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CIVIL LAW—SUBSTANTIVE DUE PROCESS—PARENT AND CHILD LIABILITY: IS A FUNDAMENTAL RIGHT VIOLATED?—Spence v. Gormley, 387 Mass. 258, 439 N.E.2d 741 (1982)

Ina A. Forman

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CIVIL LAW—SUBSTANTIVE DUE PROCESS—PARENT AND CHILD LIABILITY: IS A FUNDAMENTAL RIGHT VIOLATED? —*Spence v. Gormley*, 387 Mass. 258, 439 N.E.2d 741 (1982).

I. INTRODUCTION

One of the cornerstones of American law is that an individual should not be legally burdened for the wrongs of another on the mere basis of one's relationship or association with the person who committed a wrong.[1] This concept of individual liability has manifested itself in both civil and criminal law, with the latter giving rise to the notion that one is innocent until proven guilty.[2]

The civil and criminal arenas have dealt with this theory of individual liability in a range of cases. It has been held, for example, that there is a fundamental right to freedom of association with subversive political groups;[3] that one cannot be held liable for having a certain status, such as being a drug addict;[4] and that legal burdens cannot be imposed on family members for the acts or status of another family member, such as illegitimacy[5] or a mother's violent acts against a third person.[6]

The broad proposition that individuals have a substantive due process right not to be civilly punished for the acts of another has rarely been narrowed by courts, and courts have narrowed this proposition only when public policy has strongly necessitated such action.[7] One area in which public policy considerations have come

1. St. Ann v. Palisi, 495 F.2d 423 (5th Cir. 1974). ("Freedom from punishment in the absence of *personal* guilt is a fundamental concept in the American scheme of justice." *Id.* at 425 (emphasis in original).

2. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW, § 8 at 53 (1972). *See also* MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE, § 342 at 805 (E. Cleary ed. 1972).

3. Scales v. United States, 367 U.S. 203 (1961).

4. Robinson v. California, 370 U.S. 660 (1962).

5. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972). (Court invalidated a Louisiana statute which granted workmen's compensation benefits to legitimate children for the death of a parent but deprived benefits to illegitimate children.

6. St. Ann v. Palisi, 495 F.2d 423 (5th Cir. 1974). (Children cannot be expelled from school for their mother's act of hitting the school's vice-principal).

7. *Id.* at 425-26.

> In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . , that rela-

into play is with parent and child liability. Early tort law declared that parents were not liable for the torts of their children merely because of their parenthood and were liable only if they ratified or consented to the child's act or if the act fell under a traditional tort liability category.[8] Many states found this system unworkable however, since the financial situation of many minors often left plaintiffs uncompensated.[9] Thus states have enacted statutes holding parents financially liable for certain types of property or physical injury.[10]

The question is whether strong public policy considerations were present in *Spence v. Gormley*,[11] wherein two women were legally burdened, in the form of evictions, due to their maternal relationship with the young men who were accused of firebombing their neighbor's apartments.[12]

This note will establish that there is a substantive due process right not to be legally burdened for a wrong unless one is responsible for committing that wrong. It shall also be demonstrated that this right not to be burdened is a fundamental right.[13] The relationship between parental liability for the acts of their children and the right not to be burdened for the wrongs of another will be explored within the context of the facts presented in *Spence v. Gormley*.[14]

Specifically, this note will examine how the traditional law of torts, which generally holds parents blameless for their children's wrongs, has been statutorily narrowed in order to effectuate the goal that victims be adequately compensated. It will then be shown that the solution to protecting this fundamental right is to increase the burden of proof beyond a mere "preponderance of the evidence" to a standard of "clear and convincing evidence." Furthermore, this note contends that when a court is presented with the issue of the right not to be burdened, it ought to contemplate less restrictive alternatives before imposing a harsh judicial remedy.

Throughout, the note will indicate how an entirely different result might have emerged (1) had the supreme judicial court not assumed facts that the trial court did not find; (2) had the cases not

tionship must be sufficiently substantial to satisfy the concept of personal guilt . . . .

Id. (quoting Scales v. United States, 367 U.S. 203, 224-25 (1961)).

8. 387 Mass. 258, 439 N.E.2d 741 (1982).

9. *Id.* at 259-60, 439 N.E.2d at 743.

10. 67A C.J.S. *Parent and Child* § 123 (1978).

11. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 123, at 871 (4th ed. 1971).

12. *See infra* note 87.

13. *See infra* notes 41-63 and accompanying text.

14. 387 Mass. 258, 439 N.E.2d 741 (1982).

been consolidated;[15] and (3) had the court properly categorized the right to freedom from liability without individual guilt as a fundamental or important right. This heightened status may only be infringed upon after strict or intermediate scrutiny rather than a rational basis standard.[16]

II. FACTUAL BACKGROUND

In April, 1981 and May, 1981, the Boston Housing Authority (BHA) started summary process eviction proceedings against two families, the Gormleys and the Buntings, for alleged violent acts to BHA property and/or BHA employees by the two families' sons.[17] The Boston Housing Court, as trier of fact, allowed the eviction of each of the families.[18] The Housing Court based its decisions on findings that on May 11, 1980, Mark McDonough, son of Mrs. Gormley, firebombed the BHA-owned apartment of a black family, and that on July 17, 1980, he assaulted a black BHA employee.[19] The court similarly found that William Bunting participated in a racially motivated firebombing of a BHA apartment on November 7, 1980.[20]

The supreme judicial court granted a request for direct appellate review, and in so doing, consolidated the previously separate cases of the Gormleys and Buntings into one action.[21] Mrs. Gormley's son Mark was sixteen at the time of the alleged incident and living at home.[22] When the supreme judicial court heard the case, Mark was serving the second year of a six-to-ten year sentence for crimes unrelated to the firebombings.[23] While Mrs. Gormley stated that she did not intend to let her son Mark return home after his release from prison, Mark stated that he did intend to return home.[24]

William Bunting, Mrs. Bunting's son, was eighteen when the

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15. *Id.* *See infra* text accompanying notes 94-95.

16. *Gormley*, 387 Mass. at 274, 439 N.E.2d at 751. *See also St. Ann*, 495 F.2d at 427: "Having established a significant encroachment upon a basic element of due process, the state, in order to justify this encroachment, must satisfy a *substantial* burden . . . . One must analyze the compelling reason . . . ." (emphasis in original).

