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## Grappling with Our Own Errors: Lessons from *State v. Blake*

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# Grappling with Our Own Errors: Lessons from *State v. Blake*

Alicia Ochsner Utt\*

## *Abstract*

*After fifty years of a failed war on drugs, many states are just now beginning to take steps toward attempting to repair a half-century of harm. By examining the response of Washington's government at the executive and legislative levels to the Washington Supreme Court's decision in State v. Blake, this Note identifies some key factors that must be present in the paths forward for all states in their own processes of reform. The stakeholders involved in transforming the criminal legal system must ensure that relief from prior drug-related convictions is automatic, geographically standardized, and complete. Any form of relief must include the right to the assistance of counsel. Lawmakers and other stakeholders must also consider the inadequacy of simply substituting misdemeanor convictions for felony convictions. Finally, any large-scale reform of the criminal legal system must include input from the people most affected by the failed war on drugs. This is an opportunity to embrace truly*

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*bold and meaningful reform. By applying the factors identified in this Note to any legislation tackling the fallout of Blake, Washington can live up to the promise of the decision and lead the way in the national process of creating a fair and equitable criminal justice system.*

*Table of Contents*

INTRODUCTION .....	349
I. WASHINGTON’S WAR ON DRUGS .....	352
A. <i>Who Are the Washingtonians Affected by the State’s Drug Laws?</i> .....	356
B. <i>RCW § 69.50.4013(1): The Strict Liability Drug Possession Statute</i> .....	360
1. Washington’s Strict Liability Drug Possession Statute Was Unique .....	361
2. Fifty Years of State Court Interpretation Found RCW § 69.50.4013(1) to Lack a Mens Rea Element .....	362
II. <i>STATE V. BLAKE</i> .....	366
A. <i>Background</i> .....	366
B. <i>The Opinion</i> .....	367
III. THE DECISION IN <i>STATE V. BLAKE</i> IS RETROACTIVE .....	371
A. <i>Washington Courts of Appeals Have Consistently Treated State v. Blake as Retroactive</i> .....	372
B. <i>Under State and Federal Retroactivity Precedent, State v. Blake Is Retroactive</i> .....	373
IV. RESPONSES TO <i>STATE V. BLAKE</i> .....	375
A. <i>The Executive Response</i> .....	376
B. <i>The Legislative Responses</i> .....	378
1. Senate Bill 5476: An Experiment in Reform .....	379
2. Senate Bill 5663: Tackling <i>State v. Blake</i> ’s Unanswered Questions .....	384
3. Senate Bill 5536: A “Public-Health Approach” with “Criminal-Justice Consequence” .....	385
4. House Bill 1492: Another Attempt to Tackle <i>State v. Blake</i> ’s Unanswered Questions .....	389

a.	<i>State v. Blake Left Key Legal Questions Unresolved</i> .....	389
b.	<i>House Bill 1492 Leaves the Vacation of Convictions Almost Entirely in the Hands of the Criminal Legal System</i> .....	390
c.	<i>House Bill 1492 Raises Its Own Legal Questions</i> .....	39393
C.	<i>The Executive and Legislative Responses Both Leave Significant Room for Improvement</i> .....	397
V.	LESSONS FROM <i>STATE V. BLAKE</i> .....	399
A.	<i>Relief Must Be Automatic, Standardized, and Complete</i> .....	401
B.	<i>Any Relief Must Include the Right to Assistance of Counsel</i> .....	404
C.	<i>States Must Consider the Consequences of Any Substitute for Felony Convictions</i> .....	404
D.	<i>Lawmakers Must Seek Input from Affected Communities in the Creation and Implementation of Relief</i> .....	407
	CONCLUSION.....	409

## INTRODUCTION

After years of struggling to reduce his thirty-three-year prison sentence, Nate Saunders had given up.<sup>1</sup> His petition for clemency had been denied.<sup>2</sup> A prosecutor rejected his attempt to take advantage of a state law allowing prosecutors to seek resentencing for “extreme” sentences like his, which had been lengthened by an offender score that included prior convictions for possession of a controlled substance.<sup>3</sup> It must have seemed like there was nothing else left for him to try. But on February 25, 2021, four years before Saunders’s expected date of release, the Supreme Court of Washington struck down the state’s strict

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1. Leslie Brown, *‘I’m Home.’ Client Is Freed Thanks to Blake Decision and Public Defense*, FOR THE DEF.: NEWS FROM THE KING CNTY. DEP’T OF PUB. DEF. (Aug. 26, 2021), <https://perma.cc/X35E-NK49>.

2. *Id.*

3. *Id.*

liability drug possession statute, RCW § 69.50.4013(1),<sup>4</sup> as unconstitutional under both the state and federal constitutions.<sup>5</sup> Six months later, Saunders walked into his mother’s house after twenty-six years of imprisonment and told her, “I’m home.”<sup>6</sup> He was only one of the hundreds of thousands of Washingtonians who, as a result of the court’s decision, were now eligible for immediate release, reduced sentences, relief from probation obligations, or even a complete erasure of the “scarlet letter” of a felony conviction on their records.<sup>7</sup>

In 2020, sentences for possession of controlled substances made up nearly twenty-five percent of the sentences imposed in Washington, with almost 5,000 sentences for possession handed down that year.<sup>8</sup> From the numbers alone, the Washington Supreme Court’s decision in *State v. Blake*<sup>9</sup> is massively significant for Washingtonians.<sup>10</sup> *Blake* applies not only to

4. WASH. REV. CODE § 69.50.4013(1), *invalidated by State v. Blake*, 481 P.3d 521 (2021) (en banc). The text of the statute was as follows:

It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

*Id.* Following the Washington Supreme Court’s decision in *Blake*, the state legislature passed S.B. 5476, which amended the statute to include a mens rea requirement. Engrossed S.B. 5476, 67th Leg., 2021 Reg. Sess. § 9 (Wash. 2021) (amending RCW § 69.50.4013(1) to provide that “[i]t is unlawful for any person to knowingly possess a controlled substance” (emphasis added)). All references to RCW § 69.50.4013(1) in this Note will be referring to the invalidated version of the statute (without the mens rea requirement), unless otherwise indicated.

5. See *Blake*, 481 P.3d at 532 (“RCW 69.50.4013(1) . . . violates the due process clause of the state and federal constitutions and is void.”).

6. Brown, *supra* note 1.

7. *Id.*

8. See STATE OF WASH. CASELOAD FORECAST COUNCIL, STATISTICAL SUMMARY OF ADULT FELONY SENTENCING: FISCAL YEAR 2020, 11 tbl.1A, 28 tbl.6 (2020), <https://perma.cc/A9EX-TLY5> (PDF) (recording 4,913 sentences for “non-dealing” drug possession out of the 19,742 sentences imposed in 2020). In stark contrast, two years later, only 802 sentences for drug possession were imposed, with a mere forty-five sentences recorded for simple possession. STATE OF WASH. CASELOAD FORECAST COUNCIL, STATISTICAL SUMMARY OF ADULT FELONY SENTENCING: FISCAL YEAR 2022, 13 tbl.1A, 30 tbl.6 (2022), <https://perma.cc/N5KH-KHMT>.

9. 481 P.3d 521 (Wash. 2021) (en banc).

10. See Mark Cooke, *The Unsettled Policy Landscape of Drug Possession Laws in Washington*, WASH. STATE BAR ASS’N: NWSIDEBAR (May 25, 2021), <https://perma.cc/8JNB-RASE>.

people who are currently incarcerated or otherwise serving active sentences for possession of a controlled substance who are now entitled to be resentenced and potentially released, but also to people with old convictions who have already completed their sentences.<sup>11</sup> The state's criminal legal system has moved quickly to take action: by May 2021, the King County Department of Public Defense had already accepted 230 *Blake* cases, with “[h]undreds more” awaiting assignment to public defenders.<sup>12</sup> As of February 2023, state courts had already vacated nearly 43,000 convictions pursuant to *Blake*, although thousands more remained.<sup>13</sup>

Washington's responses to *Blake*, both legislative and executive, could serve as a model for other states seeking to reform their own criminal legal systems to be “more humane, equitable, and effective.”<sup>14</sup> After all, Washington is not alone in its process of reform.<sup>15</sup> Other states have both caused and suffered from the same sort of damage that has been the effect of Washington's war on drugs.<sup>16</sup> As a country, we have reached the point where “[w]e cannot afford to keep raising our hands and shaking our heads about what to do.”<sup>17</sup> With the legislature grappling with how to humanely respond to the state's struggle with substance use<sup>18</sup> and considering legislation focused on

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11. *Id.*

12. Leslie Brown, *Public Defenders Help People Convicted Under Unconstitutional Drug Law*, FOR THE DEF.: NEWS FROM THE KING CNTY. DEPT OF PUB. DEF. (May 10, 2021), <https://perma.cc/2PZH-SS7X>.

