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## STUDENT ARTICLE

# IN THE GHETTO: THE STATE'S DUTY TO PROTECT INNER-CITY CHILDREN FROM VIOLENCE

AILEEN M. BIGELOW\*

Are These Forgotten Children? Doesn't Anybody Care?†

### INTRODUCTION

[T]he whole community has an interest that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed citizens. . . . A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."<sup>1</sup>

When a child suffers abuse or neglect at the hands of his parents or guardians, the State<sup>2</sup>, acting pursuant to legislative and common law dictates, will intervene in the life of that child to protect him from further harm. These actions are taken because within that abusive or neglectful home, there is no one

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† This quote expresses the outrage felt by a Chicago teacher following the death of Dantrell Davis, a 7-year-old boy who was shot in the head by a sniper on October 13, 1992 while walking with his mother to school. Don Terry, *Even a Grade School is No Refuge From Gunfire*, N.Y. TIMES, Oct. 17, 1992, at A6. Dantrell's walk to school was only one block from his home in Cabrini-Green, a high-rise public housing project in north Chicago. Another youth, in speaking of the public reaction to Dantrell's death, stated, "They made a big deal about it but they probably don't understand how it is, because they live in houses. It happens all the time here." Kevin Johnson, *For Kids, Nowhere to Hide*, USA TODAY, Oct. 15, 1992, at A3. This article is dedicated to Dantrell and all the children who are still living and trying to survive amidst the violence that plagues our inner cities.

1. *Prince v. Massachusetts*, 321 U.S. 158, 165, 168 (1944) (upheld statute prohibiting children from selling pamphlets on the street).

2. The word "State" throughout the Article generically refers to any one of the fifty states.

acting: "in the best interest of the child." The State, acting in place of the parents, in *loco parentis*, takes affirmative actions to remedy the child's situation, whether by providing services to the family or, in the extreme, by removing the child from his home.<sup>3</sup>

This article explores life for young children living in the violence-ridden communities of the inner-city housing projects. Through analogy, I will argue that just as a State has a "duty," legislative<sup>4</sup> and judicial,<sup>5</sup> to intervene in the lives of children who are suffering from abuse and neglect in their individual homes, the State also has an affirmative "duty" to intervene in the lives of children who are exposed continuously to the violence present in the State's own "home," that of the inner city.

Part I of the article describes the conditions present in the inner city and the effects—developmental, physiological and psychological—that are currently being discovered in the children who are raised within these explosive communities. Part II discusses why an affirmative "duty of protection" to the inner-city children ought to be recognized. The recent Supreme Court case *DeShaney v. Winnebago County Department of*

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3. See generally SANFORD N. KATZ, CHILD NEGLECT LAWS IN AMERICA (1976) [hereinafter NEGLECT]; NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, JUVENILE JUSTICE AND DELINQUENCY PREVENTION 335-36 (1976); SANFORD N. KATZ, WHEN PARENTS FAIL (1971) [hereinafter PARENTS].

4. See, e.g., IND. CODE ANN. § 31-6-4-3 (West Supp. 1991). The relevant sections of this statute state:

(a) A child is a child in need of services if before the child's eighteenth birthday:

- (1) the child's physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of the child's parent, guardian, or custodian to supply the child with necessary food, clothing shelter, medical care, education, or supervision;
- (2) the child's physical or mental health is seriously endangered due to injury by the act or omission of the child's parent, guardian, or custodian; . . . and needs care, treatment, or rehabilitation that the child is not receiving, and that is unlikely to be provided or accepted without the coercive intervention of the court.

*Id.*

5. See, e.g., *Lassiter v. Department of Social Serv. of Durham County, N.C.*, 452 U.S. 18 (1981) (parental termination proceeding upheld after child was adjudicated to be a neglected child) (The Constitution does not require appointment of counsel for indigent parents in every parental status termination proceeding).

*Social Services*<sup>6</sup> is analyzed, along with its ambiguous "special relationship" test as a necessary predicate to the State's responsibility for a child's protection. Part II also explores the history and original purpose of the Fourteenth Amendment, in the context of having established a citizen's right to protection. Finally, Part III details a legislative and judicial reform plan for the States to recognize and to combat the long-term developmental consequences for children being raised surrounded by danger.<sup>7</sup>

## I. AN OVERVIEW

### A. *Life for Children in the Inner-City Housing Projects*

During the past twenty-five years, inner-city neighborhoods, especially public housing projects, have undergone a dramatic change. Public housing projects at one time were considered a "nice" place to live for those who could not afford any better.<sup>8</sup> Originally developed with families in mind, the

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6. 489 U.S. 189 (1989).

7. By focusing on inner-city children, I do not wish to ignore or lessen the plight of many children living in suburban and rural areas amongst poverty and deplorable conditions. The proposed reform plan covers all children suffering from developmental, physiological and psychological harms as a result of their surrounding community's influence. The estimated average number of poor children in the United States, between 1983 and 1987, was estimated at 13,055,000. CHILDREN'S DEFENSE FUND, THE STATE OF AMERICA'S CHILDREN, 1991, at 151 (1991) [hereinafter AMERICA'S CHILDREN]. Of every 100 children living in poverty, twenty-eight live in suburban areas, twenty-seven live in rural areas, and forty-five live in central cities. *Id.* at 2.

8. See, e.g., Patrick T. Reardon, *City's Public Housing is Promise Unfulfilled*, CHI. TRIB., Oct. 15, 1992, at A1, A6; see also ALEX KOTLOWITZ, THERE ARE NO CHILDREN HERE 22 (1991). This book details the lives of two young boys, Lafayette and Pharoah Rivers, who live in Chicago's Henry Horner Homes, one of the city's nineteen public housing developments.

Inner-city housing projects began appearing in the United States in the late 1950s as a Congressional response to a postwar housing crisis. Federal monies were appropriated to the cities, and then the fight started among the white politicians regarding where the low-rent "projects" were going to be built. The NIMBY syndrome surfaced—Not In My Back Yard. Eventually, the public housing was built beside the black ghettos. "Rather than providing alternatives to what had become decrepit living conditions, public housing became anchors for existing slums." *Id.* at 22. In Chicago, limited sites were available for construction, hence, when the time came for expansion, the projects were built up rather than out. Henry Horner is a complex of fifteen such high-rises. *Id.* In the 1980s when federal funding was cut-back, public housing agencies were left with little money to maintain and repair the buildings. Reardon, *supra*, at A1, A6. As a result, the projects deteriorated, and an underclass "living in concentrated areas of poverty" was

projects initially had grassy, park-type areas where the children could play.<sup>9</sup> Now, however, years have passed, and those "grassy, park-type areas" no longer belong to the 1.6 million children who currently live in the public housing developments in the United States.<sup>10</sup>

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left behind. JAMES GARBARINO ET AL., CHILDREN IN DANGER: COPING WITH THE CONSEQUENCES OF COMMUNITY VIOLENCE 42 (1992).

A popular rap group describes the projects:

And let's look at that word "project,"  
Another word for "experiment."  
On one side of the street there's a church,  
Across the road is a liquor store.  
Both of 'em keepin' us poor, keepin' us down.  
My 'hood ain't considered a town.  
And the joint is packed back to back with Black.

Public Enemy, "I Don't Wanna Be Called Yo Niga," *Apocalypse '91: The Enemy Strikes Black* (1991).

Because of the violence inherent within the inner-city housing projects, and the fact that they are mostly home to minorities, the developments are often referred to as "black islands," by both the residents and the outsiders. See KOTLOWITZ, *supra*, at 25; Mary Schmich, *Just Blocks Away, But Worlds Apart*, CHI. TRIB., Oct. 16, 1992, at A1.

9. See, e.g., KOTLOWITZ, *supra* note 8, at 24-25. The boys' mother states: When I got my apartment I thought this is what it was meant to be. I never looked any further than here. It wasn't like it is now. The grass was greener. We had light poles on the front of the building. We had little yellow flowers. We had it all. I really thought this was it. And I never knew, until I lost it all, that it wasn't.

*Id.* See also, Joye Mercer, *Memories Bind Tenants of Premier Black Apartment Complex*, WASH. POST, Sept. 19, 1991, at J5; Lewis Cole, *Prisoners of Crack*, ROLLING STONE MAG., Feb. 9, 1989, at 68.

10. GARBARINO ET AL, *supra* note 8, at 45. Examples of the enormity of public housing projects in Chicago include Robert Taylor Homes which is two miles long and in 1987, was home to fifteen thousand people (KOTLOWITZ, *supra* note 8, at 25), and Cabrini-Green, where Dantrell Davis was killed, which is a four-mile-long expanse of eighty-three buildings, comprised of high-rises and rowhomes. See Kevin Johnson, *For Kids, Nowhere to Hide*, USA TODAY, Oct. 15, 1992, at A3.; Reardon, *supra* note 8, at A1, A6. Fifty-six percent of the current residents of Cabrini-Green are under the age of twenty. Jacquelyn Heard & Matthew Nickerson, *At Jenner, Sorrow Too Soon*, CHI. TRIB., Oct. 15, 1992, at A7. Like many public housing projects, however, Cabrini-Green stands with thirty-one percent of its 3,493 apartments vacant. *Id.* at A7. See also KOTLOWITZ, *supra* note 8, at 127, 159. These vacant apartments often serve as "hideaways" for gangs, where they store their weapons and drugs. The infiltration of the gangs is so great within the projects that public officials often speak of having to "secure" the buildings. See, e.g., Jennifer Lenhart & John O'Brien, *Alleged Gang Leader Charged in Boy's Death*, CHI. TRIB., Oct. 15, 1992, at A1, A6; KOTLOWITZ, *supra* note 8, at 39-42, 261. Gangs, in turn, often speak of having to "take back" the highrises from rival gangs. *Id.* at 39-42, 261.

The thriving drug trade<sup>11</sup> and its corresponding gangs and violence<sup>12</sup> have taken over many of the children's playgrounds. The areas are no longer safe for the children to go outside and play. What exists outside the apartment doors of many children is a frightening sight. Trash litters the darkened hallways, and graffiti is abundant.<sup>13</sup> Strangers loiter everywhere. Drug addicts both shoot-up and smoke in the stairwells and in the laundryrooms.<sup>14</sup> Having just made their drug purchase, these addicts desire to get high quickly and purchase again in twenty minutes.<sup>15</sup> In addition to the addicts, present are the dealers,

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11. According to the American Alliance for Rights and Responsibilities, throughout the nation's largest cities, open-air drug markets, many located in the inner-city housing projects, are prospering. Police Department surveys which were gathered in the Alliance report estimate the following number of open-air drug markets: Baltimore, 35-45; Chicago, 251-300; Columbus, 11-20; Dallas, 35-45; Detroit, 46-60; Houston, 251-300; Indianapolis, 4-10; Jacksonville, 151-175; Los Angeles, 121-150; Milwaukee, 251-300; New York, 251-300; Philadelphia, 100-120; Phoenix, 11-20; San Antonio, 11-20; San Francisco, 35-45; Washington, D.C., 46-60. AMERICAN ALLIANCE FOR RIGHTS & RESPONSIBILITIES, *THE WINNABLE WAR: A COMMUNITY GUIDE TO ERADICATING STREET DRUG MARKETS* 102 (1991). Although the size of the cities differ and the number of markets vary in each city, the conditions which exist within these open-air drug markets are virtually the same. Other than the particulars, such as where within the particular city the market is located, each market contains the same drugs, the same violence and the same criminal elements.