17. Spence v. Gormley, 387 Mass. 258, 439 N.E.2d 741 (1982).

18. *Id.* at 259, 439 N.E.2d at 743.

19. *Id.*

20. *Id.* at 260, 439 N.E.2d at 743.

21. *Id.* at 258, 439 N.E.2d at 742.

22. *Id.* at 259-60, 439 N.E.2d at 743.

23. *Id.* at 260, 439 N.E.2d at 743.

24. *Id.*

firebombing occurred,[25] and was thus an adult. William had been in the custody of the Division of Youth Services (DYS) from the ages of eleven to eighteen, at which time he could only visit home once a month.[26] At the time of the incident, however, William was no longer under the DYS program and visited home sporadically.[27] The fact that William no longer lived at home also distinguished him from Mark McDonough.

III. ANALYSIS BY THE COURT

A. *Lease Provisions*

The supreme judicial court began its review of whether Mrs. Gormley and Mrs. Bunting could be evicted for the alleged acts of their sons by carefully examining the leases signed by the tenants.[28]

Out of the ten permissible grounds for termination of tenancy by the BHA, there were three which the court found applicable to the present case.[29] While the firebombings of BHA property and assault of a BHA employee would have been sufficient reason to evict a tenant according to the lease provisions, the issue was whether the provisions for termination applied to household members who had not signed the lease and were not named as tenants.

The court found that the provisions did apply to household members under the premise that the acts committed constituted a threat to "health and safety or a likelihood of interference with rights."[30] The court believed that the wording of the lease suggested support for the eviction if the problem came from within the house-

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25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 261-63, 439 N.E.2d at 744-45. Mrs. Gormley and Mrs. Bunting had signed identical lease forms and were the sole persons signed as "tenant" on their respective leases. The lease form itself was a result of collective bargaining between the Boston Public Housing Tenants' Policy Council, Inc. and the BHA. *Id.* at 261, 439 N.E.2d at 744.

29. *Gormley*, 387 Mass. at 261-62, 439 N.E.2d at 744. The court found the pertinent provisions to be:

> This lease may be terminated by the [BHA] . . . for no reason other than . . . 2. Reasonable likelihood of serious repeated interference with the rights of other tenants . . . 5. Creation or maintenance of a serious threat to the health or safety of other tenants . . . 10. In the event of a violation by the Tenant of any of the terms, conditions or covenants of this lease. In addition, . . . [the tenant agrees to] [l]ive in a peaceful way, respecting the rights of his neighbors to privacy and quiet.

Id.

30. *Id.* at 262, 439 N.E.2d at 744.

hold, regardless of whether the source of the problem was the actual tenant or merely a family member.[31] The court also found such a result to be harmonious with the primary purpose of the termination provisions that existed to promote safety and order within BHA housing.[32]

B. *Statutory Requirement of Cause*

The court then considered the tenants' argument that in order for the BHA to terminate a lease in these factual situations, it must be shown that the mothers were personally responsible for their sons' conduct.[33] In rejecting this argument, the court referred to the statutory requirement of Massachusetts General Laws c. 121B § 32 which stipulates that a housing authority, such as the BHA, cannot "terminate a tenancy without 'cause.' "[34] The court concluded that, in accordance with the statutory provisions, "violent acts by household members can constitute 'cause' to terminate a tenancy."[35] The court further stated that an amendment to § 32, added after these cases arose, which specifically included members of the tenant's household in considering causes for eviction, lent support for the proposition that the legislature approved of the inclusion of household members.[36] Prior to the amendment, the court found sufficient cause to terminate absent the tenant's ability to show that they could not foresee or prevent the violence.[37]

The two exceptions to the cause requirement, which allow termination only when there is a connection between the tenant and the conduct underlying the discontinuance of the tenancy, are as follows: 1) when the circumstances indicate that the consequences of the eviction will be severe; and 2) when there are "unsettled constitutional questions."[38]

C. *Constitutional Claims*

The unsettled constitutional questions exception led the court into a discussion of the tenants' constitutional claim, which is the focus of this article. Simply stated, the tenants' argued that there is a

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31. *Id.*
32. *Id.*
33. *Id.* at 263, 439 N.E.2d at 745.
34. MASS. GEN. LAWS ANN. ch. 121B, § 32 (West Supp. 1983-84).
35. *Gormley*, 387 Mass. at 263-64, 439 N.E.2d at 745.
36. *Id.* at 264 n.6, 439 N.E.2d at 745 n.6. For a counter argument *see infra* note 91.
37. *Id.* at 265, 439 N.E.2d at 746.
38. *Id.* at 264, 439 N.E.2d at 745.

due process right, beyond the reach of MGL c.121B § 32, which requires that a tenancy not be terminated without proof that the mothers were responsible for their sons' acts.[39] The supreme judicial court found that this due process right was not applicable when the public health, safety or welfare was concerned.[40] The court added that no higher standard of proof was necessary beyond the 'preponderance of evidence' standard used[41] for this lesser status right.

IV. ESTABLISHING THE FUNDAMENTAL RIGHT TO BE BURDENED ONLY UPON PERSONAL LIABILITY

A. *Due Process Goes Beyond the Bill of Rights*

It was established in *St. Ann. v. Palisi*[42] that "substantive due process rights are not limited to those liberties specifically enumerated in the Bill of Rights."[43] One of those rights not mentioned in the Constitution, but that nevertheless exists, is the right of an individual not to be legally burdened unless the individual is personally responsible.

Since this right is not specifically mentioned in the Bill of Rights, it is necessary to find substantiation of the existence of the right from other sources. *St. Ann* unequivocally established the weight, or importance, of this right when the court declared that "[f]reedom from punishment in the absence of *personal* guilt is a fundamental concept in the American scheme. In order to intrude upon this fundamental liberty governments must satisfy a substantial burden of justification."[44] The court in *Tyson v. New York City Housing Authority*[45] proclaimed the weight of this right by stating that "the concepts of personal guilt and individual responsibility . . . are touchstones of the Anglo-American system of law . . . implicit within the concept of due process is that liability may be imposed on an individual only as a result of that person's own acts or omissions."[46]

39. *Id.* at 270, 439 N.E.2d at 748.

