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Margaret F. Brinig
*Notre Dame Law School, mbrinig@nd.edu*

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CHOOSING THE LESSER EVIL: COMMENTS ON BESHAROV'S "CHILD ABUSE REALITIES"

Margaret F. Brinig

Determining the degree of state intervention into intra-family decision making requires an unhappy choice between allowing abuse to continue or interfering with some families that would be better left alone. Mr. Besharov introduces the possible harms associated with the increased involvement of the state but fails to fully comprehend the circumstances that necessitate such involvement. Evils bracket the phenomenon discussed in Mr. Besharov's paper and this one. The difference in our approach lies in the choice we think is the lesser evil of the two, not that we think that either the harms associated with state involvement or the risk of non-intervention is a good thing. I would like to present two recent cases to illustrate the choice society makes as it selects a family intervention policy. I will also offer some suggestions for reducing the unhappy effects of what Besharov perceives to be undue intervention by social services into intact families.

His skepticism about the effectiveness of state intervention is well illustrated by Calabretta v. Floyd,¹ a Ninth Circuit case in which aggrieved parents sued a social worker and a police officer. Following a call by an anonymous neighbor who said she'd heard a child crying "No, Daddy" at 1:30 in the morning and two days later saying "No, no, no" in the yard, a social worker was dispatched to the Calabretta home.² Significantly, the caller had reported that the Calabrettas were "extremely religious" and homeschooled their children.³ (Religious groups have complained that state agencies have been quicker to investigate claims about their members' parenting than they would be for less religious fami-

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¹ 189 F.3d 808 (9th Cir. 1999).
² See id. at 810.
³ See id.
When the social worker went to investigate four days after the call, Mrs. Calabretta refused to allow her entry into the home. The social worker did see the children behind their mother, however, and noted in her report that they did not appear to be abused. The social worker then went on vacation, and upon her return ten days later, visited the Calabretta home accompanied by a police officer. At that point she insisted, over Mrs. Calabretta’s objection, on interviewing the children alone. She discovered that they were occasionally disciplined using a “stick,” a thin Lincoln log. The social worker then asked to examine the three-year old child’s buttocks. When the twelve-year old sibling objected to pulling down her brother’s pants so that the social worker could examine them, Mrs. Calabretta was asked to do so. Although expressing objections, Mrs. Calabretta complied with the social worker’s request. There were no marks on the child’s bottom. The social worker departed after saying that it was against the law to “hit your children with objects” and counseling Mrs. Calabretta on other forms of discipline. The Calabrettas subsequently sued under 42 U.S.C. § 1983 for declaratory relief, injunctive relief and damages. The Ninth Circuit upheld the District’s Court finding that the defense would not be entitled to a plea of qualified immunity.

The Calabretta incident raises many questions about the use and abuse of state power exercised in an effort to protect the safety of children. Families, particularly those who are either extremely religious or who home-school their children seem to be the targets of state suspicion too often, and many bring suit against the state when undue intervention does occur.

There are, however, equally compelling illustrations of the failure of non-intervention. My summer family law reading brought a truly tragic case to my attention, and this one illustrates

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4 See id. at 810-11.
5 See id. at 811.
6 See id.
7 Id.
8 See id. at 812.
9 See id.
10 See id.
11 Id. at 811-12.
12 See id. at 812.
13 See id. at 817.
the danger of not intervening before real harm is done. In *Lord v. Living Bridges*, the Lords approached an American adoption agency, Living Bridges, looking to adopt Mexican children. The couple noted that because they had a history of health problems themselves they “needed children in good health,” and specifically mentioned that they were not capable of caring for children with “special needs.” The Lords were told about a “premier” Mexican orphanage with which Living Bridges dealt and were told that the three girls they could adopt were “sweet and loving,” “bright” and “had not been abused.” Unfortunately, most of these representations proved to be untrue. Most of the children in the orphanage had been abused, including the three girls placed in the Lord’s custody. The orphanage had records showing that the girls were the victims of physical abuse and, in the case of one, physical torture. One of the girls had intellectual impairments, possible brain damage and psychological problems. Almost immediately after placement, one of the girls showed signs of serious mental illness requiring hospitalization. Another was diagnosed with serious emotional problems that required therapy, and two of the girls had acted out violently. These problems cost the Lords not only money, but also caused severe emotional distress, and, in Mr. Lord’s case, substantial cardiac problems. The Lords sued the placing agency for wrongful adoption, fraudulent and negligent misrepresentation, negligent nondisclosure, and intentional and negligent infliction of emotional distress.

