Guilty by Association: What the Decision in *Boston Housing Authority v. Garcia* Means for the Innocent Family Members of Criminals Living in Public Housing in Massachusetts

I. INTRODUCTION

The purpose of this article is to examine the substantial impact that the recent decision in *Boston Housing Authority v. Garcia* will have on the friends and family members of convicted criminals who are living in federally funded public housing in the Commonwealth of Massachusetts.\(^1\) In *Garcia*, the Plaintiff was a longtime tenant with the Boston Housing Authority when two of her sons, who were listed on the official family composition forms, were arrested and charged on separate occasions with possession of an illegal substance.\(^2\) After the Boston Housing Authority brought a lawsuit to enforce her eviction, the housing court judge refused to admit evidence offered by Garcia that she did not know and could not have reasonably known about her sons’ conduct.\(^3\) Ultimately, the Supreme Judicial Court found that the Massachusetts law allowing for an innocent tenant defense was preempted by federal law when Congress passed the Anti-Drug Abuse Act of 1988 (Act).\(^4\)

This case comment will seek to explain the wide-ranging effects of the loss of the innocent tenant defense in Massachusetts. The decision in *Garcia* is an unqualified victory for public housing authorities in Massachusetts, while simultaneously serving as yet another major setback for the innocent family members who did not or could not have known of

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1. 871 N.E.2d 1073 (Mass. 2007).
2. *Id.* at 1075-76.
3. *Id.* at 1075.
the offender’s conduct.5 The real life impact of this decision is that innocent, unaware family members and friends who live with convicted criminals in federally-funded public housing in Massachusetts must now live with the fear of eviction and face the very real possibility of being homeless.

Part II of this case comment will offer a review of the historical development of the innocent tenant defense at both the federal level and within Massachusetts. This historical context is an important first step toward understanding the waves created by Garcia. In Part III, this comment will look at the factual and procedural background of Garcia, as well as the Supreme Judicial Court’s erosion of the innocent tenant defense. Part IV of this comment will compare the recent developments in Massachusetts with the relevant law in other states. The portions of this comment which follow will explore both the increase in power this decision gives to public housing authorities, as well as the adverse effects suffered by the families of convicted criminals. Finally, a summary of the conclusions of the author will be given.6

II. THE HISTORY OF THE INNOCENT TENANT DEFENSE

A. The Case of Spence v. Gormley

Spence v. Gormley was a combination of lawsuits involving racially motivated criminal conduct on the part of household members of tenants of the Boston Housing Authority (Housing Authority).7 As a result, the Housing Authority evicted both offenders, as well as their families, who then brought separate lawsuits challenging the evictions.8 Ultimately, the Supreme Judicial Court upheld the evictions of the tenants, finding that the Housing Authority had sufficient cause.9 Importantly, however, the court

5. Id.
6. This case comment will contain occasional insights, opinions, and personal observations of the author based on his experience working for the legal department of the Boston Housing Authority.
7. 439 N.E.2d 741, 743 (Mass. 1982). The first case involved the eviction of a Boston Housing Authority tenant, Frances Gormley, for her son’s criminal conduct. Specifically, Mark McDonough had, on separate occasions, firebombed a black tenant’s residence, as well as assaulted another black victim who was an employee of the Housing Authority. The eviction of tenant Beatrice Bunting was the subject of the second suit as her son had set off explosives in another’s apartment for racial reasons. Id.
8. Id.
9. Id. at 753. The court reasoned that because the terms of the housing leases specified eviction as a possibility for a family’s failure to live in a peaceful manner or for creating a dangerous environment for other tenants, the aforementioned criminal acts constituted clear violations. Id. at 744.
carved out a "special circumstances" caveat for the family members of criminals who did not know and should not have reasonably known of the conduct.\textsuperscript{10} The court did so despite arguments by the Housing Authority that real reasons exist for evicting even the innocent tenant.\textsuperscript{11} The court found that the "tenants identified no special circumstances to negate the inference of awareness and control" and thus upheld their evictions.\textsuperscript{12}

B. The Federal Anti-Drug Abuse Act

In 1988, six years after the Massachusetts Supreme Judicial Court decided \textit{Gormley}, Congress passed the federal Anti-Drug Abuse Act.\textsuperscript{13} Unlike the court in \textit{Gormley}, Congress apparently found it important that housing authorities have the ability to terminate a family's subsidy or to evict them outright if criminal or drug activities were engaged in by members of the household, or those persons for whom they were responsible.\textsuperscript{14} To further this goal Congress passed the Act, which required all federally assisted housing authorities to maintain clauses in all leases granting themselves such authority.\textsuperscript{15}

On October 21, 1988, on the floor of the 100th Congress, various members of the Senate voiced their reasons for supporting the measure, and what they hoped to achieve by doing so.\textsuperscript{16} Senator Pell, for example, stated his opinion that, much to his dismay, the United States was losing the war

\textsuperscript{10} \textit{Id.} at 745-46. This caveat is very logical. While ignorance is not a valid defense, if it is found that a person did not know, and should not have known of another's misconduct, then it is nonsensical to evict them for that wrongdoing. The realities of these situations call for such an exception to eviction policies.

\textsuperscript{11} \textit{Id.} at 749. The Housing Authority argued that doing so would help enhance security at its housing developments in two distinct ways. The first justification was deterrence. The Housing Authority stated that other public housing tenants would be less likely to commit crimes out of fear of their families suffering the consequences. \textit{Id.} The second theory proffered was that merely evicting the criminal tenant still leaves open the likely possibility that the convict will return to the premises to visit family, which may lead to more problems. \textit{Id.}

\textsuperscript{12} \textit{Id.} at 753.


\textsuperscript{14} \textit{Id.}

\textsuperscript{15} \textit{Id.} Specifically, the statute read that each public housing authority:

[S]hall utilize leases which . . . provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy . . .

\textit{Id.} §1437d(l)(6).

\textsuperscript{16} 134\textsc{Cong. Rec.} S32,632 (1988).
on drugs and needed strong centralized action to combat it. Another cause for concern was the alarming statistical correlation between drug use and crime. Senator McConnell spoke about how the Act makes it possible to deny federal benefits to drug dealers and abusers, adding that "no longer will law-abiding taxpayers subsidize drug abusers." The legislature's intent was thus made very clear. Congress sought to fight the war on drugs by going after dealers, traffickers, users, and mere possessors. One way to accomplish this goal was to, in no uncertain terms, mandate that all housing authorities be equipped with the power to evict family members of such persons, even if they reasonably were without knowledge of such conduct. The intent of the federal government in passing the Act has proven to be crucial given recent developments, which will be discussed in greater depth later in this comment.

C. The Case of HUD v. Rucker

In 2002, the Supreme Court decided U.S. Department of Housing and Urban Development v. Rucker, a monumental case in its own right. In that case, the tenants contended that the Act of 1988 did not give housing authorities the discretion to evict innocent and unknowing tenants living in public housing and, in the alternative, the Act was unconstitutional if it did so. The Supreme Court held that the Act clearly required leases used by public housing authorities to vest such groups with the power to evict these families regardless of the knowledge (or lack of knowledge) of any member of the household, and regardless of any foreseeable inquiry. The Court found that "Congress' decision not to impose any qualification in the statute, combined with its use of the term 'any' to modify 'drug-related criminal activity,' precludes any knowledge requirement." The Court

17. Id. at S32,637-38.
18. Id. at S32,637. Senator Rockefeller stated that approximately 70% of all persons arrested for serious crimes in the year prior had also tested positive for drug use. Id.
19. Id. at S32,638.
20. Id.
21. 535 U.S. 125 (2002). The respondents were four former tenants of the Oakland Housing Authority public housing system. Id. at 128. The Housing Authority sought to have the various tenants evicted in 1997 and 1998 for a number of allegations, including complaints that relatives of the tenants, who were among those named as residents in the leases, had been found smoking marijuana on the premises, smoking cocaine in their apartments on multiple occasions, and had been found nearby with crack pipes and cocaine in their possession. Id.
22. Id. at 129.
23. Id. at 130.
24. Id. at 130-31. The Court further developed its position by comparing the language of the Act to a civil forfeiture statute, which the Court said demonstrates that Congress is
further justified its holding on several policy grounds.\textsuperscript{25}