40. *Id.* at 273, 439 N.E.2d at 750.

41. 495 F.2d 423 (5th Cir. 1974).

42. *Id.* at 425.

43. *Id.* (citing Karr v. Schmidt, 460 F.2d 609 (5th Cir. 1972), in which the court held that wearing long hair in a public school is not subject to constitutional protection, and thus any such regulation need only meet minimum rationality tests).

44. 369 F. Supp. 513 (S.D.N.Y. 1974).

45. *Id.* at 518.

46. 367 U.S. 203 (1961).

B. *The Perimeters of the Right*

In *Scales v. United States*,[47] the Supreme Court dealt with the issue of whether or not a person could be held liable for merely associating with a criminal organization.[48] The Court held that "[i]n our jurisprudence guilt is personal," implying that association, without more, is not a criminal wrong.[49]

Freedom of association is not the only area afforded protection. In *Robinson v. California*, the Supreme Court struck down a statute which made it a crime to be a drug addict, reasoning that the *status* of a person does not involve criminal activity.[50] The Court found the California statute offensive in that it allowed a conviction simply based upon Robinson's " 'status' or 'chronic condition' . . . [of] being 'addicted to the use of narcotics.' "[51]

The substantive right of liability for individual guilt is not limited to the criminal arena. Oliver Wendell Holmes established this point succinctly when he said, "criminal liability, as well as civil, is founded on blameworthiness . . . . [A] law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear."[52]

This substantive right surfaced again when the Supreme Court expressed its distaste for differentiating between legitimate and illegitimate children.[53] The Court stated: "[I]mposing disabilities on the illegitimate child is contrary to the basic concepts of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."[54]

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47. *Id.*

48. *Id.* at 224. The Court established that "[m]embership, without more, in an organization [said to be] engaged in illegal advocacy," was not criminal. *Id.* at 225. The Court then stated that not all associational relationships were beyond liability. Conspiracy and complicity, the Court noted, were punishable offenses even without "the commission of specific acts of criminality." *Id.*

49. 370 U.S. 660 (1962).

50. *Id.* The Court noted that the California statute, under which Robinson was arrested, did not require proof that narcotics were actually used in the jurisdiction, and that the jury had been instructed that they could convict Robinson even if they did not believe the evidence of his use of narcotics. *Id.* at 665.

51. *Id.*

52. O.W. HOLMES, THE COMMON LAW 50 (1881). This idea was repeated by the court in *Tyson*, which stated: "This notion of personal guilt is not limited to criminal actions." Tyson v. New York City Housing Authority, 369 F. Supp. 513, 519 (S.D.N.Y. 1974).

53. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972). *See supra* note 5.

54. *Id.*

The right to associate with criminals was upheld in the civil case of *Sawyer v. Sandstrom*,[55] which disallowed a loitering ordinance since it "punishe[d] an individual not for his own criminal acts, but rather for his act of being in a public place and associating with individuals whom he knows to be engaged in criminal activity, *i.e.*, drug use or possession."[56] The *Sawyer* court further stated that it was in full agreement with the Supreme Court that "punishment must be predicated only upon personal guilt."[57]

Lastly, this fundamental right appeared in a civil case, factually similar to *Gormley*.[58] In *Tyson v. New York City Housing Authority*,[59] the court held it to be violative of the fourteenth amendment to evict tenants from their public housing for the criminal acts committed by their family members who were not living at home at the time.[60] The court found the link of parental blameworthiness too weak: "There must be some causal nexus between the imposition of the sanction of eviction and the plaintiffs' own conduct. Defendants rely simply on the existence of the parent-child relationship."[61]

In *St. Ann v. Palisi*,[62] the connection between the weight and importance of the substantive due process right and the burden that the state must bear was made explicit by the court:

> [T]he children do not complain that they were denied the constitutional right to an education, but that they were punished without being personally guilty. Thus a cardinal notion of liberty is involved and substantive due process is applicable.
>
> . . .
>
> Having established a significant encroachment upon a basic element of due process, the state, in order to justify this encroachment, must satisfy a *substantial* burden.[63]

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55. 615 F.2d 311 (5th Cir. 1980).

56. *Id.* at 316. *See also* Bridges v. Wixon, 326 U.S. 135 (1945), in which Justice Murphy stated that "[t]he deportation statute completely ignores the traditional American doctrine requiring personal guilt rather than guilt by association or imputation before a penalty or punishment is inflicted." *Id.* at 163 (Murphy, J., concurring).

57. *Sawyer*, 615 F.2d at 316.

58. *Spence v. Gormley*, 387 Mass. 258, 439 N.E.2d 741 (1982).

59. 369 F. Supp. 513 (S.D.N.Y. 1974).

60. *Id.* at 521.

61. *Id.* at 519. This case was brought as a class action but not allowed to continue as such. The plaintiffs in *Tyson* had been declared undesirable tenants and faced eviction because of the conduct of their adult children. *Id.*

62. 495 F.2d 423 (5th Cir. 1974).

63. *Id.* at 426-27 (emphasis in original). *See infra* notes 141-46 and accompanying text for further discussion regarding substantial burden of proof.

C. *Distinguishing and Extending the Fundamental Right Cases*

While *Scales v. United States*[64] reinforces the doctrine of personal guilt and its importance in determining liability, *Scales* may be distinguished from *Gormley* in two respects. First, *Scales* was a criminal case, which distinguishes it from *Gormley* in that there is concern regarding the severity of the offender's punishment. The loss of liberty in a criminal case is often more severe than a civil remedy, thus the standard of proof is higher in a criminal case.[65] Secondly *Scales* involved a pure freedom of association issue. While freedom to associate with a political or religious group and personal guilt for liability are two of the principle foundations underlying our system of jurisprudence, they are not identical. The two doctrines are entwined, however, in that one is allowed the freedom to *associate* with illegal groups *because* one cannot be burdened without personal guilt.[66]

It is not clear, though, that the freedom to associate is protected on a personal level. That is, association with one's family, a personal affiliation, differs from association with a political or religious group in that a court is less willing to step inside the family unit and supervise the intra-family activities and relationships. On the other hand, courts have not hesitated to regulate other groups in society, such as religious or political organizations.[67] The foregoing distinction was diminished, however, by the *Tyson* court:

> [P]laintiffs' allegation that their right of association has been infringed does state a good cause of action. The nub of this claim is that by declaring these tenants ineligible for continued occupancy on the basis of their children's acts, the defendants have acted 'solely from the fact of association' by the plaintiffs with their children . . . . Such a claim, if proven, would run afoul of the First Amendment which guarantees . . . the right to freely associate with others, including members of his family, without interference from the state.[68]

64. 367 U.S. 203 (1961).