Both within and outside the housing complexes where an open-air drug market is present, drug deals abound. Dealers can be seen walking around with baggies of crack hanging from their belts. Nine millimeter pistols are also casually tucked into the belts of pants. A quick handshake usually means another drug deal has gone down, not *planned* but actually *occurred* as a vial of crack can easily be tucked into the palm of a hand. Interview with Frank Morgan, District of Columbia Metropolitan Police Officer, Fourth District, in Washington, D.C. (Jan. 28, 1989).

12. See Lenhart & O'Brien, *supra* note 10; KOTLOWITZ, *supra* note 8, at 39-42, 261.

13. Lafayette's and Pharoah's building in Henry Horner has no enclosed lobby, rather, a dark tunnel cuts through the middle of the building. KOTLOWITZ, *supra* note 8, at 8-9. Any balconies are enclosed with chain-link fencing, similar to prison catwalks rather than apartment walkways. Susan DeGrane, *The Crossfires of Faith*, NOTRE DAME MAG., Spring 1992, at 51. Since darkness permeates the corridors, even in the daytime, residents carry flashlights. KOTLOWITZ, *supra* note 8, at 8-9. The gangs only add to the darkness, by knocking out any existing lights. *Id.* at 41.

14. Amy Louise Kazmin, *Fighting to Reclaim a Neighborhood*, L.A. TIMES, Mar. 16, 1991, at B7. Rene Sanches and Linda Wheeler, *Residents Along Drake Place Say They Are Living in Fear*, WASH. POST, Feb. 16, 1989, at A14.

15. The drug described here is crack, where the high lasts less than fifteen minutes. GOVERNMENT OF THE DISTRICT OF COLUMBIA, DISTRICT OF COLUMBIA'S OFFICE OF CRIM. JUST. PLANS AND ANALYSIS, *DRUG ABUSE AND CRIME IN THE DISTRICT OF COLUMBIA* (1987). Not all drug markets in the

the gang members, and the "lookouts," usually young kids recruited by the dealers to watch for any signs of trouble, either from the police or rival dealers and gang members.<sup>16</sup>

Drug market participants, addicts and dealers, and accordingly gang members, have a distorted code of ethics with a distinct means of enforcement. Violence is necessarily commonplace. For example, in Montana Terrace, a Washington, D.C. public housing project, there is an alley called the "danger zone." In this "zone," trespassers are likely to be shot or stabbed on sight. The code of the local crack cartel is kill or be killed.<sup>17</sup>

Daily gunfire echoes throughout projects such as Montana Terrace.<sup>18</sup> As D.C. officials put it, "[w]ithin a drug market, no legal recourse exists for unpaid bills. There are no boards or committees in place to settle territorial disputes. A police report is not an option when drug funds or goods are stolen."<sup>19</sup> Drive-by shootings are a reality.<sup>20</sup> Few arrests are ever made.<sup>21</sup> In addition to the rampant drug-trade and the corre-

projects deal in crack. For instance, according to Chicago police, crack operations have never really entered Chicago. KOTLOWITZ, *supra* note 8, at 38.

16. These young kids are ideal employees for the drug dealers because if the kid gets caught, he is usually in and out of the "system" very quickly and able to resume working within a matter of days. Interview with Sidney Swann, Director of the District of Columbia High Intensity Treatment Supervision Program for Juveniles, in Washington, D.C. (Jan. 23, Feb. 22 and Apr. 19, 1989). In addition, through peer pressure, these kids serve as recruiters to employ other youths to join their gang. See, e.g., GARBARINO ET AL., *supra* note 8, at 60; Alex Kotlowitz, *Urban Trauma: Day-to-Day Violence Takes a Terrible Toll on Inner-City Youth*, WALL ST. J., Oct. 27, 1987, at 1, 26.

17. Courtland Milloy, *Prepping for Corrective Surgery*, WASH. POST, Mar. 5, 1989, at D3.

18. See, e.g., Sara Horwitz & Linda Wheeler, *Drug Market Intensifies Violence on Drake Place*, WASH. POST, Feb. 17, 1989, at D7; Kotlowitz, *supra* note 16, at 1. The majority of the gunfire and the violence within the projects can be attributed to warring gangs trying to take full control of the entire complex. See, e.g., KOTLOWITZ, *supra* note 8, at 39-42.

19. GOVERNMENT OF THE DISTRICT OF COLUMBIA, OFFICE OF CRIM. JUST. PLANS AND ANALYSIS, *HOMICIDE IN THE DISTRICT OF COLUMBIA* 30 (1987).

20. Because territorial disputes abound, with them comes unpredictable violence. Gunfire simply erupts, at any time of day, at any place. See, e.g., KOTLOWITZ, *supra* note 8, at 18 ("It was two-thirty in the afternoon; school had just let out . . . . The dispute had started when two rival drug gangs fired at each other from one high-rise to another.").

21. See, e.g., Kotlowitz, *supra* note 16, at 26. Surprisingly, one day following the death of Dantrell Davis, an arrest was made. The 33-year-old alleged sniper stated that he aimed at a group of teenagers in a "revenge shooting," part of the "ongoing turf war for control of the high-rise buildings" at Cabrini-Green. Lenhart & O'Brien, *supra* note 10, at A6.

sponding violence present within the projects, other serious crimes are committed as well.<sup>22</sup>

This type of surrounding community does not go unnoticed by the children who live in these projects. The children, forced to grow up very quickly, often see things in their youth which many citizens do not see in an entire lifetime.<sup>23</sup> Many of these inner-city public housing projects produce a different "breed" of child, one who has no idea if he will survive to the next year.

#### B. *The Effects on Children Who Grow Up With Community Violence*

Chronic exposure to community violence variably affects the children of the inner-city housing projects. The developmental, physiological and psychological effects are discussed in this section. For the reasons detailed below, exposure to community violence does not impact every child raised in the inner-city housing projects to the same level or in the same manner. To an extent, however, every child does suffer.

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22. For example, at Cabrini-Green, the following were the 1991 rates of crime per 1,000 residents: murder - 4; criminal sexual assault - 21; serious assault - 261; robbery - 77; total violent crime - 363. Heard & Nickerson, *supra* note 10, at A7. In 1983, in Chicago's Robert Taylor Homes housing project, which comprises .5 percent of the city's total population, eleven percent of the city's murders were committed, nine percent of the rapes and ten percent of its aggravated assaults. These are rates twenty times what they were for the rest of the city. GARBARINO ET AL, *supra* note 8, at 44.

23. In a recent study conducted in day-care centers in Chicago public housing projects, 100 percent of the children surveyed reported having seen a shooting by the age of 5. Philip Bennett, *Growing Up, Skewed, With Violence*, BOSTON GLOBE, June 4, 1992, at 1; *Children and Violence: Hearings on Children and Violence Before the Subcomm. on Children, Family, Drugs, and Alcoholism of the Senate Comm. on Labor and Human Resources*, 102d Cong., 2d Sess. (1992) (unpublished testimony of Dr. James Garbarino, President of the Erikson Institute for Advanced Study in Child Development) [hereinafter *Testimony*]. Another recent study, by Chicago's Community Mental Health Council, of more than 1,000 Chicago inner-city students found that seventy-four percent of the children had actually witnessed a murder, shooting, stabbing or robbery. The breakdown went as follows: twenty-four percent had seen someone get killed, thirty-nine percent had seen a shooting and thirty-five percent had seen a stabbing. The students knew most of the victims of these acts of violence. In about half, the victims were family members, friends, classmates or neighbors. Another startling fact is that forty-six percent reported being the victim themselves in either a rape, shooting, stabbing, robbery or other violent act. GARBARINO ET AL, *supra* note 8, at 46; Ronald Kotulak, *Study Finds Inner-City Kids Live With Violence*, CHI. TRIB., Sept. 28, 1990, at C1.



## 1. The Developmental Toll

Children who have witnessed the sort of violence present in the inner-city housing projects rarely smile. Although as babies they instinctively smiled, now they have seen and heard too much, and their smiles have gone.<sup>24</sup>

The children's affect is extremely flat. They can describe to you without emotion the details of the latest shooting or murder in their neighborhood.<sup>25</sup> At the sound of gunfire, they know to drop to the ground immediately and to crawl slowly away from the direction of the shots.<sup>26</sup>

These children know the ins and the outs of the drug trade. They can tell you about the enforcers, the soldiers, the lieutenants, the runners, the handlers and the big men. They also know all about the gangs. This knowledge is necessary for survival. Wearing the wrong colors, tilting your hat to the wrong side or walking on the wrong side of the street can often mean the difference between life and death.<sup>27</sup> The presence of the drug trade and the gangs, as well as its corresponding violence, surrounds the children. These children are simply part of a new generation growing up amidst violence with an "intensity unthinkable to previous generations."<sup>28</sup>

The violence numbs the kids.<sup>29</sup> However, that is not the only devastating effect. Children in the inner-city, where they are constantly surrounded by the uncertainty of not knowing if

24. When Alex Kotlowitz approached Lafayette's and Pharoah's mother about writing a book about them and the other children in the neighborhood, she responded, "But you know, there are no children here. They've seen too much to be children." KOTLOWITZ, *supra* note 8, at x.

25. See, e.g., Heard & Nickerson, *supra* note 10, at A7 (One 8-year-old girl stated, "Last week, [gang members] jumped on my sister. Last year, they shot at my brother, but he just got skinned." *Id.*).

26. See, e.g., KOTLOWITZ, *supra* note 8, at 9. Inner-city children "who cannot tell one bird's song from another can often distinguish the caliber and proximity of a gun by the crack of its report." David Freed, *Under Fire*, L.A. TIMES, May 21, 1992, at A1. "[Children] can more easily distinguish a .357-caliber Magnum from a .45-caliber revolver than he can a computer from a typewriter." Kotlowitz, *supra* note 16, at 26.

27. I acquired this information both throughout a student internship in Washington, D.C., working with inner-city youth many of whom lived in housing projects, as well as through my experiences as a juvenile probation officer. See also KOTLOWITZ, *supra* note 8.