13. House Bill Report: HB 1492, H. 1492 HBR APP 23, 2023 Reg. Sess., at 11 (Wash. 2023), <https://perma.cc/6TQL-ANEM>.

14. Ann Lininger, *Harm Reduction Is Justice*, YALE L. & POL'Y REV. INTER ALIA (Jan. 3, 2022), <https://perma.cc/TRL7-UX5N>; *see id.* (noting that experiments like the one in Washington provide “a unique window of opportunity to evaluate the status quo and compare it to new policies that will certainly achieve different (and perhaps better) outcomes”).

15. *See, e.g.*, Nicole D. Porter, *Top Trends in State Criminal Justice Reform, 2020*, SENTENCING PROJECT (Jan. 15, 2021), <https://perma.cc/94CS-UQ8F>. States across the country have enacted reforms to reduce their prison populations, to recalibrate sentencing practices, to institute universal “second look” reviews that recognize the capacity to change after years of incarceration, to reduce the effects of collateral consequences, and to expand voting rights for people convicted of felonies. *Id.*

16. *See infra* Part I.

17. Lininger, *supra* note 14.

18. *See infra* Part IV.B.1, 3.

efficiently vacating hundreds of thousands of unconstitutional convictions,<sup>19</sup> progress is being made in Washington. The questions that remain—and which this Note will address—are whether this progress goes far enough and how it can guide other states in their own paths toward a system of criminal law that, instead of perpetuating inequities, provides “greater stability, safety, and dignity.”<sup>20</sup>

Part I of this Note provides a background of the war on drugs in the United States and at the local level in Washington. It includes a history of Revised Code of Washington (“RCW”) § 69.50.4013(1), the strict liability drug possession statute that, until it was found unconstitutional, was unique to Washington. This Part also includes a discussion of the populations most affected by the statute’s harsh consequences for even unwitting possession of a controlled substance. Part II is a discussion of the *State v. Blake* opinion itself, including an analysis of the Washington Supreme Court’s refusal to take the easier path of merely reading a mens rea element into the statute. Part III argues that, although the court did not indicate whether it intended for *Blake* to apply retroactively, state and federal precedent requires the decision to be applied to all convictions under the invalidated statute. Part IV describes Washington’s response to *Blake* at both the executive and legislative levels. It weighs the pros and cons of the state’s approaches to the decision, offering critiques and suggestions of how more aggressive reform could move Washington further toward an equitable treatment of substance use disorder across the state. Part V identifies the ways in which Washington’s responses can serve as either models or precautionary tales for other states on their own paths toward reform.

## I. WASHINGTON’S WAR ON DRUGS

Announced by President Nixon in 1971 following the enactment of the federal Comprehensive Drug Abuse Prevention and Control Act of 1970,<sup>21</sup> the so-called war on drugs

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19. See *infra* Part IV.B.2, 4.

20. Lininger, *supra* note 14.

21. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. §§ 801–904, 951–971).

in the United States has raged for over fifty years.<sup>22</sup> While there is debate over whether the government response to increasing substance use in the United States was launched in response to public health concerns or with racist and ideological motives,<sup>23</sup> its racialized effects are not in doubt.<sup>24</sup> The war on drugs has cost the United States an estimated \$1 trillion as of 2018,<sup>25</sup> with little to show for the price beyond a new American tradition of the mass incarceration of people of color.<sup>26</sup> Studies show that increased incarceration for drug offenses results in “enormous costs for taxpayers,” and that this investment “has not yielded a convincing public safety return.”<sup>27</sup> To the contrary, the

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22. *The War on Drugs Turns 50—Developments in the Law and Resources*, WASH. STATE L. LIBR. (June 28, 2021), <https://perma.cc/3LFR-NS2G> (describing the identification of “drug abuse” as “America’s public enemy number one”).

23. In 1994, John Ehrlichman, a domestic policy advisor to President Nixon, made a startling claim in an interview regarding the origins of the war on drugs:

“The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I’m saying? We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.”

Dan Baum, *Legalize It All*, HARPER’S MAG. (April 2016), <https://perma.cc/CX7W-DUFD> (interviewing John Ehrlichman). Some drug policy historians, however, call this claim an “oversimplification,” arguing that Nixon was not “solely motivated by politics or race” and that the drug war began as a public health initiative that only later shifted to its more punitive modern form. German Lopez, *Was Nixon’s War on Drugs a Racially Motivated Crusade? It’s a Bit More Complicated*, VOX (Mar. 29, 2016, 2:00 PM), <https://perma.cc/PDQ8-JJH7>.

24. See *infra* Part I.A.

25. Betsy Pearl, *Ending the War on Drugs: By the Numbers*, CTR. FOR AM. PROGRESS (June 27, 2018), <https://perma.cc/EMV9-RJFJ>.

26. See Betsy Pearl & Maritza Perez, *Ending the War on Drugs*, CTR. FOR AM. PROGRESS (June 27, 2018), <https://perma.cc/2N87-ML99> (“By 2017, more than 2.2 million Americans were in prison or jail, and nearly 60 percent were black or Latino. Today, 1 in 9 black children has an incarcerated parent, as does 1 in 28 Latino children.”).

27. Adam Gelb et al., *More Imprisonment Does Not Reduce State Drug Problems*, PEW CHARITABLE TRS. (Mar. 8, 2018), <https://perma.cc/9B6B-FLVA>. In fact, Pew’s analysis of publicly available federal and state data from 2014 found “no statistically significant relationship between state drug



“increased use of incarceration accounted for nearly zero percent of the overall reduction in crime” in the United States in recent decades.<sup>28</sup> It is difficult to argue that America’s war on drugs is anything but a failure.

Even as over half of the states have either legalized or decriminalized the possession of marijuana,<sup>29</sup> the drug war continues to sweep people into the criminal legal system at a rate of more than two arrests for possession of a controlled substance every minute.<sup>30</sup> While the number of incarcerated people in the United States has fallen from its peak of 2.3 million in 2008, approximately 1.8 million people remained in state and federal prisons and local jails as of 2020.<sup>31</sup> One out of five of these incarcerated people (approximately 456,000) were serving time for a drug charge, in addition to another 1.15 million people

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imprisonment rates and three indicators of state drug problems: self-reported drug use, drug overdose deaths, and drug arrests.” *Id.*

28. DON STEMEN, VERA INST. OF JUST., *THE PRISON PARADOX: MORE INCARCERATION WILL NOT MAKE US SAFER* 1–2 (2017), <https://perma.cc/BPZ8-TQF2> (PDF). Not only does mass incarceration fail to reduce crime, but it may also actually increase crime. *See id.* at 2

The argument is that high rates of imprisonment break down the social and family bonds that guide individuals away from crime, remove adults who would otherwise nurture children, deprive communities of income, reduce future income potential, and engender a deep resentment toward the legal system; thus, as high incarceration becomes concentrated in certain neighborhoods, any potential public safety benefits are outweighed by the disruption to families and social groups that would keep crime rates low.

At the individual level, there is also some evidence that incarceration itself is criminogenic, meaning that spending time in jail or prison actually increases a person’s risk of engaging in crime in the future. This may be because people learn criminal habits or develop criminal networks while incarcerated, but it may also be because of the collateral consequences that derive from even short periods of incarceration, such as loss of employment, loss of stable housing, or disruption of family ties.

29. *See Decriminalization*, NORML, <https://perma.cc/YK4W-VTNX>.

30. *See* Pearl, *supra* note 25 (“Every 25 seconds, someone in America is arrested for drug possession.”).

31. *See* JACOB KANG-BROWN ET AL., VERA INST. OF JUST., *PEOPLE IN JAIL AND PRISON IN 2020*, 1 fig.1 (2021), <https://perma.cc/SYH5-AMC9> (PDF). The national shift to mass incarceration was driven largely by the war on drugs. *See* Ernest Drucker, *Drug Law, Mass Incarceration, and Public Health*, 91 OR. L. REV. 1097, 1112 (2013). Prior to the start of the war on drugs, only around 200,000 people in total were incarcerated in state and federal prisons. *Id.* at 1101.

on probation or parole for drug-related offenses.<sup>32</sup> This continues to occur even though alternatives to incarceration as punishment for drug offenses are increasingly popular among Americans of all political stripes, with nearly eighty percent of Americans favoring an end to mandatory minimum sentences for drug offenses.<sup>33</sup> Over eighty percent of Americans support permitting federal prisoners to reduce their sentences by participating in drug treatment and job training programs.<sup>34</sup> Similar sentiment exists at the state level as well, with public opinion polls “revealing significant and broad political support for reducing prison sentences for nonviolent offenders and reinvesting the savings in alternatives, including drug treatment.”<sup>35</sup> Despite this wide support for alternatives to incarceration, however, mass incarceration continues, “siphon[ing]” limited funds “away from programs, practices, and policies that have been proved to reduce drug use and crime”<sup>36</sup>—unlike the war on drugs itself.

