/2012/12/Children-of-Incarcerated-Parents-Report-January-1-2012.pdf.; *see also* FINAL REPORT OF THE OVERSIGHT COMMITTEE: CHILDREN OF INCARCERATED PARENTS (June 30, 2006) https://www.dshs.wa.gov/sites/default/files/SESA/legislative/documents/IncarPar0606.pdf.*https://www.dshs.wa.gov/sites/default/files/SESA/legislative/documents/IncarPar0606.pdf.*

219. Interview with Jami Hagemeier on April 6, 2019.

or institutionalized parent at all court hearings."[220] Identifying some ways that local jail, law enforcement, and social service agencies can collaborate can also change practice in this area.

CONCLUSION

Whether one agrees or disagrees with the ultimate result in *L.M.*, the conversation between the courts in this case highlights important challenges facing child welfare policy in a time of mass incarceration. These challenges are not new. They have developed over the last thirty years as changes in criminal justice and child welfare policy collided. What is troubling, however, is that reform in this area has been slow at best. Many of the recommendations are already in place in several jurisdictions, yet very few states have pursued meaningful reform in this area. Maybe this is simply because incarcerated parents are not a demographic that inspires much sympathy. Child welfare case law often reminds parents that it was their own criminal conduct that separated them from their children.[221] But if a parent like Katherine, who was a model prisoner, took advantage of substance abuse treatment and vocational training, and secured parole does not have a chance to regain custody of her child, does any incarcerated parent have a chance? Furthermore, even if one believes adoption was ultimately in L.M.'s best interest,[222] the case reveals things our child welfare system can do better when it comes to addressing the needs of families impacted by incarceration. There is simply too much at stake for children and their parents to ignore the reasonable efforts and fairness concerns Chief Justice Cady and the Court of Appeals identified.

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220. CAL. WELF. & INST. CODE §361.5(E)(2).

221. *See e.g. In re* J.S., 470 N.W.2d 48, 51 (Iowa Ct. App. 1991) (upholding TPR of an incarcerated parent's and explaining the court "cannot ignore that G.S. has repeatedly engaged in irresponsible and violent behavior resulting in his absence from his children's lives.").

222. It is important to remember that neither the Court of Appeals nor dissenting Justices suggested that L.M. should be returned to her mother's care; the debate was simply over whether Katherine and L.M. deserved more time to reunify under the circumstances.