Ultimately, the Supreme Court unambiguously reinforced the United States Department of Housing and Urban Development's (HUD) interpretation of the Act of 1988—namely that housing authorities are required to include lease provisions granting their organization the power and discretion to evict entire families, regardless of whether those persons knew or should have known of the conduct of criminal residents.\textsuperscript{26} The Court reasoned in part that it is the housing authorities who are most capable of gauging the seriousness of a development's drug problem and the solution needed to rectify that situation.\textsuperscript{27} The majority found that such an application of the Act in this way facilitates housing authorities in this quest, and that "[s]trict liability maximizes deterrence and eases enforcement difficulties."\textsuperscript{28} These interpretations of the Act have clearly been adopted in the Code of Federal Regulations as well.\textsuperscript{29}

\textsuperscript{25} Id. at 131.
\textsuperscript{26} Id. at 133 n.4.
\textsuperscript{27} Id. at 134.
\textsuperscript{28} See 24 C.F.R. § 966.4(l)(5)(i)(B) (2008). This section states:

\begin{quote}
The lease must provide that drug-related criminal activity engaged in on or off the premises by any tenant, member of the tenant’s household or guest, and any such activity engaged in on the premises by any other person under the tenant’s control, is grounds for the [Public Housing Authority] to terminate tenancy. In addition, the lease must provide that a [Public Housing Authority] may evict a family when the [Public Housing Authority] determines that a household member is illegally using a drug or when the [Public Housing Authority] determines that a pattern of illegal use of a drug interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.
\end{quote}

\textit{Id.} This requirement also applies to Section 8 housing certificates and vouchers. See 24
D. Massachusetts Law and the Innocent Tenant Defense

Despite these developments, in 2004 Massachusetts passed a law which, among other things, took a contrary view as it relates to the knowledge requirement. In pertinent part, the law permits a housing court to terminate a tenant’s lease if it has reason to believe that either the tenant or another person on the official family composition form has illegally possessed or sold narcotics, possessed narcotics with an intent to sell them, or has otherwise engaged in criminal behavior which poses a serious threat to the well-being of the housing community. The legislature intended this to also apply to any guest of a tenant or household member. Finally, the legislature restricted the ability of housing authorities to evict tenants to situations where the tenant knew or should have known that a “reasonable possibility” existed that the person in question would behave in such a way.

To summarize, while the Supreme Court in Rucker interpreted the federal Act to require leases to contain a blanket eviction policy regardless of any knowledge element, the Commonwealth of Massachusetts continued to limit drug and crime-related evictions to actual offenders and those who knew or should have known about the conduct. It was this conflict of views on the innocent tenant defense which would ultimately be decided by the Supreme Judicial Court in Garcia.

III. THE CASE OF BOSTON HOUSING AUTHORITY V. GARCIA

On March 5, 2007, the Supreme Judicial Court of Massachusetts heard the case of Boston Housing Authority v. Garcia. At the time the misconduct in question occurred, Doris Garcia had been a tenant of the Housing Authority for approximately eleven years. At that point,

31. Id.; see also Lowell Hous. Auth. v. Melendez, 865 N.E.2d 741, 745 (Mass. 2007) (reasoning that in order for a housing authority to address their main area of concern, the safety of their tenants, “it follows that a public housing authority must have the discretion to seek to terminate a lease based on criminal activity, occurring on the premises, or off, that constitutes a threat to public safety”).
32. Ch. 121B, § 32.
33. Id.
36. Id. at 1075.
37. Id.
Garcia's three sons, Ezequiel, Geraldo, and Juan Grajales, were all part of her official family composition and were listed on her tenancy lease. The lease explicitly stated that it was the obligation of Garcia to abstain from partaking in criminal activity, drug-related or otherwise, on or off the household premises. The lease further obligated Garcia to ensure that the various persons in her household, including guests, also refrained from criminal behavior. Finally, the lease stipulated that a failure to abide by these restrictions would constitute a violation of the lease and that the Housing Authority had the discretion to terminate her subsidy upon the occurrence of such an event.

It was in July 2004 that the Housing Authority, after a conference regarding the misconduct engaged in by her two sons, informed Garcia that she and her family were being evicted for cause. The criminal behavior at issue in the case occurred on two separate occasions. The first instance involved Garcia's son Juan, who on June 21, 2004, was searched after being pulled over while driving and was found carrying a bag of marijuana. Only four days later, Garcia's other son Ezequiel was carrying a metal baseball bat while walking with a group of other males, causing a police officer to stop and speak with the men. When the officer searched Ezequiel to see if he was carrying another weapon, the officer discovered he was in possession of more than a dozen bags of marijuana. Importantly, during each altercation, both Juan and Ezequiel gave their mother's public housing address as their own.

The case made its way into court when the Housing Authority sought judicial enforcement of the tenant's eviction through summary process. At trial, the housing court judge refused to permit Garcia to testify that she could not have foreseen and had no control over her sons' criminal misconduct. The judge justified his decision by saying that public housing tenants no longer had access to the special circumstances or

38. Id.
39. Id.
40. Id.
41. Id.
42. Id. at 1076.
43. Id. at 1075-76.
44. Id. at 1075. Juan was later charged with possession of a class D substance as a result of this event. Id.
45. Id. at 1075-76. Ezequiel would later plead guilty to a possession charge. Id. at 1076.
46. Id. at 1075-76.
47. Id. at 1076.
48. Id. at 1075.
innocent tenant defense given the Supreme Court's holding in *Rucker*. On appeal, the Supreme Judicial Court was faced with the issue of whether the 'special circumstances' limitation on the existence of cause, referred to as the 'innocent tenant defense,' remains viable in the termination of tenancies in federally assisted public housing projects." The court further narrowed this to an issue of preemption, specifically seeking to answer whether the Massachusetts law was acting as a barrier to achieving the goals of Congress. The court held that the federal Act did in fact preempt Massachusetts law; therefore, they affirmed the lower court's refusal to admit evidence that Garcia did not know of and could not have known of her family's conduct. In passing the Act, the court reasoned that Congress was striving to keep public housing units drug and crime free, and therefore safer for their residents. Furthermore, the court reasoned that Congress was reserving for housing authorities the right to use discretion in deciding how much weight, if any, to give to an "innocent tenant." The court found the Massachusetts legislature had instead allowed the courts to reserve that right, inasmuch as courts would be allowed to take an eviction appeal in which the housing authority had declined to consider a tenant's lack of knowledge. The courts could then decide to give credence to that lack of knowledge and overturn the housing authority's decision. Thus, Massachusetts's law would interfere with the objectives of Congress in passing the Act, and for that reason the court found that the Massachusetts law was preempted.

Beyond the legal twists and turns of this decision, what *Garcia* now

49. *Id.*
50. *Id.* at 1074-75.
51. *Id.* at 1078.
54. *Id.* at 1078. It was with this same sentiment that the Housing Authority Attorney Helene Maichle, while arguing *Boston Housing Authority v. Garcia* in front of the Supreme Judicial Court, said:

   The true innocent tenants are the . . . people who don’t use drugs, who don’t sell drugs, who don’t have household members and guests who do or sell drugs, but who have to live next to those who do in public housing. These are the people most affected by this decision today.

55. *Garcia*, 871 N.E.2d at 1078.
56. *Id.*
57. *Id.*
58. *Id.* at 1075.
stands for is that tenants in Massachusetts are no longer permitted to use the innocent tenant defense at trial. As will be examined in greater depth later in this case comment, this will undoubtedly have dire effects on persons living in federally-funded public housing in the Commonwealth. If a housing authority now determines during an eviction process that it is irrelevant whether a tenant had actual knowledge of another's criminal behavior, or even if that tenant could have reasonably known, the tenant will have no permissible defense as it relates to that issue. It is now up to the hearing officers in housing authorities across the Commonwealth of Massachusetts to determine whether it is appropriate to give consideration to the special circumstances that may surround tenants' behavior.