These levels of disparity are echoed in the results of Washington’s implementation of its own drug laws.<sup>37</sup> Compared to other states, Washington’s drug laws (prior to the state supreme court’s decision in *State v. Blake*) impose severe criminal sanctions for the possession and sale of illegal drugs.<sup>38</sup> Combined with the particularities of Washington’s sentencing laws, the state’s drug laws can still, even after *Blake*, result in

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32. *Pearl*, *supra* note 25.

33. Gelb et al., *supra* note 27.

34. *Id.*

35. *Id.*

36. *Id.*

37. See *Report of the Task Force on the Use of Criminal Sanctions to the King County Bar Association Board of Trustees*, 30 *FORDHAM URB. L.J.* 499, 516 (2003) [hereinafter *Report to the KCBA*]. The state’s prison population “increased by over 125 percent” between 1989 and 2001, fueled mostly by “increased prison admissions for drug offenses and property offenses related to drugs” and the longer sentences associated with these offenses. *Id.*

38. See *id.* at 507 n.8 (comparing the federal categorization of the possession of small amounts of illegal drugs as a misdemeanor with Washington’s categorization as a felony); *id.* at 508–09 (noting the higher sentences for drug-related offenses as compared to those for crimes such as child molestation, extortion, and many other violent crimes).

a person convicted of a nonviolent drug offense receiving a sentence of up to twenty years in prison.<sup>39</sup>

A. *Who Are the Washingtonians Affected by the State's Drug Laws?*

Just as the sanctions imposed as a part of the federal war on drugs have at the national level, Washington's harsh penalties for drug-related offenses do not fall evenly across its population. The brunt of the war on drugs landed disproportionately on Washington's most vulnerable communities.<sup>40</sup> While statistics may have improved somewhat since the peak of disproportionality forty years ago,<sup>41</sup> people of color in Washington remain overrepresented in the state's criminal legal system. Even prior to entering the system itself, Washingtonians of color are "negatively and disproportionately affected" by contact with law enforcement.<sup>42</sup> Despite findings that Black and white people use and sell drugs at similar rates, Black people in Washington are arrested for drug offenses more than twice as often as white Washingtonians.<sup>43</sup> Seattle, for example, has one of the country's highest rates of racial disparity in drug arrests: in 2006, while only 8% of the city's population was Black, 67% of arrests for delivery of a narcotic

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39. *Id.* at 507–510.

40. *See id.* at 543 ("The War on Drugs has taken a particularly hard toll on disadvantaged communities, both because of intensified law enforcement activity in those communities and the incarceration of residents from those communities."); RSCH. WORKING GRP., TASK FORCE ON RACE & THE CRIM. JUST. SYS., RACE AND WASHINGTON'S CRIMINAL JUSTICE SYSTEM: 2021 REPORT TO THE WASHINGTON SUPREME COURT 34 (2021) [hereinafter TASK FORCE 2.0], <https://perma.cc/J4PP-JV8J> (PDF) ("In 2021, race *still* matters in ways that are not fair, that do not advance legitimate public safety objectives, that produce racial disparities in the criminal justice system, and that undermine public confidence in our legal system.").

41. *See* TASK FORCE 2.0, *supra* note 40, at 4 (noting that a Black person in Washington was 14.1 times more likely to be incarcerated than a white person in 1980, while the rate has fallen to 4.7 in 2020).

42. *See id.* at M-5 ("Native Americans are searched by the Washington State Patrol at a rate more than five times that of White individuals; Black individuals are twice as likely to be searched. Latino/a and Pacific Islander individuals are 80% more likely to be searched than White individuals.").

43. *Id.* at 3.

other than marijuana were of Black Seattleites.<sup>44</sup> Not only does this rate of arrest “not reflect the reality of the local drug economy,”<sup>45</sup> but white Seattleites actually appear to be the majority of drug users in the city.<sup>46</sup> Similar disproportionalities exist in sentencing outcomes, as well: Black people in Washington convicted of drug offenses “receive, comparatively, a greater share of prison sentences and a lesser share of jail and other sentences.”<sup>47</sup> In general, across all types of criminal offenses, people of color in Washington are imprisoned at a “much greater rate” than white people in the state.<sup>48</sup>

The financial effects of Washington’s war on drugs have disproportionately harmed its communities of color, as well.<sup>49</sup> For example, asset forfeiture<sup>50</sup> frequently impacts communities

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44. Research Working Group, Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington’s Criminal Justice System*, 35 SEATTLE U.L. REV. 632, 651 (2012) [hereinafter Task Force 1.0]. “This rate of disparity is surpassed by only one of the other thirty-eight comparably sized cities in the nation for which data are available.” *Id.* at 652.

45. *Id.* at 651–52.

46. See KATHERINE BECKETT, RACE AND DRUG LAW ENFORCEMENT IN SEATTLE 45, 46 tbl.8 (2008), <https://perma.cc/HF3E-XTE7> (PDF).

47. TASK FORCE 2.0, *supra* note 40, at 19.

48. *Id.* at D-1. See *id.* at M-6 for an example of the racially disproportionate rates of arrest, booking, and charging in a single county in Washington.

49. Washington’s racial and ethnic minority populations can also be some of its poorest. See Task Force 1.0, *supra* note 44, at 651. This results in the war on drugs hitting them doubly as hard as it does for white or wealthy communities in the state. See *Report to the KCBA*, *supra* note 37, at 543–44 (“The focus of drug enforcement on the poor and near-poor has resulted in a massive ‘prisonization’ of disadvantaged young men, to the point that more poor people are now housed within the correctional system than in public housing.”); *id.* at 512 (noting that Washington’s drug laws often result in “extremely long prison sentences” for homeless and indigent people “who are repeatedly arrested, convicted, and sentenced for selling very small amounts of drugs,” usually to support their own drug dependency).

50. Asset forfeiture occurs when police and prosecutors “seize and permanently keep . . . cash, cars, homes and other property suspected of being involved in a crime—without regard to the owners’ guilt or innocence.” LISA KNEPPER ET AL., INST. FOR JUST., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 5 (3d ed. 2020), <https://perma.cc/Y98H-RGM4> (PDF). Nationally, law enforcement agencies seize property worth billions of dollars every year, with states and the federal government seizing property worth a total of at least \$68.8 billion since 2000. *Id.* at 5.

of color in the state.<sup>51</sup> In 2019, 70% of the property seized by a drug task force in the city of Kent, Washington, “came from owners with Chinese, Vietnamese, or Latino surnames.”<sup>52</sup> In the same year, a drug task force in Grays Harbor County, Washington, conducted a “crackdown” on marijuana growers code-named “Green Jade” that resulted in 147 forfeitures.<sup>53</sup> Of these forfeitures, 128 were from property owners with Chinese surnames.<sup>54</sup> Similarly, the legal financial obligations<sup>55</sup> imposed upon people convicted of a crime disproportionately impact disadvantaged communities.<sup>56</sup> In Washington, Black, Latino, and Indigenous people are not only sentenced to legal financial obligations “more frequently and at higher rates” than other Washingtonians, but also experience increased inability to repay these fines.<sup>57</sup>

Washington’s most vulnerable and disadvantaged communities have not seen any benefit of what has become, in the end, a failed war.<sup>58</sup> Instead, they have been left to grapple with its aftermath as the collateral damage continues to ripple

51. See TASK FORCE 2.0, *supra* note 40, at L-2 (“Some anecdotal evidence suggests that asset forfeiture may be used in connection with drug enforcement efforts targeting communities of color.”).

52. *Id.*

53. *Id.*

54. *Id.*

55. See WASH. REV. CODE § 9.94A.030(31) (2021)

“Legal financial obligation” means a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims’ compensation fees . . . , court costs, county or interlocal drug funds, court-appointed attorneys’ fees, and costs of defense, fines, and any other financial obligation that is assessed . . . as a result of a felony conviction.

56. See TASK FORCE 2.0, *supra* note 40, at 21 (“It is a system that on one hand is a determinate sentence for people with means, and on the other hand, an indeterminate sentence that imposes a longer and disproportionate punishment for people without financial means.”); Devah Pager et al., *Criminalizing Poverty: The Consequences of Court Fees in a Randomized Experiment*, 87 AM. SOCIO. REV. 529, 531 (2022) (describing how “the burden of court debt ‘can lead to a profound sense of despair’” (quoting ALEXES HARRIS, *A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR* 70 (2016))).