65. It is important to note that interference with the substantive due process right of individual guilt is repulsive to our judicial system, whether or not the interference stems from a civil or criminal matter.

66. Fisher v. Snyder, 346 F. Supp. 396, 398 (D. Neb. 1972). ("It makes no difference 'whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.' ").

67. *E.g.*, NAACP v. Alabama, 357 U.S. 449, 460 (1958), Shelton v. Tucker, 364 U.S. 479 (1960).

68. Tyson v. New York City Housing Authority, 369 F. Supp. 513, 520 (S.D.N.Y.

In *Fisher v. Snyder*,[69] the court recognized that most of the cases dealing with the constitutional right to freedom of association for teachers involved membership in organizations.[70] Yet, it found no relevant distinction between that type of associational interest and that asserted by Mrs. Fisher: the right to associate with unrelated individuals.[71]

Similarly, *Robinson v. California*[72] differs from *Gormley* in that it involved criminal activity.[73] Another distinction is that *Robinson* involved a status crime and warned against finding guilty those who carried a certain status, such as being a drug addict, without evidence as to criminal activity.[74]

Again, while the motivation behind the Supreme Court disallowing status crimes may be due to a dislike for punishment without personal guilt, status crimes have not yet included the of status of motherhood. Rather, all the disallowed status crimes involve a status that is tainted with illegality, such as being a drug addict or felon.[75] The spirit of the law, however, is that there shall be no punishment without personal liability and certainly not for one's status in society.

Although not entirely analogous, the case most similar to *Gormley* in its facts and issues is *Tyson*,[76] which involved a group of tenants who brought constitutional claims against the New York City Housing Authority.[77] The plaintiffs' constitutional claim was whether the Housing Authority "may constitutionally evict an entire

1974). This court cited Fisher v. Snyder, 346 F. Supp. 396 (D. Neb. 1972), in which a teacher was dismissed from her position on grounds of immorality, i.e. on the basis of the guests she entertained at her home. *Id.* at 397. The court held that a teacher's right to freely associate was closely aligned to freedom of speech and that neither could be curtailed without the strictest of scrutiny. *Id.* at 398-99.

69. 346 F. Supp. 396 (D. Neb. 1972).

70. *Id.* at 399.

71. *Id.*

72. 370 U.S. 660 (1962).

73. *Id.* at 660.

74. *Id.* at 666-67.

75. *Id.* *See also* Lambert v. California, 355 U.S. 225 (1957), which involved a challenge to a Los Angeles ordinance making punishable the failure of a felon to register with the police within five days after entering the city. *Id.* at 226. The defendant challenged that statute on the ground that she was not aware that she had a duty to register. *Id.* at 227. The Supreme Court invalidated the statute stating that it put an unfair burden on defendant to inquire as to a duty to register without notice of such duty. *Id.* at 229.

76. 369 F. Supp. 513 (S.D.N.Y. 1974).

77. *Id.* at 516. The tenants' constitutional claims consisted of procedural and substantive due process and equal protection issues under the first, fourth, ninth and fourteenth amendments. *Id.* In addition, the tenants asserted their rights under the United

family from public housing on the sole ground that an adult child in that family, who does not reside in the parental home, has committed criminal acts which are deemed nondesirable."[78] While *Tyson* is factually distinguishable in that all of the children were adults and did not live at home at the time the criminal acts were committed, it would be hasty and unwise to dismiss *Tyson* on this basis alone. The court in *Tyson* was entirely justified in focusing upon the lack of a causal nexus between the parent and the child's act and ignoring the aspect of whether or not the children lived at home. The *Gormley* court should have followed *Tyson*'s example by concentrating on the relationship of the parent to the child's action. This would have enabled the court to use the child's residence as an aspect of the familial relationship, *i.e.*, indicative of whether the parent knew or should have known of the child's propensity to cause damage and whether the parents controlled the child's acts.

Lastly, *St. Ann v. Palisi*,[79] like *Tyson*, is a civil case. The court in *St. Ann* refused to suspend the children from school for the violent act of their mother against a school official, stating that liability without personal guilt was an encroachment upon a basic substantive due process right.[80] The distinguishing feature, of course, is that in *Gormley* the relationships are reversed.

V. The Application of the Fundamental Substantive Due Process Right of Personal Blameworthiness to Parental Liability

The doctrine of individual "guilt" has been applied with varying results in cases where the issue is whether parents can be legally burdened for the tortious acts of their children. Examination of the common law of tort liability shows that the general rule is that the relationship of parent and child alone will not impose liability on the parent for the tort of the child.[81] Specifically, "[t]he parent is not

States Housing Act of 1937. 42 U.S.C. §§ 1401-1430 (1976). 369 F. Supp. at 521. The court dismissed plaintiffs' claim to a privacy interest. *Id.* at 520.

78. 369 F. Supp. at 518.

79. 495 F.2d 423 (5th Cir. 1974).

80. *Id.* at 425.