IV. A COMPARISON OF MASSACHUSETTS'S CURRENT POSITION ON THE INNOCENT TENANT DEFENSE WITH THAT OF OTHER STATES WHICH HAVE ALLOWED OR DO ALLOW SUCH AN EXCEPTION

It is important to understand the developments of the innocent tenant defense in a broader sense. One way to do that is to look at the defense and to look at how that area of law has progressed in other states which recognize it (or at one point did). The State of Illinois, for example, has had a law which harbored the innocent tenant defense for some time now. The statute, which was enacted prior to the Supreme Court's decision in *Rucker*, grants housing authorities the power to evict tenants if any number of named crimes or events occurs.

Although the statute is broad enough to cover guests of the tenant, it does condition this eviction power on the tenant knowing or being in a position in which it should have known of the misconduct. The courts in Illinois of course followed suit and upheld the statute's preservation of an innocent tenant defense.

60. *Id.*
61. *Id.* at 10/25(f). Specifically the act states that the housing authority in its discretion may institute a cause of action for eviction “if a tenant has created or maintained a threat . . . to the health or safety of other tenants or Authority employees, . . .” which includes the following activities “of the tenant or of any other person on the premises with the consent of the tenant, . . . [p]hysical assault or the threat of physical assault, . . . [i]llegal use of a firearm or other weapon or the threat to use [such a weapon]” and also including the “[p]ossession of a controlled substance by the tenant or any other person on the premises with the consent of the tenant if the tenant knew or should have known of the possession by the other person of a controlled substance . . .” *Id.*
62. Hous. Auth. of Joliet v. Keys, 761 N.E.2d 338, 344 (Ill. App. Ct. 2001). In *Keys*, the Housing Authority sought court permission to enter and repossess the premises of a public housing tenant, Patricia Keys. *Id.* at 340. While Keys was hospitalized in 2000, her grandson Jeffrey Campbell (who was listed on the lease as a household member) shot and robbed another man at the public housing residence. *Id.* After the lower court found for the
Since the decision in *Rucker*, however, Illinois courts have begun to demonstrate adherence to the Supreme Court’s holding that the Act gave housing authorities the discretion to disregard a lack of knowledge or special circumstances defense by tenants. In *Housing Authority of Joliet v. Chapman*, the tenant in question was Delores Chapman who was living with her daughter and son in public housing, and both were listed in the lease as members of the household. Three years after Chapman and her family began living in public housing, Chapman’s oldest child—her son—engaged in illegal behavior. The Housing Authority then brought judicial action in order to evict the tenant and to repossess the unit. The lower court held for the tenant finding (1) that Chapman had no knowledge of her son’s conduct; and (2) that because he was legally an adult at the time, she had no control over his actions. Therefore, the court held that she could not be evicted under Illinois law. On appeal, the court held that based on *Rucker*, the tenant’s knowledge or ability to control her son’s conduct was irrelevant as it was the housing authorities, not the courts or states, that Congress vested with that discretion. This case signifies that the State of Illinois, much like Massachusetts has now done, no longer recognizes the innocent tenant defense in the wake of *Rucker*.

The Commonwealth of Pennsylvania, prior to *Rucker*, had no clear statutory requirement that a tenant have knowledge of another’s conduct in order to be evicted. Despite this fact, the Pennsylvania courts began

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64. *Id.* at 1107.
65. *Id.* In the spring of 2000, the tenant’s son was pulled over after leaving the public housing premises for driving while his license was suspended. *Id.* During the course of the pull over, police discovered the boy had on him three bags of marijuana. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 1108. The court further articulated its position by stating that by signing a valid and binding lease, “Delores assumed the obligation and responsibility to insure that she and those given access to her unit do not engage in or permit drug-related criminal activity. Because knowledge of the criminal activity was not a prerequisite to eviction, eviction clearly could occur regardless of Delores’ lack of knowledge.” *Id.*
70. Sarah Clinton, *Evicting the Innocent: Can the Innocent Tenant Defense Survive a Rucker Preemption Challenge?*, 85 B.U. L. REV. 293, 307 (2005). One Pennsylvania statute reads in relevant part that eviction is proper in a public housing situation when a “tenant, any member of the tenant’s household or any guest has engaged in drug-related criminal activity on or in the immediate vicinity of the leased residential premises.” *Id.* at 307
granting a common law imposed innocent tenant defense to public housing tenants. In Bishop, the court affirmed the denial of an eviction of a public housing tenant whose lease had terminated because of criminal misconduct on the part of her sons, both listed as household members and living with her. The court held that she could not be strictly liable for her sons’ unforeseeable conduct given their age and the fact that she was out of town at the time. Since the Supreme Court’s decision in Rucker; however, the courts in the Commonwealth of Pennsylvania appear to have moved in the direction of rejecting an innocent tenant defense.

New Jersey is another state which historically has recognized an innocent tenant defense in cases involving evictions of public housing tenants for the criminal misconduct of guests or other household members. The law in New Jersey states that public housing authorities within the State have the power to evict tenants for specific drug-related offenses, permitting eviction of persons after conviction for “the use, possession, manufacture, dispensing or distribution of a controlled dangerous substance, controlled dangerous substance analog or drug paraphernalia . . . within or upon the leased premises or the building or complex of buildings . . .” The legislature went on to permit evictions for the same misconduct even when it was committed by persons other than

(Quoting 35 PA. STAT. ANN. § 780-156(a)(3) (West 2004)).


72. Id. at 998-99, 1002. One of the tenant’s sons, who was twenty-one years old at the time, robbed and raped an elderly neighbor who lived in the same apartment complex. Id. at 998. The tenant’s other son, who was thirty-two years old, was discovered to have had cocaine and marijuana in his bedroom. Id. at 999.

73. Id. at 1002.

74. See Hous. Auth. of Pittsburgh v. Fields, 816 A.2d 1099, 1099 (Pa. 2003) (per curiam). In a lower appellate court case, the son of a public housing tenant, both of whom were on the lease, was arrested and charged with resisting arrest, possession of a controlled substance, and possession of a controlled substance with the intent to deliver. Hous. Auth. of Pittsburgh v. Fields, 772 A.2d 104, 105 (Pa. Commw. Ct. 2001). Following this incident, the housing authority sought to evict the tenant for violation of her lease. Id. at 106. On appeal, the court interpreted the Act and concluded that Congress may not have intended for the language to apply to innocent tenants. Id. at 109. Later, following the decision in Rucker, the tenant filed a “Motion to Dismiss Petition for Allowance of Appeal as Moot.” Fields, 816 A.2d at 1099. The Supreme Court of Pennsylvania denied the motion expressly basing their decision upon the U.S. Supreme Court’s holding in Rucker, which had been announced in the interim. Id.; see also Powell v. Hous. Auth. of Pittsburgh, 812 A.2d 1201 (Pa. 2002) (finding that the family members of a teenager convicted of carjacking were properly evicted with no analysis or showing that the son was under the control of the tenants).


76. Id.
the tenant.\textsuperscript{77} However, the legislature conditioned such evictions on the tenant having some knowledge about the situation.\textsuperscript{78} The legislature further limited this subsection by not applying it to certain situations involving juvenile residents.\textsuperscript{79}

In the past, the statute had been read by New Jersey courts as creating or codifying an innocent tenant defense for public housing tenants.\textsuperscript{80} In \textit{Housing Authority of Hoboken v. Alicea},\textsuperscript{81} the Appellate Division of the Superior Court tackled this very issue. The housing authority in that case was seeking eviction of the tenant, Carmen Alicea, for allegedly allowing her convicted son, charged with a drug offense, to stay with her in the residence.\textsuperscript{82} The court found that under New Jersey law, Alicea could be properly evicted for permitting "such a person" to remain on the premises with her.\textsuperscript{83} However, the court found that the tenant had not been shown to necessarily have known about her son's run-in with the law and as such overturned the eviction.\textsuperscript{84} In doing so, the court recognized an innocent tenant defense under New Jersey law.\textsuperscript{85}

\textsuperscript{77} \textit{Id.}

\textsuperscript{78} \textit{Id.} The New Jersey Legislature continued to permit evictions of public housing tenants for misconduct relating to the aforementioned drug related crimes and commissioned by other persons. The statute states this intention of the legislature when it permits eviction if "being the tenant or lessee of such leased premises, [one] knowingly harbors or harbored therein a person who committed such an offense, or otherwise permits or permitted such a person to occupy those premises for residential purposes, whether continuously or intermittently . . . ." \textit{Id.}

\textsuperscript{79} \textit{Id.}


\textsuperscript{82} \textit{Id.} at 109. The tenant's son, Luis, who was twenty-six years old at the time, was charged under the New Jersey Comprehensive Drug Reform Act for possession of heroin in 1995. \textit{Id.}

\textsuperscript{83} \textit{Id.}

\textsuperscript{84} \textit{Id.} at 110.