57. TASK FORCE 2.0, *supra* note 40, at F-3.

58. See *Report to the KCBA*, *supra* note 37, at 539 (calling the war on drugs “ineffective in reducing levels of drug use, drug abuse, drug offenses, or other drug-related crimes.”).

through their lives.<sup>59</sup> Much of this damage is euphemistically described as the “collateral consequences” of the conviction for a felony offense.<sup>60</sup> In Washington, these range from disqualification for employment by the state or any county, city, or town in the state;<sup>61</sup> to ineligibility for certain professional licenses;<sup>62</sup> to the forfeiture of property associated with the manufacture of controlled substances;<sup>63</sup> to losing the rights to vote,<sup>64</sup> hold public office,<sup>65</sup> and serve on a jury.<sup>66</sup> This list is, of course, not exhaustive,<sup>67</sup> and not only because it does not include the social stigma that can also accompany a felony record.<sup>68</sup> Uniquely among criminal offenses, conviction for a drug offense makes students ineligible for federal financial aid and

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59. *See id.* at 544 (citations omitted)

The incarceration of minorities and the poor has further eroded the economic security of families in those communities, resulting in the loss of educational, employment (through job disqualification due to criminal records), and training opportunities, as well as losses in seniority. . . .

. . . The “normalization” of prison time and the strengthened links between prison and the street have also limited the chances of success in the regular economy for many of those who come out of prison.

60. “Collateral consequences are legal and regulatory sanctions and restrictions that limit or prohibit people with criminal records from accessing employment, occupational licensing, housing, voting, education, and other opportunities.” *National Inventory of Collateral Consequences of Conviction*, NAT'L REENTRY RES. CTR., <https://perma.cc/24VQ-KKWN>.

61. WASH. REV. CODE § 9.96A.020 (2023).

62. *Id.*

63. WASH. REV. CODE § 69.50.505 (2023).

64. WASH. CONST. art VI, § 3; WASH. REV. CODE § 29A.04.079 (2023). As of January 1, 2022, however, the right to vote is automatically restored upon release from “total confinement.” WASH. REV. CODE § 29A.08.520 (2023). Unfortunately, someone whose right to vote is restored following release from incarceration will still need to re-register to vote. *Id.*

65. WASH. REV. CODE § 29A.68.020 (2023).

66. WASH. REV. CODE § 2.36.070(5) (2023).

67. For a detailed list of collateral consequences for drug offenses in Washington, search the National Inventory of Collateral Consequences of Conviction for jurisdiction “Washington” and offense type “controlled substances offenses” at the National Reentry Resource Center’s website: <https://niccc.nationalreentryresourcecenter.org/consequences> [<https://perma.cc/XP9Q-V3E8>].

68. *See Report to the KCBA, supra* note 37, at 547 (“[O]ne of the harshest effects of a felony record is the social stigma that poses barriers to employment and can give rise to other unpleasant and embarrassing situations.”).

guaranteed student loans.<sup>69</sup> These collateral consequences of conviction merely perpetuate the cycle of poverty in disadvantaged communities, stripping those convicted of even minor, nonviolent drug offenses of opportunities for education and employment,<sup>70</sup> as well as preventing them from exercising the rights many other Americans are able to use to pursue change.<sup>71</sup> Washington's strict liability drug possession statute, which did not require the state to prove that possession of a controlled substance was either knowing or intentional, was a core driver of these inequities.

B. *RCW § 69.50.4013(1): The Strict Liability  
Drug Possession Statute*

As enacted in 1923, Washington's possession statute made it a crime to possess any unprescribed controlled substance "with [the] intent to sell, furnish, or dispose" of it.<sup>72</sup> The next

69. *Id.* In addition to the ban on government financial aid for education for people who had completed their sentences, the state legislature banned state financing of postsecondary education for incarcerated people in 1995. Katherine Long, *Behind Bars, College Is Back in Session in Some Prisons*, SEATTLE TIMES (Jan. 21, 2015, 8:00 PM), <https://perma.cc/4WMP-RYPR>. As a result, educational programs are charitably funded and found in only a select few Washington prisons. *More Washington State Inmates Finding Their Way to College Behind Bars*, THE OREGONIAN (Jan. 20, 2015, 4:25 PM), <https://perma.cc/WLD9-TF7J> (last updated Jan. 20, 2015, 5:25 PM). People who are not incarcerated in one of these prisons are left with one option: to pay out of their own pocket for a correspondence program of higher education. *Id.*

70. See Tara O'Neill Hayes & Margaret Barnhorst, *Incarceration and Poverty in the United States*, AM. ACTION F. (June 30, 2020), <https://perma.cc/25MS-4W6Y>

[O]nly 49 percent of incarcerated men were employed in the three years prior to incarceration and their median annual earnings were \$6,250; just 13 percent earned more than \$15,000. . . . These individuals are not just more likely to be poor and unemployed, but they were also more likely to grow up in poverty and in neighborhoods with high unemployment. The likelihood that a boy from a family in the bottom 10 percent of the income distribution will end up in prison in his thirties is 20 times greater than that of a boy from a family in the top 10 percent.

71. See *Report to the KCBA*, *supra* note 37, at 546 ("The loss of the right to vote of those in the custody of the corrections system has arguably deepened their political alienation and the sense of impotence in their local communities.").

72. Act of Mar. 3, 1923, ch. 47, § 3, 1923 Wash. Sess. Laws 133, 134 (1923).

iteration of the statute, enacted in 1951, did not include this intent element, merely providing that “[i]t shall be unlawful for any persons to . . . possess . . . any narcotic drug.”<sup>73</sup> This version of the statute remained in effect until 1971, when Washington adopted the Uniform Controlled Substances Act.<sup>74</sup> Although Section 401(c) of the model uniform act criminalized “knowingly or intentionally” possessing a controlled substance, the final version of Washington’s Uniform Controlled Substances Act did not contain a mens rea element.<sup>75</sup>

### 1. Washington’s Strict Liability Drug Possession Statute Was Unique

After North Dakota added a “willfulness” mens rea element to its drug possession statute in 1989, Washington became the only state with a strict liability drug possession statute.<sup>76</sup> Even in states where “statutes . . . [were] silent as to the knowledge element,” most of those jurisdictions determined, “by judicial decision,” that knowledge was an element of the crime of possession of a controlled substance.<sup>77</sup> As a result of this judicial tendency to read a mens rea element into possession statutes, prior to *State v. Blake*, the only state court to strike down as unconstitutional a possession statute that permitted conviction for unknowing possession was the Louisiana Supreme Court.<sup>78</sup>

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73. Uniform Narcotic Drug Act, ch. 22, § 2, 1951 Wash. 2d Ex. Sess. Laws 79, 82 (1951).

74. Uniform Controlled Substances Act, ch. 308, 1971 Wash. Sess. Laws 1794 (1971) (codified as amended at WASH. REV. CODE § 69.50).

75. See *State v. Bradshaw*, 98 P.3d 1190, 1192 (Wash. 2004) (en banc), *overruled in part by State v. Blake*, 481 P.3d 521 (Wash. 2021) (en banc) (citations omitted)

Senate Bill 146 included these *mens rea* words in the section corresponding to section 401(c) of the model uniform act. However, Substitute Senate Bill 146 and Second Substitute Senate Bill 146 did not. The legislation as passed and enacted as the mere possession statute did not contain the “knowingly or intentionally” language.

76. *Blake*, 481 P.3d at 530 (citations omitted).

77. *Dawkins v. State*, 547 A.2d 1041, 1045 (Md. 1988). Courts in at least fifteen states chose the path of constitutional avoidance and read a mens rea element into their statutes. *Blake*, 481 P.3d at 537 n.18 (Stephens, J., concurring in part and dissenting in part).

78. *Blake*, 481 P.3d at 530. In *State v. Brown*, 389 So. 2d 48 (La. 1980), the Louisiana Supreme Court ruled that, because Louisiana’s possession statute allowed “a third party [to] hand[] the controlled substance to an



But, as the Washington Supreme Court wryly noted, “that’s probably because Washington [was] the only state that continue[d] to criminalize this innocent nonconduct” by the time *Blake* was decided in February 2021.<sup>79</sup>

## 2. Fifty Years of State Court Interpretation Found RCW § 69.50.4013(1) to Lack a Mens Rea Element

Although RCW § 69.50.4013(1) was amended many times in the first fifty years of its existence, the state legislature continued to omit “knowingly or intentionally” from the statutory language<sup>80</sup>—and the Washington Supreme Court continued to interpret the statute as lacking a knowledge or intent element.<sup>81</sup> As the United States moved into the twenty-first century, Washington stood alone in maintaining its strict liability drug possession statute. This dedication to a strict liability reading of the possession statute was not new: from the 1950s until the moment that it invalidated RCW § 69.50.4013(1) as unconstitutional in 2021, the Washington Supreme Court consistently interpreted the state’s possession statute as not containing a knowledge or intent element in every case that raised the issue.

In its 1957 decision in *State v. Henker*,<sup>82</sup> the first time the Washington Supreme Court was asked to read an intent element into the statute, it determined that the issue of whether the statute required knowledge or intent was for the legislature to decide.<sup>83</sup> The court considered the omission of the words “*with intent*” to be evidence of “a desire to make mere possession or control a crime.”<sup>84</sup> This reliance on the legislature’s omission of the knowledge or intent element in adopting the Uniform

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unknowing individual who [could] then be charged . . . and subsequently convicted . . . without ever being aware of the nature of the substance he was given,” the statute was unconstitutional. *Id.* at 51.