In contrast to the Calabretta’s case, the agencies involved in the Lord’s adoption had not intervened soon enough nor investigated carefully enough. Unfortunately, much of the long-term damage associated with an abusive household cannot be undone when the state postpones intervention until a later stage. When children are left too long with abusive parents, they often become un-adoptable. If the children

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15 See id. at *4.
16 Id.
17 Id. at *5.
18 See id.
19 See id.
20 See id.
21 See id. at *5-*6.
22 See id. at *6.
23 See id.
24 See id. at *1.
have survived, they are difficult to place in new homes due to permanent scars resulting from the abuse. In addition, if children grow older without appropriate parental love and guidance, they may permanently lack the ability to create the attachments they need to become successful adults.\(^{25}\)

The ground that Mr. Besharov and I share, in addition to our love for children, is a desire to zero in on the cases that are really important,\(^{26}\) rather than have social workers bogged down with cases like the Calabretta's. But as we are a society prone to error, I would rather impose the cost of mistakes on families like the Calabrettas, who can at least sue and move on with their lives, than on parents and children like the Lords. Hopefully, my suggestions will help narrow the territory within which mistakes are made.

Discussions of parental autonomy and child welfare often begin with the following quotation from *Prince v. Massachusetts*:\(^{27}\)

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.\(^{28}\)

Parents, then, need privacy and lack of interference to best do their important work. In fact, as Professor Elizabeth and Dean Robert Scott have written, they may be given this latitude in order to reward them for performing well in what the Scotts term their fiduciary duties.\(^{29}\) None of us is a perfect parent. Even when both


\(^{27}\) 321 U.S. 158 (1944).

\(^{28}\) Id. at 166 (internal citations omitted).

parents remain with their family, we make so many errors that we often breathe a sigh of relief when we realize that nothing bad has happened. Children "escape" from fenced yards, pull down hot drinks we thought they could not reach and turn on kitchen appliances when we are answering the phone. Most of the time, they are not hit by cars, burned too badly, or maimed by loss of digits.

Sometimes, even for parents who are trying hard to raise a happy, healthy child, the worst occurs and a child is injured. For instance, when I was clerking in New Jersey in 1974, my judge heard a guilty plea from central city Hispanic parents who had lost a child. The father put the gun he carried to protect himself when transporting money from work to the bank in the linen closet. The mother was pulling out sheets and dislodged the gun. The gun went off when it hit the floor and killed one of their children. These parents had been neglectful, it is true, and in the process their child suffered harm. But, in sentencing them, the judge reasoned that they had been punished enough. They weren’t likely to be repeat offenders with guns or other dangerous instrumentalities that might harm their children.

Just as Mr. Besharov, I’m concerned that many parents repeatedly abuse their children while the “system,” despite knowledge of the prior abuse, does nothing. Besharov has bemoaned the fate of Lisa Izquierdo, who was tortured and eventually killed by a parent, even though countless neighbors heard her cries and social services had been called numerous times. I have pointed out similar

30 See Ira Lupu, Separation of Powers and the Protection of Children, 61 U. Chi. L. Rev. 1317, 1330-32 (1994) (pointing out how one parent will often curb the excesses of the other in two parent families); see also Margaret Brinig, From Contract to Covenant: Beyond the Law and Economics of Family 176-77 (2000) (discussing parents’ roles as complements).
31 For a horrifying fictional account of a parent who is falsely accused of child abuse, see Jane Hamilton, Map of the World 119, 123 (1998).
32 See N.J. Div. Of Youth and Family Serv’s v. B.W., 384 A.2d 923, 924, 928 (1977) (two of three children were killed in a matches-set fire while their mother was at a movie with a fourth child and her boyfriend, and the children were being “baby sat” by a five-year old).
34 See id.
35 See id.
problems in the case of Joshua Deshaney.\(^{37}\) The legislature and the courts have grappled with drawing the proper balance between the need for family autonomy and the responsibility of abuse prevention, as well as the degree and form of state intervention. Many Supreme Court cases have extended procedural protections to parents accused of child abuse.\(^{38}\) Once child abuse has been identified, however, both Besharov and I are concerned with the over-proceduralization that might prevent rapid state response.\(^{39}\) We both remember the three seminal cases: *Lassiter*,\(^{40}\) which found a right to counsel in some parental right termination cases; *Santosky*,\(^{41}\) which required at least a clear and convincing standard of proof before a court could terminate parental rights; and *M. L. B. v. S. L. J.*,\(^{42}\) which guaranteed a free transcript for an indigent’s appeal from a termination decision. The Supreme Court mandated these procedural protections after findings of horrific abuse. Both of us find encouragement in federal legislation making child safety the first priority as opposed to previous versions of the Social Security Act, which did not do so.\(^{43}\) The former Act made reunifica-