\textsuperscript{85} \textit{Id.} The court reasoned that under New Jersey's law, for such an eviction to be proper:

[The tenant] must not only 'permit' a drug offender to occupy the leased premises, but must also tolerate the offender's occupancy of the premises knowing that such person has violated the [New Jersey drug laws]. Otherwise, a tenant who has not committed a drug crime, and who does not know that the person who occupies the leased premises has committed such an offense, would be subject to eviction.

\textit{Id.} The court further reasoned that "[i]n essence, the innocent and unknowing tenant would be subject to removal based solely on the criminal act of another. This result obviously runs
In the years since *Rucker* was decided, however, New Jersey law, as it pertains to the innocent tenant defense, appears to be somewhat unclear. For example, the courts in the state have recognized the ruling in *Rucker* as permitting evictions without a knowledge requirement.\(^{86}\) However, in recent years, the New Jersey legislature has apparently continued to preserve the innocent tenant defense in public housing law.\(^{87}\) For example, in a series of proposals to amend New Jersey public housing statutes after the decision in *Rucker*, the New Jersey legislature proposed changes to certain portions of the relevant statutes, but they did not propose changes to the language granting an innocent tenant defense.\(^{88}\)

As is clear, several states, such as Illinois and Pennsylvania, have changed their position on the innocent tenant defense by judicially or legislatively denying the defense to public housing tenants in the wake of *Rucker*. Other states, like New Jersey, seem to be unclear or at the very least undecided as to what their current positions are. It was not until the decision in *Garcia* that Massachusetts's formally adopted the holding in *Rucker*. Before that time many were left to speculate as to what exactly the law in the Commonwealth would be.\(^{89}\) It is likely that Massachusetts will

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contrary to the remedial purposes of the [New Jersey law].” *Id.*

86. *See* Oakwood Plaza Apartments v. Smith, 800 A.2d 265, 267 (N.J. Super. Ct. App. Div. 2002). In that case, which was decided the same year as *Rucker*, a Section 8 head of household, Andrea Smith, was charged with drug activity. *Id.* at 266. The issue was whether the woman's three children and their foster mom, who moved in after Smith vacated the premises, could be evicted for her drug crimes given their lack of knowledge. *Id.* The court acknowledged the ruling in *Rucker* and its requirement that public housing authorities be vested with the power to evict tenants irrespective of their knowledge of criminal activity in question. *Id.* at 267. However, the court remanded the case stressing that the Supreme Court in *Rucker* had still encouraged housing authorities to consider the facts and circumstances of each case and to err on the side of caution. *Id.* at 270-71. Here the court found no record of any pertinent factors being weighed, including whether the woman was in prison and thus not able to return to the premises. *Id.* at 270. The court concluded that “Smith’s present status and the likelihood of her informal return to the premises have a bearing on any determination regarding eviction, as does . . . evidence of the nature and extent of drug activity in the complex . . . .” *Id.* at 271.

87. *See* N.J. STAT. ANN. § 2A:18-61.1(n) (West 2000). Specifically, the statute allows a housing authority to evict any tenant convicted of a violation the N.J. drug laws, as well as allowing eviction of any “tenant or lessee of such leased premises, [who] knowingly harbors or harbored therein a person who has been so convicted or has so pleaded, or otherwise permits or permitted such a person to occupy those premises for residential purposes, whether continuously or intermittently.” *Id.*

88. A427 § 2(n), 213th Leg., 1st Sess. (N.J. 2008); A462 § 2(n), 212th Leg., 1st Sess. (N.J. 2006); A138 § 2(n), 211th Leg., 1st Sess, (N.J. 2004).

89. *See* Clinton, *supra* note 70 at 316. The author there predicted that it would be “possible for [Massachusetts] to retain its innocent tenant defense in a post-*Rucker* era.” *Id.* The author reasoned that “[t]he federal and state interests in this area are compatible. Both
not be the last state to adopt such a position. The Garcia decision ultimately marks the unfortunate continuation of a nationwide trend to allow public housing authorities to evict innocent and unknowing family members of criminals.

V. THE EFFECT OF BOSTON HOUSING AUTHORITY V. GARCIA ON MASSACHUSETTS'S HOUSING AUTHORITIES

A. Increased Power

The Supreme Judicial Court's decision in Garcia will have wide-ranging effects. The loss of the innocent tenant defense in Massachusetts will certainly impact everyone from public housing tenants, both criminal and non-criminal, to the housing authorities themselves, and even the communities where those tenants reside. For the most part, it appears that housing authorities in Massachusetts and other states if and when they follow suit have come out the victor. In an effort to both deter criminal activity as well as to keep their developments safe, Garcia gives the Housing Authority the unquestionable right to evict the unknowing family members and friends of public housing tenants.

Of course, most people would agree that housing authorities should be given the tools necessary to maintain a safe environment for their tenants. There is, however, cause for concern that with its holding in Garcia, the

Congress and the Massachusetts legislature enacted their statutes in order to protect tenants and make public housing authorities safer by removing wrongdoers from public housing units and ensuring the safety of the innocent public housing tenants." Id. at 321-22. Although the author's prediction ultimately has proven to be incorrect, it did make sense. If Congress and the legislature of Massachusetts were striving to create and maintain quality, minimal-danger environments for low-income tenants, then there is a lack of conflict among the statutes. Members of both legislatures sought to cleanup public housing for their constituents, and they both seemed to be a logical extension of the other.

90. "The ruling in BHA v. Garcia will help the BHA in promoting Congress' intent to keep federally assisted housing free of drug-related criminal activity. Due to Garcia, cases in which a guest or family member commits drug related offenses are no longer allowed to present the innocent tenant defense." Interview with David Gleich, Attorney at the Boston Hous. Auth., in Boston, Mass. (Mar. 1, 2008).

91. Garcia, 871 N.E.2d at 1078; see also Interview with David Gleich, Attorney at the Boston Hous. Auth., in Boston, Mass. (Mar. 1, 2008) ("Procedurally, eviction from public housing and termination of subsidy cases due to drug related criminal activity have become increasingly straightforward because the current state of the law provides strict liability for drug-related offenses that occur within federally assisted housing.").

92. See Harold J. Krent, The Continuity Principle, Administrative Constraint, and the Fourth Amendment, 81 NOTRE DAME L. REV. 53, 108 (2005) ("The Clinton Administration established guidelines to provide public housing authorities with the tools to keep order in the projects . . . .")
Supreme Judicial Court has given housing authorities a blank check to deal with drug and criminal activity. Again, although the decision does not mandate eviction of unknowing family members, it does open the door for housing authorities to abuse this newly-crafted power. For example, if a housing authority wants to evict a family for any number of non-criminal behavior reasons, such as the family being overbearing or disliked, the housing authority will be able to move for eviction against the entire household if one of the members commits one of the delineated crimes. This allows for housing authorities to move for eviction when they otherwise may not have (i.e., a first time, minor offense by one tenant) and to couch their decision to do so. Furthermore, it gives the housing authorities even more leverage over their tenants, who are already less equipped for battle during eviction appeals hearings. Post-\textit{Garcia}, housing authorities can now threaten a criminal tenant with the eviction of their wife or husband, sons and daughters, and others in their care, if they do not agree to leave the premises permanently. This inevitably opens the door to housing authorities playing a role in the splitting up of tenant-families.\footnote{See infra Part VI.D.}

\textbf{B. The Ability of Housing Authorities in Massachusetts to Exercise Discretion in Light of \textit{BHA v. Garcia}}

It is important to try and measure the depth of this newfound power of housing authorities. While it is evident that \textit{Garcia} and \textit{Rucker} mandate that public housing leases contain a provision vesting housing authorities with the ability to evict unknowing family members, it is ambiguous as to how and when housing authorities should act on that power. In addition, HUD has its own take on the situation.