79. *Blake*, 481 P.3d at 530.

80. *See id.* at 532–33 (identifying at least eleven times that the state legislature amended RCW § 69.50.4013 without adding an intent element).

81. *See infra* Part I.B.2.

82. 314 P.2d 645 (Wash. 1957).

83. *Id.* at 647 (describing it as “basically a matter to be determined by the legislature”).

84. *Id.* (emphasis in original).

Narcotic Drug Act<sup>85</sup>—and its decades-long failure to add one—remained a hallmark of the Washington Supreme Court’s decisions surrounding RCW § 69.50.4013(1) and its predecessor statutes. Four years later, in *State v. Boggs*,<sup>86</sup> the court was again asked to consider whether the statute contained an implied mens rea element.<sup>87</sup> It reiterated its reasoning from *Henker*, emphasizing the fact that the legislature had omitted an intent element.<sup>88</sup> Although this reasoning was grounded in the Uniform Narcotic Drug Act, the court’s interpretation did not change even when the legislature repealed the act and replaced it with the Uniform Controlled Substances Act in 1971.

With the issue apparently settled, the court did not return to the question of an intent element in RCW § 69.50.4013(1) until 1981 in *State v. Cleppe*,<sup>89</sup> when it addressed a split that had developed in the Washington Court of Appeals over whether the possession statute required knowledge or intent.<sup>90</sup> Relying on the reasoning of *Henker* and *Boggs*, the court again reviewed the legislative history of the statute, finding that there was a “clear manifestation of legislative intent in omitting the key words ‘knowingly’ and ‘intentionally.’”<sup>91</sup> Despite the observed legislative inaction, however, the court in *Cleppe* “created a

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85. Uniform Narcotic Drug Act, ch. 22, 1951 Wash. 2d Ex. Sess. Laws 79 (1951).

86. 358 P.2d 124 (Wash. 1961).

87. *Id.* at 125.

88. *See id.* (“The legislature . . . has made *mere possession* of a narcotic drug a crime.” (emphasis in original)).

89. 635 P.2d 435 (Wash. 1981) (en banc), *overruled in part by* State v. Blake, 481 P.3d 521 (Wash. 2021) (en banc).

90. *See id.* at 438 (noting that Division One of the Court of Appeals would require “guilty knowledge” for a conviction, while Division Three required “possession alone”).

91. *Id.* at 438–39. That intent was only affirmed, in the court’s opinion, by a lack of action from the legislature in response to the court’s holding in a previous case that “guilty knowledge is an implicit element of the subsection 401(a) crime of delivery.” *Id.* at 439 (citing *State v. Boyer*, 588 P.2d 1151, 1152 (Wash. 1979) (en banc)). In *State v. Boyer*, the court reasoned that an implied “guilty knowledge” element was necessary to the statute, noting that “without the mental element of knowledge, even a postal carrier would be guilty of the crime were he to innocently deliver a package which in fact contained a forbidden narcotic. Such a result is not intended by the legislature.” *Boyer*, 588 P.2d at 1152. In *Cleppe*, the court noted that “[t]he legislature has met twice since our decision in *Boyer* . . . and it has not revised subsection 401(a).” *Cleppe*, 635 P.2d at 439.

brand new affirmative defense out of whole cloth.”<sup>92</sup> Recognizing the “harshness of the almost strict criminal liability for unauthorized possession of a controlled substance,” the court introduced the “unwitting possession” defense.<sup>93</sup> That is, “[i]f the defendant can affirmatively establish his ‘possession’ was unwitting, then he had no possession for which the law will convict.”<sup>94</sup>

*Cleppe*—and its judicially-created “unwitting possession” defense—remained the controlling case on the issue until 2004, when the Washington Supreme Court was asked to overrule *Cleppe* in *State v. Bradshaw*.<sup>95</sup> The court refused.<sup>96</sup> Instead, it pointed out that “the legislature ha[d] not acted to change the *Cleppe* interpretation of the mere possession statute” in the two decades between the cases, and concluded that the legislature intended for “possession alone” to be “culpable conduct” under the statute.<sup>97</sup> The court determined that “the legislative history for the mere possession statute support[ed] the court’s conclusion that no mens rea element should be implied.”<sup>98</sup> As a result, *Cleppe* and *Bradshaw* remained the two principle cases on which Washington courts would rely in adjudicating defendants as guilty of possession of a controlled substance without any findings regarding the defendants’ knowledge or intent.<sup>99</sup>

The deference shown to the legislature regarding RCW § 69.50.4013(1) is not unique in the Washington Supreme

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92. *Blake*, 481 P.3d at 530.

93. *Cleppe*, 635 P.2d at 439.

94. *Id.* The burden of proof for this affirmative defense is on the defendant. *Id.*

95. 98 P.3d 1190 (Wash. 2004) (en banc).

96. *See id.* at 1191 (“[Petitioners] ask us to overrule *State v. Cleppe* and imply a mens rea element into the unlawful possession of a controlled substance statute . . . . We refuse to do so . . . .”). A single dissenter argued that *Cleppe* was “incorrect and harmful” and resulted in “innocent people” being “convicted of crimes they had no intent to commit.” *Id.* at 1199 (Sanders, J., dissenting).

97. *Id.* at 1193 (citation omitted).

98. *Id.* at 1195.

99. *See, e.g., State v. Blake*, 481 P.3d 521, 524 (Wash. 2021) (en banc) (“Consistent with the law as interpreted in *Cleppe* and *Bradshaw*, [the trial court] did not make any findings as to whether the State had proved that Blake’s possession was intentional or knowing.”).

Court's history. Instead, the court gives "special force" to stare decisis in the realm of statutory interpretation, where the legislative power is implicated and the state legislature has the power to respond to the court's decisions.<sup>100</sup> For example, in *Buchanan v. International Brotherhood of Teamsters*,<sup>101</sup> the court was "concerned that [it] had misinterpreted a statute in a prior case."<sup>102</sup> It nevertheless found that the fact that "22 legislative sessions had passed over 17 years" without the state legislature altering the court's interpretation meant that "it was and is the policy of the legislature to concur in [the court's] prior ruling."<sup>103</sup> Even though the United States Supreme Court had announced a different interpretation of identical language in a federal statute, the Washington Supreme Court held in *Buchanan* that, "given the history of legislative acquiescence" to the court's interpretation of the statute in question, "the power to change [the court's] decision rested solely with the legislature."<sup>104</sup>

Despite its decades-long adherence to the principle that it was for the legislature to determine whether it would add a knowledge or intent element to the simple possession statute, however, the court's dramatic shift was foreshadowed in a case it heard less than two years before *Blake*.<sup>105</sup> Although the majority of *State v. A.M.*<sup>106</sup> declined to address the appellant's argument that "the affirmative defense of unwitting possession

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100. *Id.* at 532 (citation omitted). This is because the court presumes that the legislature is "aware of judicial interpretation of its enactments." *Id.* (quoting *Riehl v. Foodmaker, Inc.*, 94 P.3d 930, 935 (Wash. 2004) (en banc)). As a result, "where statutory language remains unchanged after a court decision the court will not overrule clear precedent interpreting the same statutory language." *Id.*

101. 617 P.2d 1004 (Wash. 1980) (en banc).

102. *Blake*, 481 P.3d at 532 (citations omitted).

103. *Id.* (quoting *Buchanan v. Int'l Bhd. of Teamsters*, 617 P.2d 1004, 1006 (Wash. 1980) (en banc)).

104. *Id.* (citation omitted).

105. See Sara Jean Green, *Now That Washington's Drug Possession Law Has Been Struck Down, Swamped Legal System Faces Massive Do-Over*, SEATTLE TIMES (Mar. 18, 2021, 6:00 AM), <https://perma.cc/Q9VU-ELTE> (last updated Mar. 18, 2021, 3:06 PM) ("Though a number of attorneys interviewed by The Seattle Times expressed surprise at the Supreme Court's Feb. 25 opinion that ruled the statute unconstitutional, it was actually foreshadowed in an earlier drug case . . .").