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\(^{37}\) See Margaret F. Brinig & F.H. Buckley, Parental Rights and The Ugly Duckling, 1 J.L. & Fam. Studies 41, 56 (1999). See also DeShaney v. Winnebago Co. Dept. Soc. Serv’s., 489 U.S. 189, 192-93 (1989) (dealing with a child that was repeatedly returned to an abusive parent by social services).

\(^{38}\) See, e.g., Brinig, supra note 37, at 55 n.62, 59 (citing M.L.B. v. S.L.J., 519 U.S. 102 (1996) (finding a right to a free transcript in an appeal of termination proceedings); Santosky v. Kramer, 455 U.S. 745 (1982) (holding that abuse must be found by ‘clear and convincing’ evidence); Lassiter v. Dep’t. of Soc. Servs., 452 U.S. 18 (1981) (holding that a parent’s right to court-appointed counsel in termination proceedings is determined on a case by case basis)).

\(^{39}\) See, e.g., Institute of Judicial Administration and the American Bar Association Juvenile Justice Standards Project: Standards Relating to Abuse and Neglect §1.1, §6.4(B) (1977) (expressing a preference for family autonomy and “services which least interfere with family autonomy, provided that the services are adequate to protect the child”).

\(^{40}\) Lassiter v. Dep’t of Soc. Servs., 452 U.S. 18, 32 (1981)


\(^{43}\) 42 U.S.C.A. § 671(a)(15) (Supp. 2000), provides that:

(A) in determining reasonable efforts to be made with respect to a child, as described in this paragraph, and in making such reasonable efforts, the child’s health and safety shall be the paramount concern;

(B) except as provided in subparagraph (D), reasonable efforts shall be made to preserve and reunify families—

(i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child’s home; and
tion of birth parents and children the main goal, required lengthy stays in foster homes that clearly are not beneficial to children, and returned children to repeat abusers when all possible efforts to rehabilitate parents had not been exhausted. Foster care, which by its very nature prevents children from becoming attached, may itself contribute to such additional ills as the attachment disorder mentioned earlier. The newer legislation makes the safety of children the paramount goal, preserving the family unit only if a safe environment can be accomplished. The balance required by

(ii) to make it possible for a child to safely return to the child’s home;
(C) if continuation of reasonable efforts of the type described in subparagraph (B) is determined to be inconsistent with the permanency plan for the child, reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child;
(D) reasonable efforts of the type described in subparagraph (B) shall not be required to be made with respect to a parent of a child if a court of competent jurisdiction has determined that—
(i) the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse);
(ii) the parent has—
(I) committed murder (which would have been an offense under section 1111(a) of Title 18, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;
(II) committed voluntary manslaughter (which would have been an offense under section 1112(a) of Title 18, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;
(III) aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter; or
(IV) committed a felony assault that results in serious bodily injury to the child or another child of the parent; or
(iii) the parental rights of the parent to a sibling have been terminated involuntarily;

47 The “reasonable efforts” to reunify the family, which are mandated by 42 U.S.C. § 671(a)(15) will not be necessary where the child has been subjected to aggravated cir-
the uncertainty in identifying which parents' rights should be terminated shifts in the direction of making more speedy determinations and, perhaps, erring on the side of caution.

Both Mr. Besharov and I are also concerned with the substantive definition of abuse, although here we differ somewhat in the content we would assign to the term. For example, my casebook with Carl Schneider poses the question "Parents have rights; the state has interests. What do children have?" 48 If we think of children as akin to possessions of either parents or the state, we are clearly selling them short. 49 Statutes and cases nearly always purport to place children first. 50 Most of the time, children who remain with their parents without intervention are in the very best atmosphere for children. However, once parents have abused children, I believe the presumption shifts, and intervention ought to come more frequently. 51 The stark form of the dilemma, as I see it,