For one, it appears that some group members want to stress that they feel there is no requirement to consider extraneous factors in these sorts of evictions. For example, in a letter from then Associate General Counsel for Litigation at HUD, Carole Wilson interprets the \textit{Rucker} decision. While Wilson in no way mandates evicting an "innocent" tenant, she repeatedly spells out the definite ability of housing authorities to do so without having to consider other policy factors.\footnote{Letter from Carole W. Wilson, Assoc., Gen. Counsel for Litig., HUD’s Office of Gen. Counsel, to Charles J. Macellaro, P.C., Attorney and Counselor at Law, Yonkers Pub. Hous. Auth. 1-2 (Aug. 15, 2002), \textit{available at} http://www.hud.gov/offices/pih/regs/rucker15aug2002.pdf.} In response to a request for clarification by Charles J. Macellaro, an attorney acting for the Yonkers Public Housing Authority, Wilson stated that "a PHA may evict all members of a household any time the relevant lease provision is violated" and that "HUD repeatedly has emphasized that such authority not to evict... in no way
obligates a PHA to consider any option other than the one that the statute and the lease themselves expressly authorize, i.e., termination of the lease and concomitant eviction of the entire household." Wilson's interpretation of the loss of the innocent tenant defense illustrates the boost in power and discretion of public housing authorities in dealing with criminal tenants and their families. However, other prominent persons within HUD have made it clear in the time since Rucker that while housing authorities are not required to, they are strongly encouraged to consider the facts and circumstances of each case when pursuing an eviction of household members. In a letter to public housing directors, Michael M. Liu, the Assistant Secretary of HUD, first reaffirms the holding in Rucker, stressing that "PHAs are not required to evict an entire household... every time a violation of the lease clause occurs." Furthermore, Liu writes, "after Rucker, PHAs remain free, as they deem appropriate, to consider a wide range of factors in deciding whether, and whom, to evict." Liu states that those factors include, but are not limited to, "the seriousness of the violation, the effect that eviction of the entire household would have on household members not involved in the criminal activity, and the willingness of the head of household to remove the wrongdoing household member from the lease as a condition for continued occupancy.

Others in HUD have also discouraged housing authorities from exercising their power to evict even the innocent family members

95. Id. at 1. The author goes on to say that Rucker upheld "authorizing the termination of a lease... whenever any of the statutorily-specified persons commits any statutorily-specified criminal activity... The Rucker Court, recognizing that the statute subjected public housing leaseholders to a type of vicarious, "strict liability", held that the imposition of such liability by Congress was fully logical as a matter of policy and of Constitutional due process," and that authorities "need[j] no further justification." Id. at 2.

96. Id. Wilson continues by saying that "nothing in the [HUD regulations] requires PHAs to consider anything other than the lease violation itself in connection with eviction decisions," and that "there is no legal authority for the proposition that a PHA cannot adopt a policy of maximum deterrence pursuant to which every violation of the lease... results in lease termination and household-wide eviction." Id. at 5.


98. Id.

99. Id. Liu continues by stating that he and others at HUD encourage the housing authority directors to weigh these and other factors in making eviction determinations, and that he is confident that those directors "will continue to act in a manner that protects the general welfare, while giving consideration—when you deem it appropriate—to the interests of individuals who share a household with the wrongdoing, but were otherwise unconnected with the wrongdoing." Id.
recognized in *Rucker*. Mel Martinez, the Secretary of HUD, wrote an open letter to public housing directors across the country in April 2002, in which he encouraged a consideration of all the relevant factors during the eviction process.\(^{100}\) In the letter the Secretary urges housing directors "to be guided by compassion and common sense in responding to cases involving the use of illegal drugs. Consider the seriousness of the offense and how it might impact other family members."\(^{101}\) The concept of making sensible eviction determinations is one that tenants no doubt hope housing authorities in Massachusetts will adopt in their practice. Evicting the innocent loved ones of a tenant who engages in criminal activity has dire consequences, and should not be used when it is not necessary. As Martinez put it, "[e]viction should be the last option explored, after all others have been exhausted."\(^{102}\)

VI. EXAMINING THE IMPACT OF *BHA V. GARCIA* AND THE LOSS OF THE INNOCENT TENANT DEFENSE ON MASSACHUSETTS PUBLIC HOUSING CRIMINALS AND THEIR FAMILIES

A. The Importance of Housing

For those of us who are fortunate enough to be able to afford it, the real meaning and the non-monetary value of housing is sometimes lost. We often take for granted literally being able to "go home" at the end of the day and know that some sort of safe and secure structure we find comforting awaits us. In fact, housing most likely means something slightly different to each person who has or does not have it. Housing can serve as a "person's security, self-identity, and center for social interaction."\(^{103}\) A home represents a family's safe haven, as well as providing them with "a place of privacy and security."\(^{104}\)

The poor are most likely more aware of what housing means to them. For the tenants of public housing, that shelter may have come after a period of being homeless, or it may be the last thing standing in between them and

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101. Id.
102. Id. Martinez further emphasized this position, stating that "[b]y addressing activities that threaten the health, safety, or right to peaceful enjoyment of the premises by other tenants, the household responsibility clause provides public housing authorities a strong tool to use. . . . [I]t should be applied responsibly. Applying it rigidly could generate more harm than good." Id.
104. Id. ("In terms of self-identity, a home can reflect its occupant's sense of self. It provides space to develop and express an identity.").
another period of homelessness. Public housing is vitally important to those otherwise unable to provide housing for themselves and their loved ones. As a society, it is of the utmost importance that we strive to ensure that all members of our community have safe, quality housing. As David Smith, the founder of the Affordable Housing Institute, said in describing the situation of poor citizens in urban areas, "[l]eft alone in the marketplace, the impoverished create and inhabit slums because that is their only available and economically sensible option." So how do we meet that unified goal of housing all members of a society? Smith suggests, in part, that "[s]ince market forces will never provide housing they can afford—and they never will have the ability until they cease being poor—it is up to government to stimulate the creation of sustainable affordable housing."

B. Severely Punishing the Innocent

1. Unbalanced and uncalled for punishments

On some basic, humanistic level, it may seem counterintuitive to state plainly that we are punishing the innocent. The admittedly unknowing family member, who had no reason to know of another's activities, and in no way sanctioned them, can be forcefully evicted from their homes. The concept of punishing the person who all parties agree is innocent appears to

105. See generally Ethan Barlieb, HOPE VI Revitalization Grants: Weighing the Costs and Benefits, and Considering a Solution in the Context of Liberty City, Miami, 15 U. MIAMI BUS. L. REV. 201, 208-09 (2007) (stating that "providing housing to very-low-income families . . . is one of the few programs which provides individuals of that socioeconomic status a viable opportunity to live affordably").


107. Id. at 2. Smith continues to allocate accountability in arguing that the "responsibility of government is in subsidies and financial contributions . . . . For the bottom quartile of society, housing is unaffordable, unacceptable, and impossibly distant." Id. at 4. This is a strong illustration of the need for cooperation between citizens and their government in order to ensure proper quality housing exists for all. Of course it is not a secret that many, if not all, people are not able or willing to act completely out of a sense of altruism. But keeping people off the streets and making sure that everyone has access to a home of some type benefits all of us. A community in which everyone has housing is simply a better, more efficient society. These principles are evident to those party to the public housing process.