106. 448 P.3d 35 (Wash. 2019) (en banc).

is an unconstitutional burden-shifting scheme that violate[d] her due process rights,”<sup>107</sup> not all of the justices agreed. In her concurrence, Justice Gordon McCloud argued that the court “must reach the pressing issue that the majority declines to address: the ongoing criminalization of innocent conduct in Washington’s war on drugs, as permitted by two of this court’s decisions.”<sup>108</sup> While recognizing the status of *Cleppe* and *Bradshaw* as settled law, Justice Gordon McCloud wrote that she “would hold that the settled interpretation of Washington’s basic drug possession statute offends due process insofar as it permits heavy criminal sanctions for completely innocent conduct.”<sup>109</sup> This concurrence, joined by Chief Justice González, would return as the foundation for Justice Gordon McCloud’s opinion for the majority in *Blake*.<sup>110</sup>

## II. STATE V. BLAKE

### A. Background

In 2016, Shannon Blake was staying at a friend’s house in Spokane, Washington, when police executed a search warrant on the property, seeking evidence of stolen vehicles.<sup>111</sup> The police arrested three people, including Blake.<sup>112</sup> She was transported to jail, where a corrections officer discovered a “small baggy” of methamphetamine in the coin pocket of her jeans.<sup>113</sup> As a result of this discovery, Blake was charged with the possession of a controlled substance in violation of RCW § 69.50.4013(1).<sup>114</sup>

At her bench trial, Blake turned to the unwitting possession defense, testifying that she had been given the jeans where the methamphetamine was found two days before her arrest after a

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107. *Id.* at 36; *see id.* (“[W]e decline to consider A.M.’s due process argument and remand the case back to the trial court . . .”).

108. *Id.* at 42 (Gordon McCloud, J., concurring).

109. *Id.*

110. *Compare id.* at 53 (Wash. 2019) (en banc) (Gordon McCloud, J., concurring) (urging the court to “grapple with its own errors”), *with* *State v. Blake*, 481 P.3d 521, 534 (Wash. 2021) (en banc) (declaring RCW § 69.50.4013(1) unconstitutional).

111. *Blake*, 481 P.3d at 524.

112. *Id.*

113. *Id.*

114. *Id.*

friend had purchased them secondhand.<sup>115</sup> She said that she had never used methamphetamine and that she did not know the jeans had drugs in the pocket, although she did acknowledge that the drugs had been “on [her]” on the day of her arrest.<sup>116</sup> The trial court found that Blake had possessed methamphetamine, deciding that she had not met the burden of proving that her possession of the drugs was unwitting.<sup>117</sup> Although other charges against her were dismissed,<sup>118</sup> the trial court found Blake guilty of possession of a controlled substance.<sup>119</sup> While she did not serve any prison time as a result of her felony conviction, Blake lost her right to vote, her right to possess firearms, and her ability to receive public benefits, along with the other collateral consequences of a felony conviction.<sup>120</sup>

At the Washington Court of Appeals, Blake argued that shifting the burden to the defendant to prove unwitting possession violated due process.<sup>121</sup> Like the trial court, however, the Court of Appeals relied on *Cleppe* and *Bradshaw*, rejecting Blake’s due process claims.<sup>122</sup> The Washington Supreme Court granted review.<sup>123</sup>

### B. *The Opinion*

Once again, the lack of a knowledge or intent element in RCW § 69.50.4013(1) came before the Washington Supreme Court. This time, however, instead of considering whether this element should be read into the statute, the court treated the

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115. *Id.*

116. *Id.*

117. *Id.*

118. Green, *supra* note 105.

119. State v. Blake, 481 P.3d 521, 524 (Wash. 2021) (en banc).

120. Green, *supra* note 105.

121. See State v. Blake, No. 35601-9-III, 2019 WL 276047, at \*1 (Wash. Ct. App. Jan. 22, 2019) (“[Blake] also argues requiring her to prove unwitting possession to the charged offense violates due process.”), *rev’d*, 481 P.3d 521 (Wash. 2021) (en banc).

122. See *id.* at \*2 (“The crime of possession of a controlled substance does not require a *mens rea* element. The affirmative defense of unwitting possession has been adopted by our courts to ameliorate[] the harshness of the almost strict criminal liability our law imposes for unauthorized possession of a controlled substance.” (alteration in original) (internal quotation omitted)).

123. State v. Blake, 456 P.3d 395, 395 (Wash. 2020).

case as an issue of first impression: whether “this strict liability drug possession statute with these substantial penalties for such innocent, passive conduct exceed[s] the legislature’s police power.”<sup>124</sup> The answer, the court determined, was yes.<sup>125</sup> Stare decisis and legislative acquiescence prevented the court from overruling *Cleppe* and *Bradshaw* by the discovery of a silent intent element within the statute.<sup>126</sup> The court could no longer avoid grappling with the constitutional issues arising from Blake’s due process claims.<sup>127</sup> At this point, its only option was to consider the constitutionality of the strict liability drug possession statute—and the court found it to be wanting.<sup>128</sup>

Although the court’s opinion acknowledged the State’s “legitimate interest in restraining harmful conduct,” it focused on the voluminous state and federal precedent dealing with limitations to the state’s police power.<sup>129</sup> While the court

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124. *Blake*, 481 P.3d at 524.

125. *Id.* Despite its conclusion that the criminalization of passive nonconduct was unconstitutional, however, the court was careful to reassure the State of Washington that it remained within the legislature’s police power to enact strict liability crimes. *See id.* at 533 (“[T]he simple possession statute does not violate the due process clause solely because it is a strict liability crime. Instead, the simple possession statute violates the due process clause because it criminalizes wholly innocent and passive nonconduct on a strict liability basis.”).

126. *Id.* at 524.

127. *See id.* at 533. While the court’s usual practice was to apply the doctrine of constitutional avoidance, *id.* at 531, any construction of RCW § 69.50.4013(1) that would allow the court to avoid constitutional issues would not be consistent with the plain intent of the statute to criminalize even unknowing possession of a controlled substance. *See id.* at 532–33 (summarizing the history of RCW § 69.50.4013(1) and the legislature’s continuing inaction regarding the lack of an intent element in the light of the Washington Supreme Court’s interpretation of the statute). For the court’s discussion of cases where it read mens rea elements into statutes and how it distinguished *Blake* from these cases, see *id.* at 531–33.

128. *See id.* at 524 (concluding that RCW § 69.50.4013(1) “violates the state and federal constitutions”).

129. *See id.* at 526 (“Under both the state and federal constitutions, a statute must have a reasonable and substantial relation to the accomplishment of some purpose fairly within the legitimate range or scope of the police power and [must] not violate any direct or positive mandate of the constitution.” (internal quotation omitted)). The court described these precedent cases as, in general, “hold[ing] that the State’s police power is limited by the due process clause or ‘by constitutional protection afforded

conceded that the legislature continued to possess the power to create strict liability crimes without a mens rea element,<sup>130</sup> it was not willing to find an exception to the constitutional limit prohibiting the criminalization of “essentially innocent” conduct.<sup>131</sup> Instead, the court relied on the “even greater protection of individual rights” in the Washington Constitution’s due process clause<sup>132</sup> and state precedent enforcing constitutional due process limits on the state’s police power<sup>133</sup> to consider whether RCW § 69.50.4013(1) did exactly that.

The court’s conclusion was clear: the state’s felony drug possession statute was just “as unconstitutional as were the laws in *Lambert*, *Papachristou*, and *Pullman*.”<sup>134</sup> By its strict liability interpretation, RCW § 69.50.4013(1) criminalized “unknowing, and hence innocent, passivity” and, as a result, “ha[d] an insufficient relationship to the objective of regulating

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certain personal liberties.” *Id.* (quoting *State v. Talley*, 858 P.2d 217, 221 (Wash. 1993) (en banc)). The court further explained that

[t]he “constitutional protection[s] afforded certain personal liberties” implicated by RCW 69.50.4013 are (1) the principle that “[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence” and (2) the rule that the government cannot criminalize “essentially innocent” conduct.

*Id.* (alteration in original) (first quoting *Staples v. United States*, 511 U.S. 600, 605 (1994); and then quoting *City of Seattle v. Pullman*, 514 P.2d 1059, 1063 (Wash. 1973) (en banc)).

130. *See id.* at 527.

131. *See id.* (“[T]he second constitutional limit, the rule against criminalizing ‘essentially innocent’ conduct, does not have such exceptions, and it applies with special force to passive conduct—or nonconduct—that is unaccompanied by intent, knowledge, or mens rea.”). The court then reviewed the Supreme Court’s holdings in *Lambert v. California*, 355 U.S. 225 (1957) and *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), which both determined that “criminalizing passive nonconduct while eliminating the requirement of a guilty mind violated [the] due process clause protections” of the Fourteenth Amendment. *Blake*, 481 P.3d at 527.

132. *See State v. Blake*, 481 P.3d 521, 527 (2021) (“We have repeatedly noted that the [United States] Supreme Court’s interpretation of the Fourteenth Amendment does not control our interpretation of the state’s due process clause.” (internal quotation omitted)).

133. *See id.* at 528 (“[T]he state legislature’s exercise of its otherwise plenary police power to criminalize entirely passive and innocent nonconduct with no mens rea or guilty mind violates the due process clause of the state and federal constitutions.”).