81. *See, e.g.*, Cronenberg v. United States, 123 F. Supp. 693, 703 (E.D.N.C. 1954) (under North Carolina law a parent is not liable for the tort of a minor child by reason of the parent-child relationship even where a minor child, who could not be sued, negligently operates the family car and strikes another driver); Anderson v. Butler, 284 N.C. 723, 730, 202 S.E.2d 585, 589 (1974) (a parent may incur liability for injuries or damage when the parent entrusts to a minor child an instrumentality that becomes dangerous due to the youth's immaturity or lack of judgment); Shaw v. Roth, 54 Misc. 2d 418, 282

liable merely because the child lives at home with him, works for him, and is under his care, management and control."[82] The reasoning behind the common-law principle of not holding the parent automatically liable was that there was no fusion of identity between parent and child as there was between husband and wife.[83]

One exception to the general common law rule occurs when parents consent to the child's act or ratify it in some way.[84] This liability is founded on standard negligence principles and is not considered to be an intrusion on substantive due process rights.[85] Such liability typically arises in situations in which the parent entrusts a child with a dangerous instrumentality, such as a car, or entrusts the child with a weapon knowing the child to have dangerous tendencies under such circumstances. The parent is then liable under both the ordinary rules of negligence for the dangerous instrumentality, and under the family purpose doctrine for the car.[86]

The general common law rule that parents are not liable left many plaintiffs uncompensated, since minors usually have no control over their finances or have no monetary resources at all. Thus, many states enacted legislation making parents statutorily liable for juvenile destruction.[87]

N.Y.S.2d 844 (1967) (complaint against parents for an assault committed by their minor son failed to state a cause of action against parents, where parents had no knowledge of the child's vicious tendencies); *see also* 67A C.J.S. *Parent and Child* § 123, at 493 (1978).

82. Annot., 155 A.L.R. 85, 86 (1945).

83. *See, e.g.*, Hudson v. Von Hamm, 85 Cal. App. 323, 259 P. 374 (1927); PROSSER, *supra* note 46, at 871. *See also* Takayanagi, *Liability Without Fault in the Modern and Common Law*, ILL. L. REV. 163 (1921).

84. PROSSER, *supra* note 10, at 871-72.

85. *Id.*

86. *See* Annot. 54 A.L.R.3d 974 (1973); PROSSER, *supra* note 10, at 871-72. The family purpose doctrine maintains that the owner of a car is liable for injuries brought on by the negligent operation of the car by a family member when the car is bought or kept for the pleasure of the family. *Id.* at 872.

87. *E.g.*, CONN. GEN. STAT. § 52-572 (1983); TEX. STAT. ANN. art. 5923-1 (Vernon 1962); and MASS. GEN. LAWS ANN. ch. 231, § 85G (West Supp. 1983-84). The latter statute provides:

> Parents of an unemancipated child under the age of eighteen and over the age of seven shall be liable in a civil action for any willful act committed by said child which results in injury or death to another person or damage to the property of another, damage to cemetery property, or damage to any state, county or municipal property. This section shall not apply to a parent who, as a result of a decree of any court of competent jurisdiction, does not have custody of such a child at the time of the commission of the tort. Recovery under this section shall not exceed one thousand dollars for any such cause of action.

Id.

The *Gormley* court did not use this statute in its analysis because it deals squarely

The Restatement Second of Torts advocates a standard which requires parents to exercise reasonable care in controlling the child so that others including the child are not harmed or injured, *if* the parent: "(a) knows or has reason to know that he has the ability to control [the] child, and (b) knows or should know of the necessity and opportunity for exercising such control."[88]

This test was used by the *Gormley* court when it analyzed the applicability of the Massachusetts statute.[89] Section 32 allows for evictions of tenants when there is just cause due to a serious threat to the health or safety of a tenant or employee of the housing authority.[90] The statute does not state that it applies to household members of the tenant.[91] The supreme judicial court found that because the statute should be interpreted to include family members living at home, a burden is imposed upon the tenant to show that she could neither foresee nor prevent the violence of her son. If this was proven, then there [was] no 'cause' to evict" under the statute.[92] The court further stated that the evidence in the case before it did "not negate the awareness of and ability to prevent violence."[93] It is important to note, however, that the trial "judge made no findings as to whether Mrs. Gormley knew or should have known of her son's propensity for violence, or whether she was able to control or prevent his actions."[94] Since the supreme judicial court heard *Gormley* on appellate review and not on a *de novo* basis, the court was not at liberty to make findings not made by the trial court.[95] The court

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with compensation, not health and safety. Spence v. Gormley, 387 Mass. 258, 439 N.E.2d 741 (1982).

88. RESTATEMENT (SECOND) OF TORTS § 316 at 123-24 (1965).

89. Spence v. Gormley, 387 Mass. 258, 265, 439 N.E.2d 741, 746 (1982).

90. MASS. GEN. LAWS ANN. ch. 121B, § 32 (West Supp. 1983-84).

91. The supreme judicial court noted that the amendment to section 32, enacted after the *Gormley* case arose, and which added the words "or a member of the tenant's household" should be read as an indication that the legislature meant for the unamended statute to also apply to household members. *Gormley*, 387 Mass. at 264 n.6, 439 N.E.2d at 745 n.6. Of course, the express addition of "household members" to the statute could as easily mean that the legislature did not intend for a person other than a tenant to be included until and unless the legislature decisively said so.

92. Spence v. Gormley, 387 Mass. 258, 265, 439 N.E.2d 741, 746 (1982).

93. *Id.*

94. *Id.* at 260, 439 N.E.2d at 743. As for Mrs. Bunting, the trial judge found that while she knew or should have known of her son's violent tendencies, she had no ability to control his actions. *Id.* at 266, 439 N.E.2d at 746.

95. *Id.* at 258, 439 N.E.2d at 741. (court granted a request for direct appellate review.) A *denovo* hearing would be one which tries the matter again as if no previous decision had been rendered and as if the case had not been heard before. Farmingdale Supermarket, Inc. v. United States, 336 F. Supp. 534, 536 (D.N.J. 1971). *See also* 2 Am. Jur. 2d *Admin. Law* § 698 (1962).

erred in not remanding the case back to trial court for determination of whether Mrs. Gormley had such knowledge or control of her son's violence that would hold her liable. Furthermore, due to the possibility that a trial court's findings as to Mrs. Gormley could differ from those as to Mrs. Bunting, the supreme judicial court should not have consolidated these two cases and should be wary of consolidating such cases in the future.