108. Black's Law Dictionary defines punishment as "[a] sanction—such as a fine, penalty, confinement, or loss of property, right, or privilege—assessed against a person who has violated the law." BLACK'S LAW DICTIONARY 1269 (8th ed. 2004). The key to that definition is that the guilty are punished, not the non-acting innocent.
be the antithesis of justice. And yet this practice has been written into legislative statutes, sanctioned by the Supreme Court, and now has been declared the law of the land in Massachusetts after *Garcia*. In fact, it has been argued that the policy may result in the innocent being punished to a greater degree than the guilty party.\(^{109}\) In solving a problem—here drug and criminal activity in public housing—the government must act in such a way so as not to negatively affect law-abiding citizens—here, the tenants. Striking the innocent tenant defense results in the innocent being victimized twice: first, by having to live under the circumstances surrounding the criminal activity; and second, by being evicted and often left homeless as a result.\(^{110}\) Having already suffered through consequences of violence or drugs being brought into their homes, even if they were truly unaware of it, should the *innocent* tenants also be forced to suffer additional, severe penalties?\(^{111}\)

2. Undesired effects

Beyond the seeming injustice of punishing these tenants, the loss of the innocent tenant defense will oftentimes produce negative results; outcomes which may in fact be the opposite of the policy’s stated goals of strengthening familial and community relationships. For example, leaving housing authorities with the discretion to evict some or all tenants in the event of a lease violation can lead to families being broken apart in several ways. First, eviction policies can “break[] up families by conditioning their continued occupancy on permanently excluding the third party, who often is a family member.”\(^{112}\) Furthermore, if that condition is broken, housing authorities will often move for eviction. This, of course, does not help to achieve the stated goals of maintaining the unity and resolve of a family.

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\(^{109}\) Barbara Mulé & Michael Yavinsky, *Saving One’s Home: Collateral Consequences for Innocent Family Members*, 30 N.Y.U. Rev. L. & Soc. Change 689, 690 (2006) (“These consequences may be even more severe than the criminal sentence imposed on the offending household member.”).

\(^{110}\) *See id.* (“While purporting to serve the important government objective—to ensure a safe, peaceful environment for residents of federally-subsidized housing—these policies victimize innocent tenants by imposing collateral consequences upon them.”).

\(^{111}\) *See Shazia Choudhry & Jonathan Herring, Righting Domestic Violence*, 20 Int’l J. L. Pol’y & Fam. 95, 105 (2006) (contending that “even if the children do not witness the violence they still suffer violence simply by virtue of living in a house in which domestic violence takes place”).

\(^{112}\) Peter J. Saghir, *Home is Where the No-Fault Eviction Is: The Impact of the Drug War on Families in Public Housing*, 12 J. L. & Pol’y 369, 395 (2003). Given my experience at the Housing Authority, I can say first-hand that it is not uncommon for a family to be given the choice of losing their subsidy (and ultimately their home) or to agree in writing that the offending tenant will not return to the premises.
Instead it puts into writing that family members agree not to see each other at the very place where most social activity occurs, the home. Others may be so afraid of losing their home that they will, in effect, cut off communications with the offending person so as not to risk violating their agreement. Drawing lines between family members is a dangerous and possibly unwarranted device to "clean up" public housing.

These types of eviction policies can tear families apart in other ways as well. For example, consider a family on public housing in which one of the tenants is engaging in drug-related or other criminal activity. A family member who has a drug addiction, for example, and is then evicted may lose the very structure and support they need in order to rehabilitate. As that person fades further from their family and deeper into addiction, the familial unit may be permanently severed. "Evictions conducted against substance abusers are unreasonably harsh because substance abusers need the stability of a home to recover—not homelessness." There are other ways these eviction policies can dismantle a family in which one person takes part in drug-related or criminal activities. It is not conducive to familial relations to have loved ones forced to play vigilante with one another, constantly in a state of suspicion. With the loss of the innocent tenant defense, public housing tenants may find themselves in an even more precarious situation. Does a tenant risk eviction by reporting another's crime, knowing they can be evicted despite their innocence, in an attempt to remain "innocent" and hopefully vie for favor from the housing authority? Given that the housing authority has the discretion to allow innocent family members to stay in their houses, it may seem appealing to a tenant to keep the cleanest hands possible, but at what cost? Turning in their loved one not only invites the wrath of that family member but also leaves one open to the possibility of being evicted simply for living in the

113. Id. at 403-05. Saghir states that eviction policies such as the one discussed in this article can rip families apart by requiring tenants to "permanently exclude[e]" criminal family members despite the fact that while "it is drug use that breaks up families, . . . that the recovery process can strengthen the family in many ways. Indeed, families fulfill a critical role for delinquent youths as systems of emotional support and models of appropriate behavior. Disrupting the family unit negatively impacts delinquent behavior." Id.

114. Id. at 401.

115. See id. at 398-99. The author reasons that the decision in Rucker creates a situation in which persons desiring to live in public housing must possess "detective-like skills and the courage to confront criminals about their illegal behavior." Id. at 398. Furthermore, the author points out the destructive effect this can have on a family, noting that "a grandparent or parent should be entitled to the presumption that their children are not engaged in a criminal activity . . . Such a duty should not be imposed upon a familial relationship where trust is an essential component to the health of the relationship." Id. at 398-99.
GUILTY BY ASSOCIATION

C. The Unfair Targeting of Certain Groups of People

1. Racial minorities

One legitimate criticism of the holdings in Rucker and Garcia is that it can result in the unequal treatment of various groups of people. For example, the spark which ignites the eviction process is a tenant being caught while engaging in some sort of drug or other criminal activity. However, it is a widely held theory that racial minorities are given disparate treatment by law enforcement officials. This can be further broken down by arrest records and actual criminal charges. First, arrest records are not a stellar indicator of criminal activity given that racism and prejudice can no doubt seep into the minds of police officers who have discretion in making arrests.116 To hold a person liable for a result (the arrest) they did not bring about is to punish someone for an effect they did not cause; this is illogical. As one scholar put it, "it is one thing to have more [minorities] arrested than white[s]... and then conclude that [minorities] have a higher arrest rate, but it is circular reasoning to conclude that minorities are arrested at higher levels because they commit more crime as evidenced by the higher arrest rate."117 The unfair targeting of racial minorities by law enforcement officials is also apparent in statistics relating to criminal charges. For example, "[i]n 1999, black youths in the U.S. made up fifteen percent of the population under the age of eighteen, yet they accounted for... forty-one percent of arrests for violent crimes."118 Ultimately, these are all reasons why such eviction policies are imperfect. While it is not the purpose of this article to advocate

116. See Renai S. Rodney, Am I My Mother's Keeper? The Case Against the Use of Juvenile Arrest Records in One-Strike Public Housing Evictions, 98 NW. U. L. REV. 739, 763 (2004). The author declares that "[t]he tendency of arrests to be an unreliable indicator of the suspect's actual guilt" is true because "such records not only result from alleged criminal activity, but also from the use of broad and at times discriminatory officials." Id. The author concludes that for a housing authority to rely entirely on arrest records as a justification for "imposing a penalty as severe as eviction from 'housing of last resort' is a flawed approach to reducing crime in public housing." Id.

117. See Arthur H. Garrison, Disproportionate Minority Arrest: A Note on What Has Been Said and How It Fits Together, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 29, 34 (1997). The author bases his theory on arrest records as poor indicators because "arrest records do not reflect extralegal factors and racial prejudices that exist in America," so therefore, "higher arrest rates alone are not conclusive in establishing criminality and race." Id.

118. Rodney, supra note 116, at 763-64. The author continues to say that "[t]he effect that race has on the police's perception of a particular community (in this case, a housing project) increases the likelihood that black youths will be arrested." Id. at 764.
that housing authorities should not be permitted to remove individuals who commit crimes, it is rather to show how the loss of the innocent tenant defense in Massachusetts has compounded these problems. Now, after Garcia, one racist police officer in Massachusetts who uses his or her bias to arrest a single individual living in public housing can lead to an entire minority family being forced into homelessness. While it was certainly not the legislature’s or the court’s intention, the removal of the innocent tenant defense leaves minority families living in public housing that much more vulnerable.