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49 See, e.g., Wendy A. Fitzgerald, Maturity, Difference and Mystery: Children's Perspectives and the Law, 36 Ariz. L. Rev. 11, 40 (1994) (suggesting that without a legal concept of personhood, children have no more rights than chattel); Martha Minow, Making All the Difference: Inclusion, Exclusion, and American Law (1990); Barbara Bennett Woodhouse, Who Owns the Child?: Meyer and Pierce and The Child as Property, 33 Wm. & Mary L. Rev. 995 (1992) (suggesting that Supreme Court jurisprudence could lead to a conclusion that children can be controlled like property); Carol Sanger and Eleanor Willemens, Minor Changes: Emancipating Children in Modern Times, 25 U. Mich. J.L. Reform 239 (1992) (detailing contemporary legal emancipation policies).
50 The classic examples are custody statutes. Others include different divorce standards where there are minor children. Some of the cases—particularly older ones—talk in terms of parental rights over custody and decisionmaking. See, e.g., Smith v. Stillwell, 969 P.2d 21 (Wash. 1998) (considering a statute that pits "best interests" against parental autonomy).
51 Reports chronicle the high number of repeat abuse cases, especially those ending in fatalities. See, e.g., Timothy Egan, Child Abuse Cases Draw New Attention, N.Y. Times,
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is the choice between sometimes unnecessarily interfering with parental autonomy (my choice) and sometimes mistakenly allowing repeated abuse (Mr. Besharov's). In a mathematical sense, this is a Type I/Type II error problem. (See Figure 1).

Figure 1. Errors of Over- and Under-Inclusion in Child Abuse Intervention

Mr. Besharov says that no one can know which parents will be repeat child abusers—in other words, that the number of mistaken "false positives" is unacceptably high. I believe there are some indicia that can improve the accuracy of judgments (largely made by social workers or law enforcement officers, but sometimes by

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judges who decide whether or not to return children to their homes). I would therefore favor the use of profiles\textsuperscript{52} that might help identify times when the state should intervene or proceed with termination of parental custody. These profiles focus both on past behavior of the parent (since in most cases some abuse will already have occurred) as opposed to mere characteristics (especially ones like the home schooling or "intensely religious" characterizations of the Calabrettas). Some behaviors are particularly predictive of repeat abuse once an incident of abuse has been identified. For instance, various studies of abused children show that those with parents who abuse substances are likely candidates for repeat abuse.\textsuperscript{53} Mr. Besharov himself pushed for termination of parental rights where parents were addicted.\textsuperscript{54} In those circumstances where a behavior, or combination of behaviors, elevate the risk of repeat abuse, I propose a shift in the burdens of proof as follows. I would change the burden of proof from a presumption that a mother who abuses illegal drugs during pregnancy is acting in the best interests of the child to one that presumes that the mother is not, and thus, the child should be removed.\textsuperscript{55} See Table I below for those indicia that create increased need for intervention.


\textsuperscript{55} Cf. Angela M.W. v. Kruzicki, 561 N.W.2d 729 (Wis. 1997) (dealing with a troubling case in which a post-viability pregnant cocaine-addicted mother was hospitalized involuntarily for the duration of her pregnancy).
Table I. Indicia for Burden Shifting

- Abuse + parental alcohol or drug abuse;
- Abuse + boyfriend/girlfriend/stepparent (non-adoptive) in the home;
- Abuse + child is disabled (widen abuse to non-provision of medical care);
- Serious abuse of another sibling;
- Abuse of the other parent.

A number of studies, including those of Martin Daly and Margo Wilson,\(^5\) have found that children are at greater risk when a non-related adult is living in the home.\(^5\) Special attention should be paid when children are “disciplined” in these homes.\(^5\) Some research indicates that children who are disabled are at much greater risk for abuse by parents.\(^5\) For disabled children, I would

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57 See, e.g., Martin Daly & Margo Wilson, Child Abuse and Other Risks of Not Living with Both Parents, 6 Ethology & Sociobiology 197, 205 (1985) (estimating that preschoolers living with a stepparent are forty times more likely to be abused than similarly-aged children living with their natural parents); Joy L. Lightcap et al., Child Abuse: A Test of Some Predictions from Evolutionary Theory, 3 Ethology & Sociobiology 61, 62 (1982) (finding that stepparents are more likely to abuse stepchildren than natural children); Martin Daly & Margo Wilson, Violence Against Stepchildren, 5 Current Directions in Psychological Science 77, 80 (1996) (examining data from foreign countries that indicate a higher rate of child abuse by stepparents); Robert Whelan, Broken Homes and Battered Children (1993). See generally Owen D. Jones, Evolutionary Analysis in Law: A Model for Analysis and its Application to Child Abuse, 75 N.C. L. Rev. 1117 (1997) (examining the biology of family relations and its bearing on child abuse policy).
59 The exception is Brinig & Buckley, supra note 37, at 50-53 (utilizing empirical work using the Cornell data). Other studies include William N. Friedrich & Allison J. Einbender, The Abused Child: A Psychological Review, 12 J. Clinical Child Psych. 244, 244-56 (1983) (citing higher rates of abuse among disabled children); Lawrence E. Frisch & Frances A. Thoads, Child Abuse and Neglect in Children Referred for Learning
intervene earlier, and "second guess" medical care decisions if the parents are reluctant to provide routine or life-saving medical treatment.\textsuperscript{60}