The standard of "knowledge and control" was also used in- *DePasquale v. Dello Russo*,[96] which came to a conclusion contrary to *Gormley*. The parents in *DePasquale* were not held liable despite the frequent use of fireworks by the child since there were only two incidents of misuse of fireworks, an amount insufficient to show a dangerous propensity on the part of the child.[97] To adopt any other holding, the court summarized, "would go far toward exposing parents to liability for the torts of their children solely because of their parenthood."[98] The record in *Gormley* indicates that the mothers had some information of their sons' involvement in delinquent activities,[99] yet *DePasquale* set the standard that, standing alone, "some" information of the child's tendencies was not enough to impose liability on the parents.[100] It is important that the court determine precisely the amount of information that parents have regarding the child's involvement in delinquent acts, because the legal question of parental liability through knowledge and control turns solely upon this factual determination.[101]

In *Smith v. Jordan*[102] the court chose not to rely upon the parents' knowledge, but rather followed the more concrete path of the common law, that "[t]here must exist an authority from the father to the son to do the tortious act or a subsequent ratification and adoption of it, before responsibility attaches to the parent."[103]

In applying the Restatement Second test,[104] the United States Court of Appeals for the Seventh Circuit, in *Rautbord v. Ehmann*,[105]

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96. 349 Mass. 655, 212 N.E.2d 237 (1965).

97. *Id.* at 659, 212 N.E.2d at 239.

98. *Id.* at 659, 212 N.E.2d at 240.

99. Spence v. Gormley, 387 Mass. 258, 260, 439 N.E.2d 741, 743 (1982).

100. In *Gormley*, this factual determination should have been made at the trial level. *See supra* text accompanying notes 94 and 95.

101. 211 Mass. 269, 97 N.E. 761 (1912).

102. *Id.* at 270-71, 97 N.E. at 761.

103. *See supra* note 88 and accompanying text.

104. 190 F.2d 533 (7th Cir. 1951).

105. *Id.* at 537. (quoting The 84-H, 296 F. 427 (2d Cir. 1923), *cert. denied*, 264 U.S. 596 (1924).

further defined and narrowed the type of knowledge necessary for a parent to have in order to be liable for the child's tort. " 'The privity or knowledge must be actual and not merely constructive. It involves a personal participation of the owner in some fault or act of negligence. . . . There must be some fault or negligence on his part or in which he in some way participates.' "[106] The mothers in *Gormley* did not have such active knowledge.

In *Caldwell v. Zaher*,[107] the court found that there was a duty to control a minor child if they knew of the child's propensity to assault and molest other children and yet did nothing to stop it.[108] But the court did allow for a trial regarding the parents' ability to control their son, or more precisely, "whether the defendants could halt [their son's] alleged propensity to assault other children and what steps to this end would be reasonable in the circumstances."[109] Similarly, in *Gormley* it would have been wise if a trial had been held on whether Mrs. Gormley and Mrs. Bunting had control of their sons.

While this is not an exhaustive study of the parent-child liability issue, it is adequate to show that the common law does not impose liability upon the parent for the acts of the child unless permitted by general rules of negligence, or other tort law. Many states, on the other hand, have enacted statutes for pecuniary reasons.[110] Case law is divided between these two camps in finding liability for parents. Some courts refuse to hold a parent liable for their delinquent children,[111] finding it too close to being burdened for doing no wrong; other courts are more likely to find liability so that injured parties may receive compensation.[112]

We have then an acknowledged important substantive due pro-

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106. 344 Mass. 590, 183 N.E.2d 706 (1962).

107. *Id.* at 592, 183 N.E.2d at 707.

108. *Id.*

109. *Id.* at 593, 183 N.E.2d at 707.

110. *See supra* note 87.

111. *See e.g.*, Corley v. Lewless, 227 Ga. 745, 182 S.E.2d 766 (1971), where the court held that recovery can only be had from a parent if the parent, under the terms of the state statute, negligently contributes to the tort. *Id.* at 748, 182 S.E.2d at 769. *See* GA. CODE ANN. §§ 105-113 (1966). The issue in *Gormley* was not that the mothers were forced to compensate the victims for their property damage, but rather that the mothers were being forced to leave their homes which compensated no one.

112. *See supra* note 87. The court in Watson v. Gradzik, 34 Conn. Supp. 7, 373 A.2d 191 (1977) cited Section 52-572 of the General Statutes of Connecticut and stated that the policy reasons behind the statute were two-fold: first, to deter juvenile delinquency, and second, to compensate innocent victims. *Id.* at 10, 373 A.2d at 193. The court in Kelly v. Williams, 346 S.W. 2d 434 (Tex. Civ. App. 1961) stated that it was better to let parents pay than to let innocent victims bear a loss. *Id.* at 438.

cess right not to be impinged upon for another's act. This right is subject to intrusion when the necessity is great. Acknowledging that the BHA's goal for safety and security is important, there is a way to pay credence to their goal and yet not infringe upon the fundamental right: by increasing the standard of proof.

VI. BURDEN OF PROOF

The customary manner of protecting an important right is to increase the standard of proof.[113] This is exemplified in *St. Ann v. Palisi*,[114] where the court insisted that "[h]aving established a significant encroachment upon a basic element of due process, the state, in order to justify this encroachment, must satisfy a *substantial* burden."[115] The above standard should apply where, as here, there is a weighty due process right which is substantial enough to raise the burden of proof from beyond a mere preponderance of the evidence to a standard of clear and convincing. This higher standard of proof is necessary to ascertain, first, if the sons were involved in the firebombings; second, if the mothers knew or should have known of the sons' tendencies to commit such acts; and third, whether the mothers were in a position to exert control over their sons.

This increase in proof would not hinder the BHA's desire for safe housing because the higher standard of proof would more accurately determined if the family members were actually involved in the illegal activity complained of and whether they would have a tendency to engage in such acts in the future. A lower standard of proof is overly inclusive in that it allows the BHA to evict families without ensuring that the families are the source of the threat to the safety and security of BHA housing.