28. Lynn Smith, *Living in Fear*, L.A. TIMES, July 29, 1990, at E1.

29. One mother observed the reactions of her youngest daughter to shooting incidents in her inner-city neighborhood. When the girl was two, she was very frightened when she heard gunfire outside. She would throw herself on the floor saying, "Mama, I'm scared." After a year, the mother felt her daughter had become "immune" to the shooting. When shooting

gun shots are suddenly going to pierce the air, live in an almost constant state of siege. The chronic danger of community violence displaces the fundamental safety that children need.<sup>30</sup> Hypervigilance sometimes results.<sup>31</sup> The kids often fear leaving their home, even in order to attend school.<sup>32</sup> Some tend to withdraw and become passive, as if in an "entirely different world."<sup>33</sup> Others, however, become much more aggressive, reenacting what they have seen.<sup>34</sup> Sometimes the children develop speech problems.<sup>35</sup>

The children in the inner-city housing projects tend to develop a sense of "futurelessness," anticipating more violence and death at an early age.<sup>36</sup> Consequently, they often fail to

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started, the daughter told her mother matter-of-factly, "Well, Mama, we have to get down on the floor." GARBARINO ET AL., *supra* note 8, at 80.

30. *Id.* at 2. The children's ideas of home, school and community as safe places are destroyed. Traditional notions of safety have been replaced by external violence, dictating every aspect of children's lives. Danger, hence, becomes the "organizing principle" in their lives. *Id.* at 83.

31. *Id.* at 7 and 75. "Hypervigilance" is defined as "excessive acts or periods of watching and keeping surveillance; keeping awake at times when sleep is customary." WEBSTERS NINTH NEW COLLEGIATE DICTIONARY 592 (1987).

32. GARBARINO ET AL., *supra* note 8, at 60. During the 1990-91 school year in Chicago, police made 9,822 arrests on or near school grounds: 9 for murder, 153 for carrying guns, 244 for aggravated battery, 28 for aggravated criminal sexual assault, 51 for burglary, 218 for robbery, 11 for felony theft, 15 for auto theft, and 380 for carrying knives and other weapons. Teresa Wiltz & Steve Johnson, *Once Safe Havens, Schools Now in Line of Fire*, CHI. TRIB., Sept. 26, 1991, at A19.

33. *See, e.g.*, KOTLOWITZ, *supra* note 8, at 61 (detailing Pharoah's mother's account of how he is becoming more and more forgetful, often staring off into space and daydreaming); *see also* Smith, *supra* note 28, at E1.

34. It is extremely common for children to "play" what they have been witnessing. This includes such scenarios as playing funeral, playing shooting-up, playing burglary and playing "gangbangers." GARBARINO ET AL., *supra* note 8, at 77, 198-99, 209; Bennett, *supra* note 23, at A1 (playing dead, complete with a funeral and a sermon over the body, described as a popular game in day-care centers in areas of Boston).

35. After a summer of extreme violence between the warring gangs, Pharoah developed a stutter which made communication virtually impossible. When the number of shootings decreased, however, Pharoah's stutter became less noticeable. KOTLOWITZ, *supra* note 8, at 53, 61, 143-44.

36. When Alex Kotlowitz asked Lafayette what he wanted to be, Lafayette stated, "If I grow up, I'd like to be a bus driver." *Id.* at x (emphasis added). At the time, Lafayette was ten, and he was not sure if he would make it to adulthood. The children wonder, "Is this going to happen to me?" *See* Christopher Solomon, *Kids Who See Evil Suffer Insecurity*, WASH. TIMES, June 22, 1992, at A7. According to Brother Bill Tomes, a volunteer veteran of nine years in the worst of Chicago's housing projects, the children often ask him, "[A]re you coming to my funeral?" DeGrane, *supra* note 13, at 53.

develop any sort of goal-framework, due to the uncertainty of life which permeates their environment.<sup>37</sup>

Specific age groups of youths may be affected differently by the exposure to chronic violence. Pre-school children tend to become passive and to revert to earlier behaviors such as bed-wetting and clinging.<sup>38</sup> School-age children, on the other hand, may become more aggressive, along with experiencing distortions of reality and learning difficulties.<sup>39</sup> Adolescents may begin to engage in self-destructive behavior such as substance abuse, delinquent behavior and other aggressive acts.<sup>40</sup>

Normally, when a group of young children experience a traumatic event together, such as the 1988 shooting of seven second-grade students at the Hubbard Woods Elementary School in Winnetka, Illinois, a team of psychologists is rushed in to help the children cope and to counsel them.<sup>41</sup> The inner-city youth do not receive such counseling. No one "rushes" in to help them.<sup>42</sup> Their "traumatic events" are simply the down-

37. According to Dr. James Garbarino, the experience of trauma and the exposure to chronic community violence, produces "terminal thinking" in the children—the view that the future holds only pain, frustration and premature death. *Testimony, supra* note 23.

38. GARBARINO ET AL., *supra* note 8, at 51; Kotulak, *supra* note 23, at C1.

39. GARBARINO ET AL., *supra* note 8, at 51.

40. A child's early adaptation to violence may lead to a process of identification with the aggressor. Adolescents model themselves on the powerful, aggressive individuals and groups in their environment who caused the danger in the first place. *Id.* at 65. In violent communities, a gun is a status symbol and using it gets positive reinforcement. *See id.*; *see also* Elsa Walsh, *The Guns of Children*, WASH. POST, Apr. 9, 1989, at A1, A24.

The violent economy of the illicit drug trade offers a sense of belonging and solidarity as well as cash income for kids who have few pro-social alternatives for either. . . . Traumatized teenagers are likely to be drawn to groups and ideologies that legitimize and reward their rage, their fear, and their hateful cynicism, that embody terminal thinking.

*Testimony, supra* note 23. "Every child I've seen that has committed a murder . . . has witnessed a murder." Solomon, *supra* note 36, at A7 (statement of Dr. Janice Hutchinson, Medical Director for Child and Youth Services for the D.C. Commission on Mental Health Services).

41. The concern for the psychological well-being of the Winnetka children was extraordinary and immediate. Experts in the field of psychic trauma helped the youth and the adults cope with the traumatic event. Teachers received specific instructions. The Governor demanded increased school security. GARBARINO ET AL., *supra* note 8, at 98-99; KOTLOWITZ, *supra* note 8, at 105.

42. Two days after the Winnetka shooting in 1988, a similar tragedy occurred in the Henry Horner projects, a mere ten miles from Winnetka suburb. A 9-year-old boy was shot by a bullet, meant for someone else, while walking into his building. No one counseled the boy, who survived, or his

side of living in the inner-city. In other words, the children are assumed to "adjust" to the violence, accepting it and developing around it. They are just "inner-city" kids.

Not all inner-city children exposed to this chronic community violence experience developmental damage. A child's resilience depends upon his interactions with the various social systems in his environment.<sup>43</sup> In addition, certain character traits of individual children can serve to buffer them from severe stress and trauma.<sup>44</sup>

These "buffers" become especially important for a child when the exposure to community violence compounds other factors, such as poverty, large family size, early negative interaction with parents and single parenthood, which place a child "at risk" of developmental harm.<sup>45</sup> This "accumulation of

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friends. The governor did not call for aid. GARBARINO ET AL., *supra* note 8, at 98-99; KOTLOWITZ, *supra* note 8, at 105. However, compare the above response with the more recent shooting of Dantrell Davis where there was a public outcry to help the children in the inner-city housing projects. "[He] has come to symbolize for many the seemingly uncontrolled violence on the city's streets and a homicide rate that is the highest in Chicago's history." John Kass, *Daley Enlists U.S. in War on Drugs*, CHI. TRIB., Oct. 23, 1992, at A1. The Chairman of the Chicago Housing Authority (CHA), Vince Lance, immediately began to "sweep and secure" Cabrini-Green in order to gain control of the development from the gangs. Sweeps consist of the CHA police going door-to-door and evicting people who do not appear on the lease. Tenants then get identification cards which they must show to security guards to enter the building. Lenhart & O'Brien, *supra* note 10, at A1, A6. With the help of the U.S. Department of Justice, Mayor Daley started a task force to fight the gangs and drug dealers. Kass, *supra*, at A1. A teacher at Dantrell's school is skeptical, "All the attention is nice, and it helps for a while. But we need to change hearts and minds. As soon as [CHA police] leave and the sun goes down, this place will be a battleground again." Heard & Nickerson, *supra* note 10, at A7.

43. See generally GARBARINO ET AL., *supra* note 8, at 100-14. Protective factors include: "a stable emotional relationship with at least one parent or other reference person; an open, supportive educational climate and parental model of behavior that encourages constructive coping with problems; and social support from persons outside the family." *Id.* at 103. It is important that the child develop at least one relationship with someone who provides him with stable care and who accepts him unconditionally. This relationship will in turn give the child a sense of self-worth and hope for a favorable future. *Id.* at 103-04. A child's support system includes friends, neighbors and teachers who provide "emotional support, encourage self-esteem, and promote competence." *Id.* at 108.

44. For instance, cognitive competence, self-confidence and positive self-esteem contribute to better coping skills. The children who are the most resilient tend to be popular with peers and adults, have a strong sense of personal control, take responsibility for their own actions and possess the ability to make sense of threatening experiences. *Id.* at 101-03.

45. See *id.* at 2-3. In an inner-city housing project, the violence takes

risks" jeopardizes the child's development.<sup>46</sup> Currently, children without a sufficient amount of "buffers" are being diagnosed with post-traumatic stress disorder,<sup>47</sup> a psychological and physiological condition<sup>48</sup> which previously had been thought to exist predominantly in war veterans, particularly those who had witnessed actual combat.<sup>49</sup>

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place within a larger context. The children often are poor, live in father-absent families, contend with parental incapacity due to depression or substance abuse, are raised by parents with little education or employment prospects, and are exposed to domestic violence. *Testimony, supra* note 23. In 1983, ninety-two percent of the resident families in the Chicago housing projects were headed by females. GARBARINO ET AL., *supra* note 8, at 44.

46. The trauma of community violence is often "the straw that breaks the camel's back." *Testimony, supra* note 23; GARBARINO ET AL., *supra* note 8, at 2.

47. The diagnosis was first included in standard psychiatry textbooks as a possible reaction for children and adolescents in 1987. Miriam Shuchman, *Psychological Help for Children in Urban Combat*, N.Y. TIMES, Feb. 21, 1991, at B9. For a general discussion of post-traumatic stress disorder in children exposed to community violence, see GARBARINO ET AL., *supra* note 8, at 67-99; *Testimony, supra* note 23; George Curry, *Experts Rethink Effect Violence Has on Kids*, CHI. TRIB., Oct. 9, 1991, at C23; Freed, *supra* note 26, at A1; Jean Latz Griffin & Barbara Brotman, *Urban Violence Scars Children Like Battle Fatigue*, CHI. TRIB., Oct. 18, 1992, at C3; Alex Kotlowitz, *More Psychologists Pay Close Attention to the Effects of Violence on the Young*, WALL ST. J., Oct. 27, 1987, at 26.