This need to shift the presumption in those instances when abuse has occurred is reflected in federal legislation.\textsuperscript{61} When there has already been abuse of a sibling, the federal legislation changes the presumption of reunification to one of termination.\textsuperscript{62} The American Law Institute has also debated the merits of including similar language in its child custody standards when a parent was subject to abuse during childhood.\textsuperscript{63} There is some evidence that a parent abused as a child is likely to continue the pattern of abuse on a new generation.\textsuperscript{64}

Is Mr. Besharov correct that the categories of abuse are over-
inclusive and thus contribute to excessive state intervention? Perhaps. But with the Supreme Court's emphasis on procedural due process for parents who are accused of child abuse or who face termination of their rights, coupled with the recent federal standards mandating quick action in these cases, the harm seems minimal when compared with the alternatives. Again, adopting a more restrictive policy of intervention places the risk of error on a child who might be left with abusive parents, who may face prolonged stay in foster care, or who may confront a return to an abusive home. These harms seem more substantial, especially if we can increase the accuracy of intervention approaches.

It is possible to achieve a balance between protection and parental independence. One attempt to reduce both the evils of over-intervention and the evils of excessive restraint, while still maintaining the healthy autonomy of parents, can be seen in Texas legislation. The definitions section of the Texas Human Resources Code includes the following provision for family preservation: "Family preservation includes the protection of parents and their children from needless family disruption because of unfounded accusations of child abuse or neglect. It does not include the provision of state social services for the rehabilitation of parents convicted of abusing or neglecting their children." Further, the state agency is charged with providing services that "respect the fundamental right of parents to control the education and upbringing of their children." Both Professor Besharov and I (and, presumably, most of those who have thought about the problem) would have the area occupied by abusers and the occasions of family interventions correspond exactly. The world being what it is, we cannot do so. Curtailing definitions of abuse does not help parents or children.

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65 This may be changing. For a recent case stating that parental rights termination doesn't require proof of reunification efforts, see In re Eden F., 250 Conn. 674 (1999) (terminating parental rights of a mentally impaired woman with two daughters).
67 Id. Presumably Besharov's view, and to some extent this statute, would correspond with the position of Michael Wald, as stated in his article, State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards, 27 Stan. L. Rev. 985, 1025 (1975) ("any intervention that requires a child to tell the story of what happened to authorities may cause more trauma than parental behavior").
Parents seem infinitely inventive in abusing their children,\textsuperscript{69} and abuse often escalates. Thus, even if it is not obvious at the first sign of abuse that the parent will be a repeat offender, steps must be taken to ensure that the child will not be seriously damaged by remaining in an abusive atmosphere.

In conclusion, Mr. Besharov and I present two different aspects of the same picture. The problem stems from society's inability to accurately predict behavior in combination with the conflicting rights and needs of parents and children. Besharov chooses to protect parental autonomy and, in so doing, hopes to benefit the majority. In contrast, I choose to protect child-victims. Rather than limiting the degree of intervention and placing children at risk of further abuse, I offer suggestions for reducing the incidence of error in intervention decisions.

\textsuperscript{69} See, e.g., In re Alyne E., 448 N.Y.S.2d 984 (N.Y. Fam. Ct. 1982) (finding the failure to aid a psychologically disturbed adolescent to be abuse); In re Shane T., 453 N.Y.S.2d 590 (N.Y. Fam. Ct. 1982) (finding that a father who repeatedly called his son derogatory terms indicating that the boy was gay was guilty of verbal abuse); State v. Payne, 240 Conn. 766, (1997) (involving an emotional abuse case where accused party, who was not the parent, forced young boys to urinate into a cup); Cheseborough v. State, 255 So. 2d 675 (Fla. 1971) (considering whether parents who demonstrated how babies were made to their young son were guilty of abuse).