134. *Id.*



drugs.”<sup>135</sup> The court’s decision, however, did not rest on the mere criminalization of nonconduct. In addition to the statute’s unconstitutional scope, the court cited other factors supporting its decision, such as the “harsh felony consequences,”<sup>136</sup> the loss of “many fundamental rights,”<sup>137</sup> and the “countless harsh collateral consequences”<sup>138</sup> that resulted from a conviction for simple possession. The court found that “[i]mposing such harsh penalties for such innocent passivity violates the federal and state rule that passive and wholly innocent nonconduct falls outside the State’s police power to criminalize.”<sup>139</sup>

The *Blake* opinion, however, was not a unanimous one.<sup>140</sup> In a concurrence that acknowledged *Cleppe* and *Bradshaw* as “incorrect and harmful decisions” and agreed with overturning Blake’s conviction, Justice Stephens nevertheless argued that the correct remedy was for the court to overrule both precedents and read an intent requirement into the simple possession statute.<sup>141</sup> According to the concurrence, “[s]uch an outcome [was] supported by the presumption of mens rea in criminal statutes and the requirement for uniform interpretation of the Uniform Controlled Substances Act among the states.”<sup>142</sup> The

135. *Id.* at 530 (internal quotation omitted).

136. *See id.* at 529 (citing WASH. REV. CODE § 9A.20.021(1)(c) (noting that the maximum punishment was “five years’ imprisonment and a \$10,000 fine”).

137. *Id.* (citing Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585 (2006); Tarra Simmons, *Transcending the Stigma of a Criminal Record: A Proposal to Reform State Bar Character and Fitness Evaluations*, 128 YALE L.J.F. 759 (2019); MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE 62 (2006)).

138. *Id.* (citing Pinard & Thompson, *supra* note 137, at 588; Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER, RACE & JUST. 253, 259–60 (2002)).

139. *Id.* at 530.

140. In addition to the two-justice concurrence, three justices dissented from the majority opinion, finding that “[t]he legislative power to enact strict liability crimes remains consistent and undiminished.” *Id.* at 545 (Johnson, J., dissenting). The dissent argued that the court’s “continued recognition of this legislative power applies with special force . . . given the length of time that the crime of possession of a controlled substance has been upheld as a strict liability crime.” *Id.*

141. *See id.* at 544 (Stephens, J., concurring in part and dissenting in part).

142. *Id.*

majority's decision to declare RCW § 69.50.4013(1) unconstitutional was, in Justice Stephens's eyes, "unnecessary" when the majority simply could have adhered to the doctrine of constitutional avoidance and read a knowledge or intent element into the statute.<sup>143</sup>

Despite the concurrence's offer of narrow grounds on which to decide the case, the majority held to its course of considering the constitutional issues raised in Blake's appeal.<sup>144</sup> In the end, it held that "RCW 69.50.4013(1)—the portion of the simple drug possession statute creating this crime—violate[d] the due process clause of the state and federal constitutions and [was] void."<sup>145</sup> The court vacated Blake's conviction<sup>146</sup>—and, in doing so, set the stage for the vacation of the convictions of thousands of Washingtonians who had been found guilty of possession of a controlled substance, whether they knew they possessed it or not, under RCW § 69.50.4013(1).

### III. THE DECISION IN *STATE V. BLAKE* IS RETROACTIVE

*Blake* left an unsettled legal landscape in its aftermath. While there is nothing in the opinion itself addressing its retroactivity, Washington courts and other parties to the state's criminal legal system have generally treated *Blake* as if it applies to all past convictions under RCW § 69.50.4013(1).<sup>147</sup> This de facto consensus on retroactivity is also supported by state and federal precedent.

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143. *Id.* Justice Stephens described the majority's rejection of her suggestion to resolve the case on narrow statutory grounds as "overstep[ing]." *Id.* at 542.

144. *See id.* at 533 ("[I]t is impossible to avoid the constitutional problem now (unless we overturn our own legislative acquiescence precedent as the concurrence, but not the parties, want us to do).").

145. *Id.* at 534.

146. *Id.*

147. *See Green, supra* note 105

There's [a] general but not unanimous consensus [that] the Supreme Court's 5-4 opinion . . . does not just affect cases in which some accidentally or unknowingly possessed illegal drugs, but instead requires that all past possession convictions be vacated; that new sentences be imposed for possibly thousands of people in prison; and that potentially millions of dollars in legal fees and fines be reimbursed.

A. *Washington Courts of Appeals Have Consistently Treated State v. Blake as Retroactive*

On March 17, 2021, shortly after the Washington Supreme Court released its decision in *Blake*, the State of Washington filed a motion asking the court to reconsider its opinion.<sup>148</sup> In its motion, the State encouraged the court to adopt Justice Stephens’s concurrence—and to apply *Blake* prospectively, rather than “fully retroactively.”<sup>149</sup> The motion indicated that the State considered *Blake* to be a retroactive decision.<sup>150</sup> These concerns were grounded in the Washington Supreme Court’s adoption of *Teague v. Lane*<sup>151</sup> and its exceptions to the general federal bar on the retroactive application of new procedural and constitutional rules to criminal prosecutions.<sup>152</sup> According to the State’s interpretation of *Blake*, it would fall under the exception allowing “rulings that ‘place . . . certain kinds of primary, private individual conduct beyond the power of the criminal-lawmaking to proscribe’” to be applied retroactively.<sup>153</sup>

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148. Respondent’s Motion to Reconsider at 1, *State v. Blake*, 481 P.3d 521 (Wash. 2021) (en banc) (No. 96873-0).

149. *Id.* at 8, 10. By adopting Justice Stephens’s concurrence as the majority opinion, the State argued, the court would shift the grounding of its decision from a constitutional issue to one of statutory interpretation. *Id.* at 12. As a result, “[p]otentially, . . . the *Blake* decision would apply to cases on direct appeal, but not to final convictions.” *Id.* However, the State’s conclusion seems to have been incorrect, and *Blake* would apply retroactively even if the majority adopted the concurring opinion. See WASH. STATE BAR ASS’N, WASHINGTON APPELLATE PRACTICE DESKBOOK § 24.5 (2016) (“[R]ecent statutory interpretations do apply directly to older cases . . . .”); *Schiro v. Summerlin*, 542 U.S. 348, 351 (2004) (noting that “decisions that narrow the scope of a criminal statute by interpreting its terms” are substantive rules that apply retroactively).

150. See Respondent’s Motion to Reconsider, *supra* note 148, at 8–9

Under the majority opinion, the decision will be fully retroactive, i.e., it will require dismissal of all past possession cases; it will likely require resentencing on thousands of cases where a simple possession offense was counted toward an offender score as a prior conviction; and it will also likely require resentencing for the thousands of cases where a possession conviction prevented prior offenses from washing out.

151. 489 U.S. 228 (1989).

152. See Respondent’s Motion to Reconsider, *supra* note 148, at 11–12 (“Were the majority to adopt the concurring opinion, [the] exceptions to the *Teague*-bar may not . . . apply.”).

153. *Id.* (quoting *In re St. Pierre*, 823 P.2d 492, 495 (Wash. 1992) (en banc)).

The State's concern, however, would remain unaddressed. On April 20, 2021, the Washington Supreme Court denied the State's motion, making no comment on whether it intended for *Blake* to be applied retroactively.<sup>154</sup> Since then, the Washington Court of Appeals has consistently treated *Blake* as applying retroactively to all felony convictions for possession of a controlled substance, regardless of their finality, with the State regularly conceding to the decision's retroactive effect.<sup>155</sup> This acceptance of *Blake* as fully retroactive and applying to all convictions under the invalidated RCW § 69.50.4013(1) is nevertheless correct in the light of state and federal precedent dealing with retroactivity.

B. *Under State and Federal Retroactivity Precedent,  
State v. Blake Is Retroactive*

The leading case on the retroactive application of court decisions in Washington is *In re St. Pierre*,<sup>156</sup> in which the Washington Supreme Court adopted the United States Supreme Court's retroactivity analysis from *Teague v. Lane*.<sup>157</sup> In *Teague*, the United States Supreme Court held that, "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."<sup>158</sup> New

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154. Order Denying Further Reconsideration at 1, *State v. Blake*, 481 P.3d 521 (Wash. 2021) (en banc) (No. 96873-0). While the court also issued an order amending its opinion on the same day, this order merely clarified language in the court's legislative acquiescence analysis. See Order Amending Original Opinion at 1–2, *State v. Blake*, 481 P.3d 521 (Wash. 2021) (en banc) (No. 96873-0).

155. See, e.g., *State v. Ballard*, No. 81296-3-I, 2021 Wash. App. LEXIS 1401, at \*7 (Wash. Ct. App. June 7, 2021) (ordering defendant's resentencing with a corrected offender score pursuant to *Blake*); *State v. Yates*, No. 55065-2-II, 2021 Wash. App. LEXIS 1813, at \*4 (Wash. Ct. App. July 27, 2021) (vacating defendant's conviction and remanding for resentencing pursuant to *Blake*); *State v. Mohamed*, No. 80964-4-I, 2021 Wash. App. LEXIS 2048, at \*1–2 (Wash. Ct. App. Aug. 9, 2021) (vacating defendant's conviction pursuant to *Blake*); *State v. Taylor*, No. 54049-5-II, 2021 Wash. App. LEXIS 2260, at \*1 (Wash. Ct. App. Sept. 9, 2021) (striking prior convictions for possession of a controlled substance from defendant's offender score).