2. The impoverished

Of course, any decision to make a defense unavailable to public housing tenants is going to negatively impact and target the poor. However, the loss of the innocent tenant defense in Massachusetts highlights the sad irony of the current situation of public housing—we keep finding ways to evict people from the houses they are provided since that is the very thing they cannot afford on their own. Part of this problem is similar to that of racial minorities, given that both groups can serve as unfair targets of police. This struggle to avoid eviction can be even more difficult for public housing tenants. As a result of their low socioeconomic status, the impoverished may not be equipped with all of the tools they need to fight an unfair eviction from a housing authority. Given the “limited review power of the courts... it is more imperative than ever to ensure the availability of representation for innocent federally-subsidized housing tenants, particularly at the earliest stages of the eviction process.”

119. See J. Peter Byrne & Michael Diamond, Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed, 34 FORDHAM URB. L.J. 527, 527 (2007). The authors state that “[h]ousing provides a necessary foundation for physical and social life. It provides shelter, security, recreation, and wealth.” Id. Furthermore, housing “plays a central role in the health and well-being of its occupants and also supports their employment and educational endeavors.” Id. Unfortunately, despite all of these positive and necessary consequences of housing, “[a]mong the poor, there is a severe shortage of adequate, affordable housing.” Id.

120. Mule & Yavinsky, supra note 109, at 690 (pointing out the “devastating impact on poor communities” that eviction policies like these can have, given the fact that public housing is often the last resort for those tenants).

121. See Rodney, supra note 116, at 764. Again, the prejudices that some police have can taint arrest and conviction records for some people, given that police get to exercise discretion and “[s]uch discretion is found to be exercised ‘more routinely when poor people or members of minority groups are involved,’ leading to an unjust arrest.” Id. (quoting Leonard N. Sosnov, Due Process Limits on Sentencing Power: A Critique of Pennsylvania’s Imposition of a Recidivist Mandatory Sentence Without a Prior Conviction, 32 DUQ. L. REV. 461, 494 n.225 (1994)).

122. Mule & Yavinsky, supra note 109, at 693.
3. The mentally disabled

The innocent tenant defense had provided public housing tenants with a net to fall back on in order to rightfully avoid eviction. That defense, no doubt, was a vital one for the mentally disabled who in some situations may have a more difficult time assessing their surroundings. It allowed impoverished, mentally disabled persons, the very people who may need the most assistance, to remain in public housing. However, after the decisions in Rucker and Garcia, the innocent tenant defense no longer exists in Massachusetts so the knowledge of a tenant, mentally disabled or not, is no longer a prerequisite to eviction.\(^{123}\) Notably, HUD stipulates that all public housing authorities contemplate granting what is known as a reasonable accommodation when a disabled person requests one.\(^{124}\) However, requesting a reasonable accommodation in no way guarantees that one will be granted, as the public housing authority may reject the request if, in its opinion, it finds it to be unreasonable, “or that the tenant poses a ‘direct threat’ to her community.”\(^{125}\)

Again, the issues facing public housing tenants continue to be compounded with others. Not only are these tenants impoverished and are likely to encounter difficulty finding legal representation to safeguard their rights during an eviction process, but for some, especially mentally disabled persons, these hurdles are too much to bear. They may have a more difficult time understanding, knowing, and grasping what those around them are doing, and therefore may be more vulnerable to eviction based solely on their families’ conduct. Additionally, some mentally handicapped people may have even more difficulty with the reasonable accommodations process.\(^{126}\) It is difficult enough to understand a rule which allows for the eviction of a person who did not and should not have known of another’s misconduct, but when that person possibly could not know, it is all the more unjust. An impoverished, mentally handicapped person may be in the most need of all and may require the most specialized

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124. Anne C. Fleming, Protecting the Innocent: The Future of Mentally Disabled Tenants in Federally Subsidized Housing After HUD v. Rucker, 40 HARV. C.R.-C.L. L. REV. 197, 212 (2005) (citing Giebeler v. M & B Assocs., 343 F.3d 1143, 1147 (9th Cir. 2003)). The author describes the process, saying that the “tenant has the burden to prove that she is eligible to receive an accommodation, that the request states an ‘accommodation,’ and that such accommodation is ‘reasonable.’” Id. at 213.
125. Id. (quoting in part from the Fair Housing Amendments Act, 42 U.S.C. § 3604f(9) (2000)).
126. Id. (stating that “[t]he cognitive limitations of most mentally disabled tenants render the already complicated task of making and advocating for the approval of such a request all the more difficult”).
care and aide, yet they are grouped in with all other types of innocent tenants when it comes to no-fault evictions.

D. The Resulting Juvenile Conflict

1. Scenario

Consider the following hypothetical: An impoverished family of four, whose father has recently been laid off from work, and whose mother cannot work because of their infant, find themselves evicted from their apartment because they cannot pay the rent. After spending some time on the streets and staying in various homeless shelters, the family is able to procure a unit in a public housing complex. Still struggling to get by, the family is nonetheless grateful for the shelter they do have. The father continues to job search but is unable to get hired, and the mother stays home taking care of their two children, regretting that she is unable to contribute financially. Then their oldest child, a fourteen-year-old son, is arrested along with a few of his friends for possession of marijuana. After the public housing authority learns of the arrest, they move for eviction of the entire family. Desperate to keep their home, the family requests an appeal hearing to plead with a hearing officer for mercy.

2. The no-win situation

The previous hypothetical is a far too common example of what many public housing families face in this country. What should the family do? Should the family attend the appeals hearing and beg for leniency? That option is, of course, open to them, and they do have a chance of succeeding in their mission: to stay together in their home. Rucker and Garcia certainly did not find that Congress mandates housing authorities to evict entire families whenever one member of the family engages in drug-related or criminal activity.\footnote{127. Letter from Carole W. Wilson, Assoc. Gen. Counsel for Litig., HUD's Office of Gen. Counsel, to Charles J. Macellaro, P.C., Attorney and Counselor at Law, Yonkers Pub. Hous. Auth. (Aug. 15, 2002), available at http://www.hud.gov/offices/pih/regs/rucker15aug2002.pdf.} However, with the loss of the innocent tenant defense, families like this one are vulnerable to complete eviction: The decision is left to the discretion of their respective housing authority.\footnote{128. Id.} It is important to note that “section 1437d(f)(6) . . . applies to 'any criminal activity' without distinguishing between adult or juvenile offenders.”\footnote{129. Rodney, supra note 116, at 766.} What other options are available to them? They could offer to stipulate to their son's eviction, send him to live with another family member, friend, or even put
him into foster care, never to return to the leased unit. It is obvious, though, that this would be an extraordinarily difficult choice for many parents. However, as parents with an infant, they certainly do not want to try and raise a baby on the streets. They may decide that while it would be heartbreaking, the better option would be to have their son live with his relatives—somewhere they can hopefully visit him on occasion, praying to get to the point one day when they will no longer need public housing and can be together again. In the meantime, the family would be forced to helplessly wonder if their son is being raised properly on a path toward a crime-free, self-sufficient life.

These situations have consequences which go well beyond heartbreak and anguish. The son, who may be at a crossroads in his life as a teenager, would be without one of the most important guides and learning tools—the family. Also, it cannot logically have been the intent of the legislature or the courts to break apart innocent families. However, that is the result in circumstances such as these. Families are ruined, without recourse beyond the potential appeals process and are left making seemingly impossible choices. It was never the intention of public housing programs to force a choice between being one family living on the streets together versus one family split apart but hopefully with roofs over all of their heads. In fact, it undermines the very goals of public housing: to provide safe and adequate shelter to poor families in need of a place to grow and develop together as a unit. Thus, the resulting juvenile conflict is just one of the obstacles that public housing families in Massachusetts will now have to face as a result of Garcia.