The supreme judicial court refused to raise the burden of proof in *Gormley*.[116] The judicial reasoning to reach that conclusion was both "roundabout" and erroneous. First, the court acknowledged the defendants' argument that they had a constitutional right to be free from liability without fault.[117] The court then stated this constitutional right need be overcome only by the BHA's meeting a rational basis test.[118] The proper standard of proof was then

113. Karr v. Schmidt, 460 F.2d 609, 615 (5th Cir. 1972).
114. 458 F. Supp. 569 (E.D. Tex. 1978).
115. *Id.* at 582.
116. 387 Mass. at 273, 439 N.E.2d at 750.
117. *Id.* at 267, 439 N.E.2d at 747.
118. *Id.* at 270, 439 N.E.2d at 749.

analyzed[119] wherein the court acknowledged that a higher interest was more worthy of a higher standard of proof.[120] To begin its analysis, the court examined the interest affected,[121] then switched gears by declaring that the affected interest of the tenants was their right to housing,[122] and not their right to be free from liability without fault.[123] Had the court focused on the right to individual liability, an increase in the burden of proof would have been necessary. Additionally, a higher standard of proof does not depend on the civil or criminal nature of a case,[124] "but rather on the basis of the competing interests at stake and the risk which society is willing to assume for an erroneous decision . . . ."[125] Society is not willing to assume the price of an erroneous decision when a fundamental right is involved. As expressed in *Karr v. Schmidt*,[126] "[t]he due process clause does, of course, protect freedoms 'great and small' from wholly arbitrary state action. But it is only when 'fundamental' liberties are at stake that we place upon the state a 'substantial burden of justification' for the infringement of liberty."[127] Similarly, the court in *St. Ann*[128] stated that where there was a significant encroachment upon a basic element of due process, the state must satisfy a *substantial* burden in order to justify the encroachment.[129]

There have been several cases in Massachusetts in which the standard of proof was raised beyond a preponderance of the evidence for something other than a fundamental right.[130] These cases

119. *Id.* at 273, 439 N.E.2d at 751.

120. *Id.* at 274, 439 N.E.2d at 751.

121. *Id.* The court began this interest analysis by applying the three-prong *Mathews* test. *See infra* notes 133-134 and accompanying text.

122. *Id.* at 275, 439 N.E.2d at 751.

123. *Id.* at 275 n.16, 439 N.E.2d at 751 n.16.

124. *See infra* notes 137-140 and accompanying text, for an analysis of the right not to be burdened under the *Mathews* three-prong test.

125. French v. Blackburn, 428 F. Supp. 1351, 1359 (M.D.N.C. 1977). This case concerned an attack on North Carolina's involuntary commitment statute, as a violation of the 5th and 14th amendments' due process clauses.

126. *Id.*

127. 460 F.2d 609 (5th Cir. 1972).

128. *Id.* at 615 n.12. *See supra* notes 1-16 and accompanying text. *See also*, Snyder v. Massachusetts, 291 U.S. 97 (1934), where the Court stated: "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 105. The right not to be burdened is deeply rooted in our judicial system and its elimination or diminishment would be offensive to our society. *See supra* notes 1-16 and accompanying text.

129. St. Ann v. Palisi, 495 F.2d 423 (5th Cir. 1974).

130. *Id.* at 427.

signify that the supreme judicial court has recognized that there are areas of law that are sufficiently important, though not fundamental, to warrant an increase in the standard of proof. If the court finds it necessary to increase the proof required to determine a testator's potency,[131] then surely the court should find an increase necessary when the issue is a cornerstone of our judicial system, *i.e.*, that an individual is not liable for the acts of another. The supreme judicial court, when faced with imposing the liability upon one person for the actions of another, in this case a mother for her son's, should increase the burden of proof from a mere preponderance of the evidence to a standard of clear and convincing evidence.

The United States Supreme Court in *Mathews v. Elridge*[132] established a test which would enable a judge to more accurately decide when the standard of proof should be raised:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[133]

The *Gormley*[134] court applied the *Mathews* test,[135] but erroneously concluded that the right to a tenancy was the underlying interest. The court should have found that the fundamental right to individual liability was the underlying interest. The application of the *Matthews* test to *Gormley*, utilizing as the basic interest the accountability of the mothers for their sons' acts, would be as follows:[136]

1) The private interest affected, that one be blameworthy before being blamed, is a fundamental

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131. *See* Foley v. Coan, 272 Mass. 207, 209-10, 172 N.E. 74, 75 (1930) ("The proof must be convincing though it need not reach the certainty required in criminal proceedings."); Taylor v. Whittier, 240 Mass. 514, 517, 138 N.E. 6, 7 (1922) (required proof "beyond all reasonable doubt" to determine testator's impotence; Swartz v. Sher, 344 Mass. 636, 639, 184 N.E.2d 51, 53 (1962) (used "beyond all reasonable doubt" in a contract action to recover a deposit for sale of land); Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 290, 317 (1871) (required "full, clear and decisive [evidence] free from doubt or uncertainty," in reforming an instrument on the grounds of mistake).

132. Taylor v. Whittier, 240 Mass. 514, 517, 138 N.E. 6, 7 (1922).

133. 424 U.S. 319 (1976).

134. *Id.* at 335.

135. Spence v. Gormley, 387 Mass. 258, 439 N.E.2d 741 (1982).

136. *Id.* at 274-77, 439 N.E.2d at 751-52.

right. This cherished right is one of the cornerstones of our judicial system.[137]

2) The risk of an erroneous decision is severe in two ways:
   a) It would lend a crushing blow to this important right to allow a court to deprive a person without a sufficiently high standard of proof, and
   b) the practical effect of an erroneous decision in this area would be to evict a mother and her family from low-cost public housing with reasonable housing substitutes few and far between.[138]

3) The probable value of this substitute standard of proof is extremely high since increasing the burden accomplishes the objective of protecting persons from unearned liability and yet does not completely eliminate the chances of the BHA achieving their desired end, since a parent with knowledge of a violent tendency and control over the child may still be liable and thus evicted. It is appropriate that a heavy burden of proof be placed upon the party attempting to narrow the fundamental right involved.

4) The government's interest should be stronger in having fundamental rights protected rather than in having a mother be evicted because her son may or may not have damaged BHA property and may or may not return to do the same if the mother remains. Further, the substitute procedure of an increase in the standard of proof is not a burden to the system since it requires that there be a closer connection between the liability imposed and the responsibility for the illegal actions. This is not a substantial burden to a system that is erected to mete out justice.[139]

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137. *Gormley*, 387 Mass. at 260, 439 N.E.2d at 743.

138. *See supra* notes 48-63 and accompanying text.