48. Daniel Goleman, *A Key to Post-Traumatic Stress Lies in Brain Chemistry, Scientists Find*, N.Y. TIMES, June 12, 1990, at C1.

49. See, e.g., Bennett Olshaker, *Post-Traumatic Stress Disorder: Not Just War Veterans*, 32 TRAUMA 75, 78 (Apr. 1991); Ian Fisher, *When Bullets Pierce the Body, Mind and Soul*, N.Y. TIMES, Jan. 7, 1992, at B1; Freed, *supra* note 26, at A1; J. Patrick Gannon, *Stray Bullets, Frightened Children*, S.F. CHRON., June 7, 1992, at 9 (Sunday Review). In fact, the inner-city is often referred to as an "urban war zone." See GARBARINO ET AL., *supra* note 8, at 22. There are many similarities between the experiences of children growing up in war zones around the world and American children growing up amidst chronic community violence. In a comparison of refugee camps in Thailand, Hong Kong and the Middle East with the public housing projects in Chicago and other cities, the following similarities are found. Weapons proliferate. It is common for young people, especially males, to be heavily armed and to be engaged in armed attacks and reprisals. In both areas, representatives of "mainstream" society have only partial control over what happens. After the working day, international relief workers leave the camps, and social workers leave the projects. At night, local gangs control both the camps and the projects. In both areas, children have diminished prospects for the future. They lack a positive future orientation which in turn produces depression, rage and disregard for human life—their own and others. *Testimony, supra* note 23; GARBARINO ET AL., *supra* note 8, at 22-47.

## 2. Post-Traumatic Stress Disorder in Children Exposed to Chronic Violence

According to the American Psychiatric Association, post-traumatic stress disorder involves the "development of characteristic symptoms following a psychologically distressing event that is outside the range of usual human experience . . . . [The event] is usually experienced with intense fear, terror and helplessness."<sup>50</sup> When the stressor is "of human design," such as community violence, the disorder is apparently "more severe and longer lasting."<sup>51</sup>

Three categories of symptoms are associated with post-traumatic stress disorder: re-experiencing the traumatic event, diminished responsiveness to the external world and increased arousal.<sup>52</sup> In the first category, when confronted with reminders of the trauma, victims re-experience the event in dreams, flashbacks, and intrusive memories.<sup>53</sup> Often, "intense psychological distress" results when the victim is exposed to events that resemble the trauma.<sup>54</sup> In the second category, diminished responsiveness is referred to as "psychic numbing," and it usually begins soon after the traumatic event.<sup>55</sup> This "numbing" is both a conscious and unconscious attempt to avoid all thoughts, activities and reminders of the trauma.<sup>56</sup> Finally, in the third category, symptoms of increased arousal include difficulty falling or staying asleep and difficulty concentrating or completing tasks.<sup>57</sup> This necessarily leads to difficulties in

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50. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 247, 250 (3d ed. rev. 1987) [hereinafter MANUAL]. Symptoms of the disorder have been found in children as young as 20-months-old. Bennett, *supra* note 23, at A1.

51. MANUAL, *supra* note 50, at 248.

52. *Id.*

53. This includes the children's "acting out" what they have witnessed. See *supra* note 34. Their "play" themes are not random. This is their way of dealing with their innermost psychological difficulties. Repetition of traumatic themes in children's play indicates that they are reexperiencing thoughts about disturbing events. GARBARINO ET AL., *supra* note 8, at 76; MANUAL, *supra* note 50, at 250.

54. MANUAL, *supra* note 50, at 248. This has broad implications for the children in the inner-city housing projects since they are constantly immersed in the circumstances which precipitated both the initial and the continuing trauma which they experience.

55. *Id.*

56. GARBARINO ET AL., *supra* note 8, at 79. "I feel good not understanding." KOTLOWITZ, *supra* note 8, at 280; see also Smith, *supra* note 28, at E1.

57. MANUAL, *supra* note 50, at 248; GARBARINO ET AL., *supra* note 8, at 81. See *supra* note 33; see also Curry, *supra* note 47, at C23.

school for children.<sup>58</sup> Additionally, a symptom of post-traumatic stress disorder in children may be "a marked change in orientation toward the future . . . includ[ing] the sense of a foreshortened future."<sup>59</sup>

In general, the more intense a trauma is, and the longer it lasts, the more likely it is to result in post-traumatic stress disorder.<sup>60</sup> For children, traumatic events experienced before the age of eleven are three times more likely to result in post-traumatic stress disorder than such events experienced after age twelve.<sup>61</sup> Trauma in the early childhood has a high risk of severing significant bonds of trust for the child.<sup>62</sup> This loss of trust leads to a lost feeling of security.<sup>63</sup>

Violence in the inner-city threatens the children's schools, their communities and often their homes.<sup>64</sup> The children spend their days trying to avoid dangerous situations.<sup>65</sup> No "safe" place exists for the youths. They not only lose their sense of security in their environment, but they also experience a general sense of loss in their being.<sup>66</sup> Inner-city children experience the deaths and injuries of relatives, friends and neighbors more often than children who live in safer neighborhoods.<sup>67</sup>

Inner-city children also face a challenging identity dilemma of trying to decide who is "friend" and who is "enemy."<sup>68</sup> Children know that the violence in their communities is caused by gang members and that gangs, by bringing drugs into the area, are "bad." Yet they also know that gang

58. See, e.g., GARBARINO ET AL., *supra* note 8, at 81; *Testimony*, *supra* note 23.

59. MANUAL, *supra* note 50, at 249; see also *supra* notes 36 and 37 and accompanying text.

60. Goleman, *supra* note 48, at C1. New research suggests that chronic violence holds even more damaging long-term consequences for children than a single, acute event. Bennett, *supra* note 23, at A1.

61. GARBARINO ET AL., *supra* note 8, at 13.

62. *Id.* at 70.

63. *Id.* at 82-84.

64. *Id.* at 83; see also *supra* note 30.

65. Rules for the children reflect a preoccupation with safety: stay away from the windows, go in the closet or get on the floor when the shooting starts and stay together all the time. *Id.* at 83.

66. They experience "loss of people (death), loss of physical capacity (injury to people), loss of protection (including loss of adult's ability to protect a child and loss of safe places to retreat), loss of control and loss of hope (diminished future orientation)." *Id.* at 84. See generally *id.* at 84-94.

67. *Id.* at 85.

68. See generally *id.* at 94-99.

members are family members—if not their own, then a friend's or a neighbor's. They must decide who to trust.<sup>69</sup>

Currently, a whole generation of young children are growing up suffering disastrous effects from the exposure to the chronic violence present in our inner-city communities. As a group, the generation is being psychologically abused every day. Their future is virtually being written for them. According to Dr. Bruce Perry, Director of the University of Chicago's Center for the Study of Childhood Trauma, "[i]f these poor kids who live in the inner-city are continually exposed to violence when they are developing, their options are going to be so limited that, even if they are given equal opportunity, they will still be at a disadvantage."<sup>70</sup>

The inner-city children are victims of the conditions surrounding them. They are not to blame, yet they are the ones suffering. Many of these children suffer from a disorder which has long-term consequences.<sup>71</sup> Although they are children today, they will be the adult members of our society in ten to

69. The struggle of deciding between "friend" or "foe" is demonstrated:

Juan is twelve and lives with his family in a neighborhood laced with gangs, drugs and violent crime. His two older brothers, one of whom is currently in jail and waiting trial on breaking and entering charges, belong to a prominent Chicago gang. Juan's brother is his hero. He always has money, expensive cars and girlfriends. However, the most important role his brother plays is that of protector, shielding Juan and his family from an abusive father.

Although Juan realizes the danger of drugs, he must deny this reality to maintain a positive image of his brother, who provides critical physical and emotional support. Children of gang families acknowledge the crimes of rival gang members, but psychologically dismiss the infractions committed by members of their own families.

GARBARINO ET AL., *supra* note 8, at 95.

70. Curry, *supra* note 47, at C23 (quoting Dr. Perry); *see also* GARBARINO ET AL., *supra* note 8, at 3 ("Children who are poor are already in the danger zone, where preventing the further accumulation of risk becomes imperative.").

71. In a recent study, two University of Alabama researchers looked at the lives of 221 black children and teenagers in eight Birmingham neighborhoods. Forty-five percent of the group suffered from multiple symptoms of post-traumatic stress disorder. As one researcher commented:

If we had an infectious disease outbreak tomorrow with forty-five percent of an entire school or neighborhood showing disease symptoms, we certainly would not allow it to go unchecked. Just because the signs and symptoms of post-traumatic stress disorder are harder to see does not mean their effect is not as grave.

Colman McCarthy, *For Grim Rapper, Hatred is a Cash Crop*, WASH. POST, June 23, 1992, at C10.



fifteen years. What type of person will a child in this environment grow to be?

The State's response to this matter is inadequate. If this situation of continual violence were occurring inside the four walls of a youth's home, rather than in the community-at-large, the State's Department of Public Welfare would be involved. It is highly probable that the child would be removed from the home due to the constant danger to his health, safety and mental well-being.<sup>72</sup>

The next section will argue that the State owes an affirmative duty of protection to the children in the inner-city housing projects from the community violence present. The inner-city child's "health, safety and mental well-being," like that of the child in the abusive home, is under constant threat, due to the conditions in the community. The section will explore the *DeShaney* decision, along with an analysis of its "special relationship" test and its inherently ambiguous result. This current test ought to be refined and expanded to include a State's duty to the children living in the inner-city housing projects. These children deserve certain protections and enforceable rights.

Additionally, upon a historical reading of the Fourteenth Amendment,<sup>73</sup> a constitutional affirmative duty of protection can be inferred. Originally, the Fourteenth Amendment encompassed governmental protections to citizens both from governmental abuses and from abuses by other private citizens.<sup>74</sup> Contrary to recent judicial sentiment,<sup>75</sup> "positive"

72. See, e.g., IND. CODE ANN. § 31-6-4-3 (West Supp. 1991) (reprinted *supra* note 4). See generally PARENTS, *supra* note 3, at 52-82; NEGLECT, *supra* note 3, at 25-27 (provides a Table of the fifty states and their grounds for determining child neglect).