130. See Saghir, supra note 112, at 395.

131. See Susan L. Waysdorf, Families in the AIDS Crisis: Access, Equality, Empowerment, and the Role of Kinship Caregivers, 3 TEX. J. WOMEN & L. 145, 194 (1994). In the context of a family splitting apart due to illness, one author stated that “[i]f kinship caregivers are able to navigate the complex legal system and gain legal custody or guardianship, they generally are given no assistance from the state to raise these children.” Id. The author went on to contend that “[i]n deed, these older, primarily female caregivers are facing two of the most difficult and challenging aspects of life in this society: raising children in poverty without adequate support, and growing old, usually on a fixed income.” Id. These relatives thus have to conquer more than just the inherent difficulty of nurturing children, but they are often not in a position to do so adequately. “Having raised their own children, these grandparents, other elderly relatives, and family friends now face an entirely new set of problems at a time when their own health and financial resources are likely to be declining.” Id.

132. As one author put it, “separating the child from his or her home does little to actually prevent the child from engaging in such behavior again and cannot truly be considered an alternative to eviction because it sanctions the break-up of families.” Rodney, supra note 116, at 766.
E. Deterrence

One of the desired effects of striking the innocent tenant defense is deterrence. Deterrence is defined as "[t]he act or process of discouraging certain behavior, particularly by fear; esp., as a goal of criminal law, the prevention of criminal behavior by fear of punishment."\(^{133}\) How will making an entire family liable for each other's conduct help maximize the deterrent effect sought by the elimination of the innocent tenant defense? The Supreme Court in *Rucker* reasoned that in situations similar to *Garcia*, "[s]trict liability maximizes deterrence and eases enforcement difficulties."\(^{134}\) As one author pointed out, a no-fault eviction policy and public nuisance statutes "increase the ability of landlords, neighbors, and public authorities to more aggressively prosecute perceived disorder in urban neighborhoods."\(^{135}\)

This outlook is too optimistic regarding the potential deterrent effects of the loss of the innocent tenant defense. It is true that deterrence may occur in the sense that potential criminals may decide to live an honest life, in part out of fear that their families could suffer eviction consequences for their misconduct.\(^{136}\) However, if people are otherwise willing to bring drugs and crime into their homes and neighborhood, it is unlikely that a fear of their families' evictions will override their urges to commit the crimes. Clearly, for many criminals, those activities have already won out over all other considerations. Innocent family members are just that—they are innocent. Here, though, they face punishment without having committed a crime. What is the true deterrent effect of no-fault evictions on these family members? They are more likely to be discouraged from notifying the police or appropriate authorities when someone they live with or are responsible for commits a crime because the innocent family members would then face eviction themselves even if they are innocent. In

\(^{133}\) *BLACK'S LAW DICTIONARY* 481 (8th ed. 2004).

\(^{134}\) U.S. Dept. of Hous. and Urban Dev. v. Rucker, 535 U.S. 125, 134 (2002). The Court also opined that "[i]t is not 'absurd' that a local housing authority may sometimes evict a tenant who had no knowledge of the drug-related activity. Such 'no-fault' eviction is a common 'incident of tenant responsibility under normal landlord-tenant law and practice.'" *Id.* (citation omitted).


\(^{136}\) While working in the legal department of the Housing Authority, I found that requests for paperwork, compliance, and cooperation out of tenants by the Housing Authority can come and go, but it is not until the threat of eviction and homelessness looms that many tenants are more apt to follow the rules and adhere to the structure of the programs. However, the reach of the deterrence effect from the reinstatement of no-fault evictions is limited for several reasons.
this way, the loss of the innocent tenant defense does not always deter crime but may in fact harbor it.

VII. CONCLUSION

In 2002, the Supreme Court decided in Rucker that Congress could grant housing authorities the ability to evict innocent household members when one tenant engages in drug-related criminal activity. In 2007, the Supreme Judicial Court reaffirmed this holding in Garcia by finding that state laws which restrict this power of the housing authorities are preempted by federal law. In conjunction, these two decisions have deeply impacted the landscape of public housing in Massachusetts and potentially beyond.

The ruling in Garcia is an unequivocal triumph for housing authorities in the Commonwealth. First, housing authorities now have a tremendous amount of discretion when dealing with criminal tenants and their families. The Court's holding mandates nothing of housing authorities; the decision neither ordered housing authorities to wait a certain period of time following an alleged crime to consider the legal outcome nor to consider specific, delineated factors when deciding whether to terminate the lease or evict the family. Notably, the Garcia holding does not demand that a housing authority consider or even give any weight at all to the makeup of the family, how young the children are, how old the elderly are, or the physical and mental conditions of any of the tenants. Secondly, the aforementioned expansion in discretion gives housing authorities the mechanisms they need (or desire) to enforce their rules. Housing authorities now hold all the tools of enforcement and the discretion to decide when to utilize them. Whether one agrees or disagrees with the Court's decision in Garcia, it is undeniable that housing authorities are now permitted to go after tenants accused of drug and criminal activity in unprecedented ways.

On the other end of the spectrum, of course, are the public housing tenants of Massachusetts. The ruling in Garcia delivers a severely unfair and unwarranted blow to the innocent family members of criminals living

137. Rucker, 535 U.S. at 130.
139. See supra Part V.
140. This article is not intended to serve as a scathing review of housing authorities, criticizing the people that work there and the important work that they do. Housing authorities are not to be blamed for utilizing all of the tools that legislatures and courts have given them—they are merely doing their work in a continually undefined area. Abuse of power, however, is a concern of all people and all institutions. Give a determined organization with specific goals an inch and they will take a foot; give them a wide open door and they will run through it.
Evicting innocent persons from public housing seems to directly conflict with the very goals of the system. If the Housing Authority's mission is to offer people in need the chance to live and thrive in decent, affordable housing despite their poor credit history and criminal record, then allowing evictions under these circumstances seems counterintuitive. The loss of the innocent tenant defense and the reinstatement of no-fault evictions serve as self-imposed roadblocks to this goal of housing authorities to give needy people a chance to lead safe lives and to foster personal growth ultimately leading to self-sufficiency. Yet public housing and this sense of community, which is so often the last resort for people facing increasingly deeper poverty, is ripped away from people for something they did not even do. Instead of affording low-income families a safe and comfortable living environment where they can focus on crucial aspects of life such as work and education, these innocent tenants are thrown out onto the streets without a leg to stand on for support. Worse yet, many of these tenants are likely to feel bitter and betrayed by their housing authority. This may cause them to feel even more resentment towards societal institutions, which they often feel disenchanted from to begin with. Who then do they blame? Do they blame the lawyers and government employees? Perhaps they blame the police for making the arrest which led to eviction. Certainly many of the people in these situations will blame the family member who committed the questionable conduct leading to more cuts in an already torn family fabric.

However, the unfairness of this ruling extends beyond the scope of housing authorities. The holding in Garcia is an example of making innocence irrelevant; in fact, it is the prosecution of the innocent. Needy family members and friends living with someone who commits a drug-related or non-drug-related offense are being forced out of the homes they desperately need. It is a well-established principle of our judicial system

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141. See supra Part VI.
142. See Cambridge Housing Authority Home Page, http://www.cambridge-housing.org/chaweb.nsf (last visited Feb. 16, 2009) (stating that “[t]he mission of the Cambridge Housing Authority is to develop and manage safe, good quality, affordable housing for low-income individuals and families in a manner which promotes citizenship, community and self-reliance”).
143. See Lowell Housing Authority Home Page, http://www.lhma.org/index.html (last visited Feb. 16, 2009). The Lowell Housing Authority states that it is “dedicated to providing . . . housing for all persons” which are “special place[s], reflecting the rich diversity in the experiences and backgrounds of our residents.” Id. The organization goes on to state that they “work diligently to create positive living environments to enhance the quality of life for our residents.” Id.
that each person is innocent until proven guilty. Every party involved from the criminal tenant, to his or her family members, to the police, and the housing authority itself, acknowledge that the family members are in fact innocent. Yet, with that as a foundation, housing authorities now have the power to move for full-household evictions. It is undeniably the eviction of the innocent, and no one even has to pretend otherwise. Garcia serves as another unfortunate example of the occasional disconnect between the law (and lawmakers), and the real life it seeks to regulate. The promotion of a clean, law-abiding, safe environment for all public housing tenants is a must, but it is a slippery and dangerous slope to victimize the innocent in doing so.

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