139. *See e.g.*, McQueen v. Druker, 317 F. Supp. 1122, 1130 (1970) ("Yet, on the whole, the disadvantages the government will suffer from being required to allege good cause for eviction are not to be compared with the disadvantages that a tenant will suffer if he is evicted capriciously."); Escalera v. New York City Housing Auth., 425 F.2d 853,

VII. LEAST RESTRICTIVE ALTERNATIVE

In conjunction with increasing the standard of proof, an effort must be made to investigate whether the 'punishment' chosen is the least restrictive alternative. In *Sawyer v. Sandstrom*,[140] the circuit court quoted the United States Supreme Court when it stated that fundamental personal liberties could not be stifled by legitimate governmental purposes if the result sought can be more narrowly achieved.[141]

One example of a less restrictive alternative would be that the BHA could have the mother agree to 'evict' the son, and employ the aid of an outside agency to help in enforcement. After all, the court indicated that it would have been willing to allow this type of action when an adult household member was likely to be violent and could not be controlled by the tenant.[142] The court concluded that having taken such preventive measures, the tenant had done all that was possible and thus should not be held responsible for any subsequent violence by the household member.[143]

There is also support for the argument that it is more appropriate to evict only the non-desirable household member with the consent of the family, or to have the family find a way to remove the troublemaking member. This approach is especially applicable when, as in the Bunting case, the targeted member is an adult who is away from home more often than not and who is uncontrollable or unwanted. This allows the family the option of either keeping the family intact and moving out or keeping the apartment.[144] While this alternative would be sufficient for an adult household member, the BHA would have a legitimate hesitancy to require the same in the case of a minor child. This being so, it may not be wise for a court to continue to consolidate cases where one household member

861 (2d Cir. 1970) *cert. denied*, 400 U.S. 853 (1971) ("Nor is it conclusive in the consideration of appellants' constitutional claims to argue that there is no constitutional right to continue living in public housing projects.").

140. *See, e.g.*, Mullane v. Central Hanover Trust, 339 U.S. 306 (1950) as an example of a burden to the system wherein beneficiaries of a trust had to be notified before action could be taken, creating both a time delay and financial expense.

141. 615 F.2d 311 (5th Cir. 1980).

142. *Id.* at 317, citing Shelton v. Tucker, 364 U.S. 479, 488 (1960), wherein the Court stated: "The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." *See also* Elfbrandt v. Russell, 384 U.S. 11 (1966). (statute requiring teachers to take a loyalty oath invalidated; Court stated that though the ends were legitimate, a fundamental liberty was at stake, i.e. freedom to associate).

143. *Gormley*, 387 Mass. at 266, 439 N.E.2d at 746.

144. *Id.*

is a minor and the other an adult, since such diverse factual situations may result in entirely different decisions if decided separately.

Other alternatives would be for the BHA to press criminal charges against the offender, wherein the BHA would be required to prove, beyond a reasonable doubt, that the household member committed the crime as charged. This course of action would be expeditious in removing the offender from the premises if a jail sentence was imposed and yet would not uproot the family. On the other hand, if compensation is the ultimate aim, the BHA could bring a tort action against the mother for money damages.[145] This action would likely be insufficient, however, against a low-income tenant who might be judgment proof.

VIII. CONCLUSION

There is a substantive due process right not to be blamed for the act of another or for one's association with others who commit illegal acts. This right is one of the strongholds of our judicial system and has attained the status of a fundamental right.

This right, as with most rights, fundamental or not, is not completely free from intrusion. When the governmental interest is sufficiently high, an inroad is permissible. Parental liability for wrongful acts committed by their children is an inroad on the requirement that there be individual blameworthiness before a burden is imposed. Traditional tort law does not allow such an infringement unless the parent may be held liable under an existing theory of tort liability. Certain statutes, however, have allowed for such liability to effectuate such goals as the compensation of injured plaintiffs,[146] the promotion of health and safety,[147] and when the parent is knowledgeable of the child's propensity for danger and is able to control the child.

In the case at hand, the supreme judicial court erred in dismissing the tenants' constitutional claim to the fundamental right to be personally blameworthy. The right is not applicable only in criminal cases, nor can it be summarily dismissed on the basis that the

145. *See* Note, *Policy Justifications for Public Housing Evictions*, 5 COLUM. HUM. RTS. L. REV. 215 (Spring 1973). This note analyzes the policy justifications used by New York City public housing agencies in evicting whole families for the act of one family member. Additionally, it explores the social ramifications of saving an apartment versus saving a family.

146. MASS. GEN. LAWS ANN. ch. 231, § 85G (West Supp. 1983-84).

147. *See* MASS. GEN. LAWS ANN. ch. 231, § 85G (West Supp. 1983-84).

government has a strong concern for the health, safety and welfare of housing authority tenants and employees since evicting the blameless will not insure safety for the government's tenants and employees.

The government can protect its goal of safe housing and yet not interfere with the fundamental right by merely increasing the government's burden of proof from 'preponderance of the evidence' to a standard of 'clear and convincing evidence'. This would allow the courts more accuracy in finding the culprit liable and deciding whether the mothers were aware of the sons' tendencies, and whether they could control their sons. In addition, the state should be made to offer less restrictive alternatives, so that, as here, an entire family would not be uprooted were a more reasonable and temperate solution available.

While the state certainly has a legitimate interest in safe, public housing, this goal was not furthered by the *Gormley* decision in a constitutionally sound manner. The court dismissed the due process right to not be burdened by another's wrong in an attempt to accommodate the goal of the BHA. The goal of the supreme judicial court should be to protect this substantive due process right by raising the burden of proof from a mere preponderance of the evidence standard to a standard of clear and convincing evidence and additionally, the court should search for less restrictive alternatives. These protections of the due process right would not interfere with the BHA's goal of safe housing since the BHA will be sure that the eviction is clearly and convincingly the result of the household members' action, rather than a fifty-one percent belief. Evicting innocent tenants will not bring about more safe housing, only more homeless people.

Due to the dissimilarity in findings of knowledge and control of the mothers for their sons, and because of the difference of ages of the sons, one a minor, the other an adult, the court should not have combined the *Gormley* and *Bunting* cases. The results can differ markedly in terms of responsibility and choice of less restrictive alternatives. The *Gormley* decision leaves practitioners and lower courts at a loss when handling cases of this type since the court set no clear standard as to how to treat the differences between 1) a minor

child and an adult child, 2) an emancipated child versus unemancipated, 3) a child who is frequently at home as opposed to one who is habitually away.[148]

Ina A. Forman

148. *See* MASS. GEN. LAWS ANN. ch. 121B, § 32 (West Supp. 1983-84).