73. The Fourteenth Amendment states, in part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. art. XIV, § 1.

74. See generally Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991).

75. See, e.g., *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983) (Posner, J.) (simply because a defendant is a police officer, whose course of duties includes rescuing people in danger, a "mere failure to rescue" does not become actionable) ("[T]he Constitution is a charter of negative rather than positive liberties." *Id.* at 1203.). "Negative" rights are those which

rights, such as a duty of protection, play a role in our Constitution and should continue to do so, especially in the area of child protection. Children hold a special place in our society.<sup>76</sup> It is the State's responsibility, as the sovereign, to acknowledge this special position.

## II. THE STATE'S AFFIRMATIVE "DUTY OF PROTECTION"

In 1867, a congressional representative stated, "The first duty of the Government is to afford protection to its citizens."<sup>77</sup> Since this statement, many doubts have surfaced regarding whether or not our government actually has any duty to protect individuals from the violence of private parties. Over one hundred years later, the 1989 *DeShaney* decision is illustrative.

### A. *DeShaney v. Winnebago County Department of Social Services*<sup>78</sup>

In January 1982, the Winnebago County Department of Social Services (DSS) received its first complaint that Joshua DeShaney, then three-years-old, had been hit previously and "was a prime [candidate] for child abuse."<sup>79</sup> After interviewing Joshua's father, DSS decided not to pursue the matter further. In January 1983, Joshua was admitted to the hospital for the first time with multiple bruises and abrasions. Because the attending physician suspected child abuse, DSS obtained a court order placing Joshua in the temporary custody of the hospital. Within days, a "Child Protective Team" convened to review Joshua's situation. The Team determined that there was insufficient evidence of child abuse. Consequently, Joshua was released to his father's custody, along with recommendations for Joshua to become involved in a preschool program,

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provide protections to the citizens from the government. Conversely, "positive" rights are those which dictate that not only must the State refrain from violating citizens' rights, but that it also must "affirmatively promote their welfare through intervention in the economy and through insuring a minimum level of well-being to all." MARY ANN GLENDON, *RIGHTS TALK* 99 (1991). Posner's viewpoint that our Constitution espouses only negative liberties, however, is often challenged. See generally Heyman, *supra* note 74; Aviam Soifer, *Moral Ambition, Formalism, and the "Free World" of DeShaney*, 57 GEO. WASH. L. REV. 1513 (1989).

76. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944).

77. CONG. GLOBE, 39th Cong., 2d Sess. 101 (remarks of Rep. Farnsworth) (debating Reconstruction Act of 1867), quoted in Heyman, *supra* note 74, at 507.

78. 489 U.S. 189 (1989).

79. *Id.* at 192.

for his father to obtain some counseling and for his father's girlfriend to move out of the home. Joshua's father voluntarily agreed to these recommendations.<sup>80</sup>

Over the next fifteen months, DSS received several reports from the local hospital and various individuals that Joshua was being seriously abused, yet the DSS caseworker concluded there was no basis for DSS action. The caseworker dutifully recorded each of her visits to the DeShaney home, together with her observations that Joshua's father was not complying with the voluntary agreement. In addition, she noted her continuing suspicions that someone in the household was abusing Joshua. Even after Joshua's father told the caseworker on two consecutive home-visits that Joshua was too ill to see her, DSS failed to take action.<sup>81</sup>

In March 1984, Joshua's father beat him so severely that Joshua suffered massive brain damage, leaving him forced to spend the remainder of his life confined to an institution for the profoundly retarded.<sup>82</sup> Joshua's father was subsequently tried and convicted of child abuse. Joshua's mother, on behalf of Joshua, brought a federal action against DSS, the caseworker and her supervisor, under 42 U.S.C. 1983<sup>83</sup>, alleging Fourteenth Amendment due process violations.<sup>84</sup> The District Court granted summary judgment for the state actors, and the Court of Appeals for the Seventh Circuit affirmed.<sup>85</sup>

The Supreme Court held that DSS's failure to protect Joshua from his father did not violate the Due Process Clause, thereby upholding the lower court's decision.<sup>86</sup> The Court held that while the Constitution forbids the State itself to vio-

80. *Id.*

81. *Id.* at 192-93.

82. *Id.* at 193.

83. 42 U.S.C. 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

*Id.*

84. 489 U.S. at 193.

85. *DeShaney v. Winnebago County Dep't of Social Services*, 812 F.2d 298 (7th Cir. 1987) (Posner, J.). Ironically, Judge Posner is the same judge who wrote the opinion in *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983), with its oft-quoted phrase that the "Constitution is a charter of negative rather than positive liberties." *See supra* note 75.

86. 489 U.S. at 194.

late an individual's rights to life, liberty, and property without due process, the Constitution imposes no duty upon the State to ensure that an individual's interests are not violated by private parties.<sup>87</sup> Consequently, despite Joshua's dependence upon DSS and their involvement with his case, because the state actors did not strike the final damaging blow, they were not responsible for Joshua's injuries, nor did they owe him any special protections.<sup>88</sup>

The *DeShaney* Court held that a duty to protect will arise only when the individual is in some sort of "special relationship" with the State.<sup>89</sup> This "special relationship" is never truly defined in the opinion. At first glance, it appears the test is whether or not the individual is in the actual physical custody of the State, such as with incarcerated prisoners<sup>90</sup> or with involuntarily-committed mental patients<sup>91</sup>. The Court looks to the limits which the State has imposed on the individual's "freedom to act on his own behalf."<sup>92</sup> The Court then steps beyond the bounds of physical custody present in incarceration and institutionalization and proceeds to include "other similar restraint[s] of personal liberty."<sup>93</sup> Even later in the opinion, the Court also appears to include in the special relationship test situations where the individual is injured as a result of some "state-created danger," regardless of any actual physical custody.<sup>94</sup>

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87. *Id.* at 195.

88. It did not seem to matter that the caseworker had even documented in Joshua's file that someday she was "going to get a phone call that Joshua was dead." *Id.* at 209 (Brennan, J., dissenting).

89. *Id.* at 198.

90. *Id.* (citing *Estelle v. Gamble*, 429 U.S. 97, 103-104 (1976) (State must provide adequate medical care to incarcerated prisoners because the prisoners are unable "by deprivation of [their] liberty to care for [themselves]")).

91. *Id.* at 199 (citing *Youngberg v. Romeo*, 457 U.S. 307, 314-25 (1982) (due process requires the State to provide involuntarily-committed mental patients with such services as are necessary to ensure their "reasonable safety" from themselves and others)).

92. *Id.* at 200 ("The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.").

93. *Id.* ("[I]t is the State's affirmative act of restraining the individual's freedom to act on his own behalf — through incarceration, institutionalization, or *other similar restraint of personal liberty* — which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interest against harms inflicted by other means.") (emphasis added).

94. *Id.* at 201 ("While the State may have been aware of the dangers

Since the *DeShaney* decision, the circuit courts have found themselves in a quandary as to how to apply these nebulous rules of "special relationship." For instance, in defining what encompasses State "custody," the Third, Seventh, and Tenth Circuits have split from the Fifth Circuit regarding whether or not compulsory school attendance laws place children in a position of "functional" state custody while the children are attending school.<sup>95</sup> Similarly, other types of cases, not involving a school situation, experience difficulty with the special relation-

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that Joshua faced in the free world, *it played no part in their creation, nor did it do anything to render him any more vulnerable to them.*") (emphasis added). The Court concludes that although DSS initially removed Joshua from his father's custody and then returned him, the State "placed [Joshua] in no worse position than that in which he would have been had [the State] not acted at all." *Id.* The above two statements suggest that had the State created the danger, Joshua might have won on the judgment even though he was not in custody at the time of the injury. *Accord* *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992).

95. See *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364 (3d Cir. 1992) (en banc) (compulsory school attendance laws do not create special relationship between public school officials and students that gives rise to affirmative duty, under the Due Process Clause, to protect students from sexual abuse by fellow students, even where the abuse has been brought to the attention of the school officials). The Third Circuit stated:

[P]laintiffs' allegations are insufficient to show, as required under *DeShaney*, that the school defendants either impermissibly limited the freedom of the plaintiffs to act on their own behalf, or barred their access to outside support. Nor do they demonstrate that defendants violated a constitutional duty by creating or exacerbating the danger posed by the student defendants.

*Id.* at 1376. See also *Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992) (wrongful death action; child died from strangulation after he was caught on bandana in cloakroom, which, as the complaint alleged, occurred as a direct result of teacher's failure to supervise her students) (court held that state compulsory school attendance law did not so restrain the child's liberty for the state to incur, under the Due Process Clause, an affirmative duty to protect children attending state-run schools from constitutional deprivations by private actors); *J.O. v. Alton Community Unit Sch. Dist. No. 11*, 909 F.2d 267 (7th Cir. 1990) (no duty to protect school children from sexually abusive teacher); cf. *Doe v. Taylor Indep. Sch. Dist.*, 975 F.2d 137 (5th Cir. 1992) (compulsory school attendance laws create special relationship, giving rise to a Fourteenth Amendment Due Process affirmative duty to protect students from sexual abuse by teachers). The Fifth Circuit stated:

[T]he state acquire[s] a duty to protect a child when it renders the guardian of the child powerless to act on the child's behalf. . . . When the state has in some significant way separated the child from the social milieu, the state assumes a corresponding duty to provide that protection, for a child is ordinarily incapable of fending for himself. . . . Parents, guardians, and the children themselves have little choice but to rely on the school officials for some measure of protec-

ship test.<sup>96</sup> The ambiguous special relationship test in *DeShaney* needs to be refined and expanded to include both state action and inaction when the State has knowledge of the child's dangerous situation and exercises deliberate indifference in regards to the danger.<sup>97</sup>

Youth in our society hold a special position. They are a protected class.<sup>98</sup> This protection is built upon the premise that children are unable to protect themselves and that they need the State's assistance.<sup>99</sup> The State extends protection to children from abuse and neglect at the hands of their parents or guardians.<sup>100</sup> The inner-city children need a similar protection from their community environment. Currently, "in one

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tion and security while in school and can reasonably expect that the state will provide a safe school environment.

*Id.* at 146-47.

96. See, e.g., *Estate of Sinthasomphone v. City of Milwaukee*, 785 F. Supp. 1343 (E.D. Wis. 1992) (complaint adequately alleged special relationship between three police officers and naked, beaten boy whom they encountered when responding to emergency call, so as to allow officers to be held liable for violation of boy's constitutional rights when they failed to assist him, by asserting that he showed fear of the person to whom they returned him and that he was briefly taken into police custody before being returned to the custody of the person whom he feared [Jeffery Dahmer]).

97. See generally Thomas A. Eaton & Michael Wells, *Governmental Inaction as a Constitutional Tort: DeShaney and Its Aftermath*, 66 WASH. L. REV. 107 (1991).

98. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 219-20 (1981) ("[T]he children who are plaintiffs in these cases are special members of this [ ] class . . . . [They] can affect neither their parents' conduct nor their own status." *Id.*) (statute withholding state funds to local school districts for the education of children who were not "legally admitted" into the United States, and which authorizes local school districts to deny enrollment to such children, violates the Equal Protection Clause of the Fourteenth Amendment).

99. See, e.g., *Schall v. Martin*, 467 U.S. 253, 265 (1984) (preventive detention of juveniles serves a legitimate state interest of protecting society from pretrial crime and is consistent with the Due Process Clause of the Fourteenth Amendment). The Court in dictum stated that:

[J]uveniles, unlike adults, are always in some form of custody . . . . Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*.

*Id.* Ironically, the *Schall* opinion was written by Chief Justice Rehnquist who later authors the *DeShaney* opinion, stating that before any duty as *parens patriae* is owed to Joshua, there must be some specific text in the Due Process Clause. In 1984, children are "always in some form of custody," but in 1989, the children must have some sort of "special relationship" with the State before any affirmative duties of protection are owed to them. *Accord* Soifer, *supra* note 75, at 1520-21.

100. See *supra* notes 4 and 72.

year, there are more children that are at risk of developing post-traumatic stress disorder than there are from all the years of Vietnam."<sup>101</sup> This is abuse and neglect in the extreme.

With the *DeShaney* decision, the American justice system failed to impose a legal duty, on either the individual caseworker or on the State agency, to come to the aid of a person (a child) in danger, where that aid could be accomplished without risk.<sup>102</sup> Chief Justice Rehnquist, writing for the majority, states that the "[due process] clause is . . . not a guarantee of certain minimal levels of safety and security."<sup>103</sup> This interpretation is inconsistent with the history and the original purpose of the Fourteenth Amendment.

### B. *History and Purpose of the Fourteenth Amendment*<sup>104</sup>

The Fourteenth Amendment was enacted to provide individuals with the fundamental rights, including the right to

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101. Curry, *supra* note 47, at C23 (quoting Dr. Bruce Perry) (emphasis added). This statement includes those children who are exposed to violent events and those who suffer from sexual and physical abuse as well.

102. Most European countries *do* impose such a duty. Some countries even recognize their government's duties to its citizens in their country's constitution. GLENDON, *supra* note 75, at 77, 99; see also Mary Ann Glendon, *Rights in the Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 523-24 (1992) [hereinafter Glendon, *Twentieth-Century Constitutions*]. The Swedish Instrument of Government, for example, in a section entitled "The Basic Principles of the Constitution," provides:

Art. 2 . . . The personal, economic and cultural welfare of the individual shall be fundamental aims of the activities of the community. In particular, it shall be incumbent on the community to secure the right to work, to housing and to education and to promote social care and security as well as a favorable living environment.

*Id.* at 527-28. Similar provisions appear in the French, Greek, Italian and Spanish constitutions. *Id.* at 528. Admittedly, these "rights" are often programmatic ideals, awaiting legislative or executive action in order to become enforceable individual rights. *Id.* The point is that these European countries raise the importance of these social goals to the constitutional level, while in the United States, recognizing such goals is left to the statutory discretion of the federal and the individual state legislatures. GLENDON, *supra* note 75, at 100. Not surprisingly, constitutional language has a "powerful effect on how we imagine the role and the ends of government . . . [I]t keep[s] the responsibilities—of citizens and the state alike—prominently in view, along with rights." *Id.* at 100-01.

103. 489 U.S. at 195.

104. See Heyman, *supra* note 74, for a more detailed and thorough discussion of the history and purpose of the Fourteenth Amendment and its relationship to the duty of protection. See also Reply Brief for Petitioners at App. 15, *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989) (No. 87-154) (citing and containing Edward Keynes, *The Fourteenth*

protection, which the citizens already possessed under general constitutional theory,<sup>105</sup> but that the states were not enforcing adequately.<sup>106</sup> The concept of protection was woven inextricably with the status of the individual as a citizen.<sup>107</sup> It was not until the passage of the Thirteenth Amendment in 1865, however, that the status of "citizen" was extended to blacks.<sup>108</sup> In the South, following the Emancipation Proclamation and the congressional ratification of the Thirteenth Amendment, resistance abounded against extending any sort of protections to these new citizens, who were previous slaves.<sup>109</sup> Violence was commonplace.<sup>110</sup>

Against this background, the federal government determined that it could no longer idly sit by. Reports of the

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Amendment, 42 U.S.C. § 1983, and State Inaction: Did the Authors of The Enforcement Act of 1871 Intend Civil Liability for The States' Failure to Protect Individual Rights? (unpublished manuscript).

105. Heyman, *supra* note 74, at 509. Until the time of the Fourteenth Amendment, the federal government's role was to "serve general and national purposes," and the states were the "immediate and visible guardian[s] of life and property." *Id.* at 525 (citing THE FEDERALIST No. 45, at 234 and 238 (James Madison) (Max Beloff ed., 2d ed. 1987)). It is for this reason that the federal Bill of Rights originally did not contain a guaranteed right of protection similar to that of certain state constitutions. *Id.* See, e.g., MASS. CONST. of 1780, pt. I, art. X:

Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary; but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people.

*Id.* (cited in Heyman, *supra* note 74, at 524).

106. Heyman, *supra* note 74, at 509, 547-50.

107. *Id.* at 531. See generally JAMES KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870 (1978).

108. Heyman, *supra* note 74, at 545. Prior to the Thirteenth Amendment, the Supreme Court had even stated that blacks "had no rights that whites were bound to respect." *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

109. Heyman, *supra* note 74, at 548. Many Southern legislatures, as a means of circumventing the Emancipation Proclamation and the Thirteenth Amendment, enacted "black codes" which restricted the rights of blacks in various ways, for instance, their rights to testify in court, to hold property and to dispose of their own labor. *Id.* (citing ERIC FONER, RECONSTRUCTION, 1863-1877, at 198-202 (1988)).

110. *Id.* at 549 ("Local officials and communities were either not willing or not able to enforce peace and order . . . . In many parts, general lawlessness prevailed.") (citing S. EXEC. DOC. No. 2, 39th Cong., 1st Sess. 14, 20 (1865)).



conditions in the South were printed and distributed to the congressional Joint Committee on Reconstruction.<sup>111</sup> The Committee concluded that in order to protect the freed blacks from discrimination and violence, it was "necessary to implement federal guarantees of protection, either through legislation or through constitutional amendment."<sup>112</sup> Consequently, the meaning of this "protection" which the federal government intended to provide, through the Fourteenth Amendment and the subsequent Civil Rights Act, must be understood in the context of the common law tradition and the social contract theory, upon which our Constitution originated.<sup>113</sup>

The right to protection is embedded firmly in English common law history. According to the writings of Sir Edward Coke, the relationship between the sovereign and subject is defined as a "mutual bond and obligation."<sup>114</sup> Under this arrangement, the subject owed his allegiance to defend the nation, and the sovereign owed the subject the duty of governance and protection, as consideration for the subject's loyalty.<sup>115</sup> This duty of protection included protection from others' violence<sup>116</sup> and was enforceable through both the King's laws and the legal process.<sup>117</sup>

A duty of protection is also found in the Anglo-American theories of natural rights and the social contract. John Locke was a major proponent of these theories which were based

111. *Id.* at 550 (citing REPORTS OF ASSISTANT COMM'RS OF FREEDMEN'S BUREAU, S. EXEC. DOC. NO. 27, 39th Cong., 1st Sess. (1866); REPORT OF THE JOINT COMM. ON RECONSTRUCTION, H.R. REP. NO. 30, 39th Cong., 1st Sess. (1866)).

112. *Id.*

113. *Id.* at 520-21 (citing BERNARD BILLYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 22-54 (1967); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 6-10 (1969)).

114. *Id.* at 513 (citing Calvin's Case, 7 Co. Rep. 1a, 4b-5a, 77 Eng. Rep. 377, 382 (1608)). For Coke, this relationship arose from the law of nature. Over time, however, political theorists viewed the relationship as contractual, based more on consent than some immutable law. *Id.* at 514. See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND \*233 (St. George Tucker ed., 1803 & photo. reprint 1969).

115. Glendon, *Twentieth-Century Constitutions*, *supra* note 102, at 526.

116. Heyman, *supra* note 74, at 513. "The object of the King's protection is to ensure that his subjects in all places may be protected from violence, and that justice may equally be administered to all his subjects." *Id.* at 513 n.20 (citing Calvin's Case, 7 Co. Rep. 1a, 8a, 77 Eng. Rep. 377, 386 (1608)). "The subject's right to protection entails 'the safetie of his person, servants and goods, lands and tenements, whereof he is lawfully possessed, from violence, unlawful molestation or wrong'." *Id.* (citing 1 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND \*130a).

117. *Id.* at 513.

upon the individual's consent to form a society, which in turn existed for the preservation of the individual's natural rights.<sup>118</sup> The individual's association with the State was entirely voluntary, resulting from the individual's inability to provide protection for himself. Consequently, the individual agrees to "be regulated by the Laws made by the Society" in exchange for "the labour, assistance, and society of others in the same Community" and for the "*protection from its whole strength.*"<sup>119</sup>

Sir William Blackstone, in the eighteenth century, combined Coke's common law doctrine of allegiance and protection and Locke's theory of natural rights and the social contract into the mainstream of English constitutional theory.<sup>120</sup> Blackstone revealed the structure of "positive and negative" liberties<sup>121</sup> by exploring Coke's and Locke's theories. When a society is formed to obtain the advantages of association with others, the benefits are "positive" in nature.<sup>122</sup> One of the foremost of these benefits is the protection of one's rights by the community.<sup>123</sup> This extends to protection not only from governmental oppression<sup>124</sup> but also from private aggression.<sup>125</sup>

These theories of Coke, Locke and Blackstone greatly influenced American thought prior to and during the Revolutionary period.<sup>126</sup> One of the basic tenets of the American Whig ideology was that protection was a "primary purpose of

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118. JOHN LOCKE, TWO TREATISES OF GOVERNMENT, Bk. II, § 4 (Peter Laslett ed., 1988) (3d ed. 1698).

119. Heyman, *supra* note 74, at 515 (emphasis in original) (citations omitted).

120. *Id.* at 516. See 1 BLACKSTONE, *supra* note 114.

121. See *supra* note 75.

122. Heyman, *supra* note 74, at 518.

123. *Id.* As Blackstone expressed it:

[T]he principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature, but which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities.

*Id.* at 518 n.53 (citation omitted).

124. See, e.g., the provisions contained in the Magna Carta and the American Bill of Rights. *Id.* at 533.

125. These protections are provided by civil and criminal laws regarding, for example, abortion, mayhem and duress, homicide, false imprisonment, assault and battery, and defamation. *Id.* at 533 n.158 (citations omitted).

126. *Id.* at 520.

government."<sup>127</sup> The concept of "protection" encompassed three elements:

To be under the protection of the law meant to have the status of a freeman and a citizen . . . . Protection [also] meant that the law recognized and secured an individual's rights to life, liberty, and property . . . . Finally, protection referred to the specific ways in which government prevented violations of substantive rights, or redressed and punished such violations.<sup>128</sup>

The Fourteenth Amendment was enacted as a guarantee of the above listed elements of the right to protection for American citizens.<sup>129</sup> The first section of the Amendment secured the elements of protection in three overlapping clauses: the Privileges and Immunities Clause, the Due Process Clause, and the Equal Protection Clause.<sup>130</sup>

In the late nineteenth century, when the Supreme Court began to expand its interpretation of the Fourteenth Amendment to include substantive rights, it relied on the Due Process Clause.<sup>131</sup> Similarly, the controversy in *DeShaney* also focused on the Due Process Clause. Judge Posner, in the lower court, and Chief Justice Rehnquist, in the Supreme Court, however, reject the above analysis of the history and the purpose of the Fourteenth Amendment.<sup>132</sup> Consequently, they also reject any affirmative duty of the State to protect its citizens, except in the limited number of exceptions.<sup>133</sup> This result is unfortunate. *Child* citizens, much more than adult citizens, are in dire need of the State's forgotten protection. It is in the children's best

127. *Id.* at 521 (citation omitted).

128. *Id.* at 530-31.

129. See *supra* notes 105 to 113 and accompanying text.

130. Heyman, *supra* note 74, at 554; see also *supra* note 73 for the text of section one of the Amendment.

131. See Heyman, *supra* note 74, at 557. It is beyond the scope of this article to provide a history of Fourteenth Amendment Due Process cases since the Amendment's enactment.

132. See, e.g., 489 U.S. 189, 195 (1989). The Court stated that: [N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security . . . . Nor does history support such an expansive reading of the constitutional text.

*Id.* (emphasis added).

133. See *supra* notes 89 to 94 and accompanying text.

interest and in the State's best interest towards its future generations to recognize the State's responsibility immediately.<sup>134</sup>

### C. Claiming "Responsibility" for the Inner-City Children

As demonstrated in Part I of this article, groups of inner-city children are suffering developmental, physiological and psychological harms as a result of and as a reaction to the violence in their surrounding communities. Yet, in the context of our Constitution and its delegation of rights, a "kind of blind spot seems to float across our political vision where the communal and social . . . dimensions of a problem are concerned."<sup>135</sup>

At the time of our Founding Fathers, children were raised in families that formed tight-knit communities and which were economically interdependent with one another.<sup>136</sup> The Founders surely could have neither foreseen nor anticipated the virtual breakdown which is occurring in both the American family and the American community.<sup>137</sup> Had they been supplied with

134. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 788-89 (1982) (Rehnquist, J., dissenting) (dictum) ("A stable, loving homelife is essential to a child's physical, emotional, and spiritual well-being. It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens.").

135. GLENDON, *supra* note 75, at 112. For example, when Detroit's Poletown community mounted a campaign to stop the destruction of their neighborhood, they found that the only vocabulary available to them in terms of "rights" was individual rights. The Poletown residents had no effective legal terminology to convey to the legislature and to the judges the other losses which the residents would suffer: shared memories and hopes, roots, a neighborhood life and a sense of place. *Id.* at 111.

136. *Id.* at 115-16.

137. The United States Congress has issued the following findings in its establishment of a National Center on Family Resource and Support Programs:

- (1) fundamental changes in the demographics and economics of family life in the United States over the past twenty years have had a profound effect on children and their parents;
- (2) since 1966, the number of women working outside the home has increased by 92% and the number of two earner families has increased by over 50%;
- (3) 61% of the children born today will live in a single-parent family before reaching the age of twenty, with one out of every three single female heads of households living on income below the Federal poverty level;
- (4) one out of every four children under the age of six in the United States currently lives below the Federal poverty level . . . .

42 U.S.C. § 12351(a) (1990).

foresight, the Founding Fathers may have drafted the Constitution differently. Perhaps they would have provided "protect[ion] for the social environments — families, neighborhoods . . . and other communities of obligation — that traditionally have provided us with our principal opportunities to observe, learn, and practice self-government as well as government of the self[.]"<sup>138</sup>

The Founding Fathers depended upon families and customs to "preserve and promote the virtues required by our experiment in ordered liberty."<sup>139</sup> The idea of civil society did not enter into the "mainstream of political thought" because the Founding Fathers assumed these institutions would always exist.<sup>140</sup> The institutions are now collapsing. In adherence to the history and purpose of the Fourteenth Amendment, it is the duty of the State to offer protection to its citizens. The future of our nation depends upon the State taking action.<sup>141</sup>

The next section provides a legislative and judicial plan for the States to adopt toward recognition of their important responsibility in the protection of the inner-city children. After all, "[t]he ultimate test of a moral society is the kind of world it leaves to its children."<sup>142</sup>

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138. GLENDON, *supra* note 75, at 120.

139. *Id.* at 116.

140. "The social environment, like the natural environment, was simply there. In both respects, we seemed endowed with inexhaustible riches." *Id.* at 117.

141. According to the Children's Defense Fund, the following are "Moments in America:"

Every 35 seconds an infant is born into poverty.

Every 14 minutes an infant dies in the first year of life.

Every 31 seconds an infant is born to an unmarried mother.

Every 55 seconds an infant is born to a mother who is not a high school graduate.

Every 32 seconds a 15- to 19-year-old woman becomes pregnant.

Every 64 seconds an infant is born to a teenage mother.

Every 5 minutes an infant is born to a teenage mother who already had a child.

Every 14 hours a child younger than 5 is murdered.

Every 5 hours a 15- to 19-year-old is murdered.

Every 2 hours a 20- to 24-year-old is murdered.

Every 2 seconds of the school day a public school student is suspended.

Every 10 seconds of the school day a student drops out of school.

AMERICA'S CHILDREN, *supra* note 7, at 5. See generally *The Children of the Shadows*, Series, N.Y. TIMES, Apr. 4, 6, 8, 11, 13, 18, 20, 22, 25, 1993, at A1 (detailing the lives of ten of America's inner-city youth).

142. SYLVIA ANN HEWLETT, *WHEN THE BOUGH BREAKS* 36 (1991).

### III. A PROPOSAL FOR THE STATES

As the United States Supreme Court writes, "[a] State may, through its legislatures and courts, impose such affirmative duties of care and protection upon its agents as it wishes."<sup>143</sup> Pursuant to this dictate, the States ought to take affirmative action, both legislatively and judicially, to protect the interests of the inner-city children.

#### A. *Legislative Action*

Through child protection statutes, the State legislatures have demonstrated their commitment to protecting children from the abuse and neglect which occurs within the confines of the child's own home. These statutes are to be commended, however, they are not enough. Within the inner-city, groups of youth are suffering from the devastating effects of community violence.<sup>144</sup> These children, the same children who are offered the State's protection from abuse and neglect within their own home, deserve similar protections from the effects and consequences of community violence.<sup>145</sup>

In the realm of children's rights, action can be taken on three levels: international, national, and state. Internationally, for example, the United Nations adopted in November 1989 the Convention on the Rights of the Child.<sup>146</sup> This is a "unique human rights treaty in that it protects not only the child's civil and political rights but that it also extends protection to the child's economic, social and cultural rights and humanitarian rights."<sup>147</sup> In its Preamble, the Convention states that the child "for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding."<sup>148</sup> Additionally, the Preamble states that "in all countries in the world there are children living in exceptionally difficult

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143. DeShaney, 489 U.S. at 202.

144. See *supra* part I.B.

145. "In theory . . . perhaps the most effective, most direct way of establishing a right . . . is by legislation." Florence Wagman Roisman, *Establishing a Right to Housing: A General Guide*, 25 CLEARINGHOUSE REV. 203, 210 (July 1991). Although Roisman's article concerns a "right to housing," her analysis applies to establishing a "right" in any area.

146. Convention on the Rights of the Child, U.N. Doc. A/44/736 (1989) [hereinafter Convention].

147. Cynthia Price Cohen, *Introductory Note*, 28 INT'L LEGAL MATERIALS 1448, 1448 (1989).

148. Convention, *supra* note 146, pmb1.

conditions, and that *such children need special consideration.*"<sup>149</sup> Internationally, many countries are recognizing the important position children hold in our world.<sup>150</sup>

Although the United States has not ratified the Convention,<sup>151</sup> federal legislation has been passed recently, the Claude Pepper Young American's Act, which recognizes children as the "most valuable resource of the United States."<sup>152</sup> This Act establishes, within the Department of Health and Human Service, an Administration on Children, Youth, and Families.<sup>153</sup> In addition to establishing guidelines for awarding grants for programs, the Act calls for a 1993 White House Conference on Children, Youth, and Families.<sup>154</sup> One of the purposes of this Conference is to "develop such specific and comprehensive recommendations for executive and legislative action as may be appropriate to improve the well-being of youth and their families."<sup>155</sup> Although no date has yet been scheduled for the

149. *Id.* (emphasis added).

150. Since the U.N.'s adoption of the Convention in 1989, 126 countries have ratified it. Only six countries refuse to ratify: Iran, Iraq, Libya, Cambodia, South Africa and the United States. Ellen Nakashima, *Coalition Seeks More Protection For Children In Legal System*, HARTFORD COURANT, Dec. 28, 1992, at C1. It is also necessary to remember that unlike our own country, many of these countries which have ratified the Convention also recognize the importance of children in their country's constitution. *See supra* note 102.

151. *See supra* note 150.

152. 42 U.S.C. § 12301 (1990) (effective date October 1, 1990). This Act states in pertinent part the following "Findings":

- (1) children and youth are inherently the most valuable resource of the United States;
- (2) the welfare, protection, healthy development, and positive role of children and youth in society are essential to the United States;
- ...
- (5) the family is the primary caregiver and source of social learning and must be supported and strengthened;
- (6) when a family is unable to ensure the satisfaction of basic needs of children and youth it is the responsibility of society to assist such family; and
- (7) it is the joint and several responsibility of the Federal Government, each State, and the political subdivisions of each State to assist children and youth to secure, to the maximum extent practicable, equal opportunity to full and free access to —
  - (A) the best possible physical and mental health;
  - (B) adequate and safe physical shelter. . . .

*Id.*

153. *Id.* § 12311.

154. *Id.* § 12372(a).

155. *Id.* § 12372(b)(5).

Conference, when it occurs, representatives of the following sectors of society are to be included: federal, state, and local governments; professionals working in the field of children; and representatives of the general public, particularly young individuals.<sup>156</sup>

The States in our nation ought to follow the lead of the United Nations and the United States Congress which, in both the international and the national spheres, have recognized the importance of children. The States should take specific legislative actions to demonstrate to the American citizens how important the children of our inner cities are to our society.<sup>157</sup> First, the State legislature should pass laws which include findings recognizing the child's special position.<sup>158</sup> Second, specific rights should be granted and laws should be passed which reflect the child's protected status and are tailored toward that end.<sup>159</sup>

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156. *Id.* § 12372(c)(1).

157. One organization has stated that:

The nation cannot continue to compete and prosper in the global arena when more than a fifth of our children live in poverty and a third grow up in ignorance. And if the nation cannot compete, it cannot lead. If we continue to squander the talents of millions of our children, America will become a nation of limited human potential. It would be tragic if we allowed this to happen.

HEWLETT, *supra* note 142, at 30 (quoting COMMITTEE FOR ECON. DEV., CHILDREN IN NEED: INVESTMENT STRATEGIES FOR THE EDUCATIONALLY DISADVANTAGED (1987)).

158. Not every authority agrees on whether "findings" and "general policy statements" are useful or mere rhetoric. *See, e.g.*, *Hurt v. Philadelphia Housing Authority*, 806 F. Supp. 515, 524 (E.D. Pa. 1992) (broad policy provisions do not create specific rights and are not realistically enforceable by the courts); *cf.* Roisman, *supra* note 145, at 217 ("State statutes . . . which describe a purpose . . . provide a substantial basis for litigation."). Findings combined with specific rights are essential. Rights are necessary for the enforcement mechanism to activate. Findings or general policy statements, alone, on the other hand, make a statement to society and to our citizens that "these things are important to us," which is likewise just as important.

159. *See generally* HEWLETT, *supra* note 142; AMERICA'S CHILDREN, *supra* note 7 (includes recommendations for the federal government, state and local governments, and the private sector on numerous issues affecting children in the United States). It is important to note that:

The problems of many families will not be solved by early intervention efforts, but only by changes in the basic features of the infrastructure of our society. No amount of counseling, early childhood curricula, or home visits will take the place of jobs that provide decent incomes, affordable housing, appropriate health care, optimal family configurations, or integrated neighborhoods where children encounter positive role models.

GARBARINO ET AL., *supra* note 8, at 118.



These laws may take a variety of forms. They may cover wide-scale reforms, such as instituting periodic, systematic "sweeps" of the housing projects to rid the apartments of illegal dwellers and gang members.<sup>160</sup> More police protection could be offered, perhaps by creating a mini police station actually within the housing projects. Gun control laws could be enacted, with more stringent penalties for illegal possession of the firearms.

A certain standard of maintenance of the housing projects could be mandated.<sup>161</sup> Each housing project could be ordered to set aside a percentage of its square area for a children's play area,<sup>162</sup> accessible only to the children and their parents or guardians. As a condition of receiving State monies, structured group activities for the youths could be required. A reasonable curfew for youths under eighteen could be established. The States could offer job-training programs within the projects. Perhaps these programs could be partially corporate-sponsored, and in conjunction, federal tax deductions could be made available to participating companies. It is also important that every State take part in the national effort by sending a representative to the 1993 White House Conference on Children.

Individual child protection statutes demonstrate the importance of the protection of children within their homes. Simply offering protection to children when they are at home, however, negates the importance of the community influences in their lives. According to the history of the Fourteenth Amendment, our Framers envisioned a greater protection. Consequently, in addition to the legislative suggestions described above, the States also ought to act affirmatively, through their judicial role as *parens patriae*, to provide enforceable constitutional rights to the inner-city children.

### B. *Reform of the Parens Patriae Doctrine*

Historically, courts have used the concept of *parens patriae* to intervene in the lives of children who are either being abused and neglected or who are committing delinquent acts,

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160. See *supra* note 42.

161. For instance, a law could dictate that local housing authorities furnish lighting, in working condition, every fifteen feet throughout the housing project. In addition, the State could require that the lights must be protected by some sort of material or cage to prevent the gangs from knocking out the lights. See *supra* note 13.

162. See *supra* note 9 and accompanying text.

whether the acts are criminal or status offenses.<sup>163</sup> In both scenarios, the State may step into the shoes of the parent under the principle of *loco parentis*.<sup>164</sup> *Parens patriae* expresses a state interest which is over and above the interest of a parent.<sup>165</sup> If state action is necessary as an intervention, it is taken in "the best interests of the child." Best interests include "active promotion of the physical, religious, social, and educational development of a young person."<sup>166</sup> Intervention occurs only when it is deemed absolutely necessary.

Children are always first assumed to be best placed with their own parents.<sup>167</sup> A reform of the *parens patriae* doctrine will not disrupt this sanctity of the family. Rather, the proposal calls for an expansion of the existing doctrine to include authority for the State to act in the "best interests" of these inner-city children whose physical, social, and educational development is being thwarted by the presence of chronic community violence. The inner-city youths, like all youths, are protected from abuse and neglect when they are within their home. This protection should not cease simply because children walk out their front door.

Currently, many inner-city children are exhibiting signs of post-traumatic stress disorder,<sup>168</sup> a disorder of such magnitude that previously it was diagnosed predominantly in war veterans who had witnessed actual combat.<sup>169</sup> The clinical consequences for inner-city youth demand a powerful and immediate

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163. Kechin Wang, *The Continuing Turbulence Surrounding the Parens Patriae Concept in American Juvenile Courts (Part I)*, 18 MCGILL L.J. 219, 222 (1972).

164. Ralph A. Weisheit & Diane M. Alexander, *Juvenile Justice Philosophy and the Demise of Parens Patriae*, 52 FED. PROB. 56, 56 (1988).

165. Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205, 218 (1971); accord *Schall v. Martin*, 467 U.S. 253, 265 (1984) (dictum) ("[Children] are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*.").

166. Marge Ritsman-Stree, *More Control Than Care: A Critique of Historical and Contemporary Laws for Delinquency and Neglect of Children in Ontario*, 3 CANADIAN J. WOMEN & L. 510, 512 (Summer-Fall 1989). Although this article specifically discusses laws that pertain to Ontario, Canada, it also provides a detailed discussion of the *parens patriae* framework.

167. See, e.g., *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977) (placement with natural parents is preferred to placement with foster parents); accord *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("[parents'] care custody and management of their child does not evaporate simply because they have not been model parents.").

168. See *supra* part I.B.2.

169. See *supra* note 49 and accompanying text.

response from the State lest the outcomes "perpetuate an ever downward spiral in the succeeding generations."<sup>170</sup> The State ought to assert its judicial *parens patriae* authority and begin to act "in the best interests of the child" as it would if this abuse and neglect were occurring within the four walls of an individual home.

Simply passing statutes, however, is an insufficient solution. This demise of our inner-city communities and the childhoods of the children located there has reached such a proportion that constitutional action is necessary.<sup>171</sup> Consequently, pursuant to the Fourteenth Amendment, an affirmative duty to protect the children ought to be recognized. Once this duty is acknowledged, children or their representatives would have the option of seeking relief under 42 U.S.C. 1983 in the federal courts when their civil rights are violated.<sup>172</sup> The type of relief sought would be mostly injunctive in nature.<sup>173</sup>

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170. GARBARINO ET AL., *supra* note 8, at 99.

171. The Fourteenth Amendment itself was ratified when state legislative actions were not adequately accomplishing their desired end. *See supra* notes 105 to 113 and accompanying text; *see also* A.J. v. Myers, No. 89-1077-CV-W-1, 1990 U.S. Dist. LEXIS 5454, at 16 (W.D. Mo. Apr. 30, 1990) ("Deprivation of a child's constitutional rights necessarily defies quantification.").

172. *See supra* note 83 for the text of 42 U.S.C. § 1983. The following is as an example of how this would work: The suit could be maintained as a class action of children against the State Housing Authority or the police or the local child protective services organization, some "state actor." Once a suit is initiated pursuant to section 1983, the plaintiffs would have to overcome possible "qualified immunity" problems on the part of the state actors. In addition, the plaintiffs would have to prove the state-of-mind standard of "deliberate indifference" on the part of the state actors. *See generally* Eaton & Wells, *supra* note 97. With a State's affirmative duty of protection to children at the constitutional level, plaintiffs will have access to the federal courts, which permits greater monetary damages, if that is the avenue sought, and greater fines for noncompliance of court orders. An additional benefit of raising the duty to the constitutional level is just that — *a constitutional duty*. Greater societal good can be achieved when remedying a constitutional wrong than when merely addressing a state statutory violation.

173. *See, e.g., Myers*, 1990 U.S. Dist. LEXIS 5454, at 12 (suit seeking injunction against juvenile detention facility from "punishing" juveniles and violating their due process rights by way of overcrowding, use of floor mattresses, and confinement conditions injurious to health and safety within the facility). With the proposed reform of the *parens patriae* doctrine, only in the rare instance would plaintiffs seek monetary damages. In the usual instance, plaintiffs would seek injunctive relief for the recognition of their substantive due process rights, such as the right to be free from chronic violence in the inner-city housing project communities. Upon a finding of a violation, the court would then issue an injunction for the state agency or actor to do something, such as install an effective lighting system within the

The children in the inner-city housing projects require protection from the chronic violence which lies outside their apartment door. This responsibility for taking affirmative corrective actions belongs with the State, acting in the child's "best interest" through legislation and a reformed *parens patriae* doctrine.

### CONCLUSION

Children in our inner-city housing projects are growing-up in a war zone. The accumulation of risk factors in their lives is resulting in the psychological and physiological manifestation of post-traumatic stress disorder, a condition previously only seen in war veterans who had witnessed combat. If this disorder were to appear in a youth suffering from the effects of abuse or neglect within the four walls of his or her home, the State, acting under both statutory and *parens patriae* authority, would intervene in the life of that child in order to protect him or her from further abuse and neglect.

The State needs to take similar actions for the inner-city children by taking immediate and remedial legislative and judicial action. Children are a protected class. As such, they are inherently in a "special relationship" with the State. Consistent with the history and the purpose of the Fourteenth Amendment, an affirmative duty is owed to these children to step-in and improve the conditions present in their communities. Chronic violence in the community permeates every aspect of these children's lives, affecting their families, their education and their sense of self, hence also affecting what type of citizen they will mature into. For this reason, the State should have an interest in its present *and* future generations.

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complex, to ameliorate the violation. *See supra* note 161 and accompanying text. A time limit would be given to the state agency or actor, and each day late, the state agency or actor would face a certain amount of daily fine.