156. 823 P.2d 492 (Wash. 1992) (en banc).

157. *Id.* at 497.

158. *Teague v. Lane*, 489 U.S. 288, 310 (1989).

rules, according to the Court, are announced when a case's result "was not *dictated* by precedent existing at the time the defendant's conviction became final."<sup>159</sup> An exception to *Teague*'s principle barring retroactive application of new rules is for those that "place certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."<sup>160</sup> Following its adoption of *Teague* in *St. Pierre*, the Washington Supreme Court has continued to comply with this federal precedent, following the same two-step analysis to determine the retroactivity of any new development of case law as the United States Supreme Court.<sup>161</sup>

*Blake* required Washington's legislature to act to add an intent element to RCW § 69.50.4013(1) or to allow simple possession of controlled substances to remain effectively legal in the state following the statute's invalidation. This undoubtedly breaks the kind of ground required for the decision to announce the new rule.<sup>162</sup> While the precedent cited in *Blake* could possibly have "dictated" the Washington Supreme Court's conclusion that the criminalization of passive nonconduct violated due process,<sup>163</sup> in practice, legislative acquiescence and stare decisis bound the court to its prior decisions in *State v.*

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159. *Id.* at 301 (citations omitted). The Court provided an alternate standard for a new rule, as well: "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Id.* The Washington Supreme Court uses the same definitions. *See, e.g., State v. Hanson*, 91 P.3d 888, 891 (Wash. 2004) (en banc) (applying *Teague*'s definition of a new rule).

160. *Teague*, 489 U.S. at 307 (internal quotations omitted). To determine whether a new rule falls into this exception, the court must consider whether the rule is substantive or procedural. 28 MOORE ET AL., MOORE'S FEDERAL PRACTICE—CRIMINAL PROCEDURE § 671.09 (2021). Substantive rules "alter the range of conduct or the class of persons that the law punishes." *Id.* On the other hand, procedural rules "regulate only the manner of determining the defendant's culpability." *Id.* If a rule is procedural, then it is barred by *Teague* from retroactive application to cases which have become final before it is announced—unless the rule falls into the aforementioned exception. *Teague*, 489 U.S. at 310. In contrast, if a rule is substantive, then it is retroactively applicable. *Id.*

161. *See, e.g., In re Domingo-Cornelio*, 474 P.3d 524, 529 (Wash. 2020) (en banc) ("A new rule applies retroactively on collateral review only if it is a new substantive rule of constitutional law or a watershed rule of criminal procedure." (citation omitted)).

162. *See supra* note 159 and accompanying text.

163. *See supra* note 131 and accompanying text.

*Cleppe* and *State v. Bradshaw*.<sup>164</sup> The new rule announced in *Blake* is a substantive one that places “particular conduct covered by the statute”—more specifically, the nonconduct of unknowingly or unintentionally possessing a controlled substance criminalized by RCW § 69.50.4013(1)—“beyond the State’s power to punish.”<sup>165</sup> When it struck down Washington’s strict liability drug possession statute, the Washington Supreme Court prevented the legislature from punishing particular conduct, which is exactly the type of new rule that the United States and Washington Supreme Courts have found to be substantive and therefore retroactive in effect.<sup>166</sup>

#### IV. RESPONSES TO *STATE V. BLAKE*

The invalidation of RCW § 69.50.4013(1) meant that, suddenly, the possession of controlled substances had been effectively decriminalized in Washington.<sup>167</sup> Across the state, law enforcement agencies announced that they would no longer detain or arrest people for simple possession.<sup>168</sup> Similarly, the Washington Association of Prosecuting Attorneys instructed its

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164. See *supra* notes 100–104 and accompanying text.

165. *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004).

166. Compare *State v. Blake*, 481 P.3d 521, 534 (Wash. 2021) (en banc) (holding the criminalization of “essentially innocent” nonconduct to violate due process), with *State v. Houston-Sconiers*, 391 P.3d 409, 414 (Wash. 2017) (en banc) (holding that sentencing courts must have “absolute discretion” to depart from sentencing guidelines when sentencing juveniles in adult court); and *Johnson v. United States*, 576 U.S. 591, 606 (2014) (holding the residual clause of the Armed Career Criminal Act to violate due process). In *Welch v. United States*, 578 U.S. 120 (2016), the United States Supreme Court held that the new rule from *Johnson* was substantive, and therefore to be applied retroactively. *Id.* at 9. Similarly, in *In re Ali*, 474 P.3d 507 (Wash. 2020) (en banc), the Washington Supreme Court held that *Houston-Sconiers* also announced a new substantive constitutional rule, and was also to be applied retroactively on collateral review. *Id.* at 520–21.

167. See Flannery Collins, *The Status of Drug Possession in Washington State*, MUN. RSCH. & SERVS. CTR. OF WASH.: MSRC INSIGHT BLOG (Mar. 29, 2021), <https://perma.cc/BKW2-KXUH> (“The end result [of *Blake*] is that the state law criminalizing possession of controlled substances has been struck down as unconstitutional; in other words, it is no longer a crime for someone to possess controlled substances, whether knowingly or unknowingly.”).

168. *E.g.*, Press Release, Seattle Police Dept., Seattle Police Statement on Recent Court Ruling for Drug Possession Arrests (Feb. 25, 2021, 3:50 PM), <https://perma.cc/R84W-FW5S>.

members to immediately drop any pending cases for simple possession, to seek orders vacating old convictions, and to recall any arrest warrants issued in simple possession cases.<sup>169</sup> While action beyond these immediate responses within the state's criminal legal system took some time to materialize, both the executive and legislative branches of Washington's government did eventually react to the state supreme court's decision in *State v. Blake*, although unanswered questions still remain.

#### A. *The Executive Response*

Washington Governor Jay Inslee announced that he would commute the sentences of people in custody solely due to convictions under RCW § 69.50.4013(1).<sup>170</sup> Additionally, the governor's office instituted a process by which eligible people under community supervision<sup>171</sup> by the Washington State Department of Corrections (DOC) could apply for unconditional commutations of the remainder of their sentences.<sup>172</sup> Although the governor's office identified approximately 1,200 people under DOC supervision when it announced the new clemency process, by September 2021, Governor Inslee had commuted the sentences of only 350 people.<sup>173</sup>

While commuting sentences to release people from serving community custody and paying legal financial obligations is commendable, it does not go far enough in undoing the

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169. Gene Johnson, *Washington State Justices Strike Down Drug Possession Law*, ASSOCIATED PRESS (Feb. 25, 2021), <https://perma.cc/2Y2U-WM7W>.

170. See Press Release, Wash. State Governor's Off., Inslee Signs Commutations Following Blake Decision (Apr. 13, 2021), <https://perma.cc/KS8E-E727>.

171. Community supervision (also called community custody) is Washington's version of probation. See WASH. REV. CODE § 9.94A.030(3) (2023).

172. Press Release, Wash. State Governor's Off., Inslee to Provide Clemency Relief to Individuals Still Serving Community Supervision Solely on Invalid Drug Possession Convictions (Aug. 16, 2021), <https://perma.cc/D3VZ-8NAY>. The commutation would also relieve petitioners of any obligation to continue paying outstanding legal financial obligations. *Id.* For a detailed description of the process by which clemency petitions are reviewed and granted, see *id.*

173. *Inslee Commutes Sentence of 350th Low-Level Drug Offender*, YAKTRI NEWS (Sept. 22, 2021), <https://perma.cc/3LBE-5R7U>.

consequences of a conviction under RCW § 69.50.4013(1). In Washington, a commutation order does not change the fact that a person was convicted and sentenced.<sup>174</sup> Instead, the recipient of a commutation order must move to vacate their conviction in the county where they were originally convicted.<sup>175</sup> This is not an easy task,<sup>176</sup> and it is made even more difficult by the fact that each county in Washington has a different approach for handling motions and hearings (such as resentencing hearings, motions to vacate convictions, and hearings on reimbursement of fines and fees) in response to *Blake*.<sup>177</sup> The King County Prosecuting Attorney, for example, does not respond to pro se requests for resentencing under *Blake*, and instead requires people seeking resentencing to either hire an attorney or screen for a public defender.<sup>178</sup> In Pierce County, the Prosecuting Attorney's Office offers no information about *Blake*, only a "Blake response form" and a suggestion to contact the county's

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174. Letter from Jay Inslee, Governor of the State of Wash., to Individuals on DOC Supervision for Simple Drug Possession Convictions (July 23, 2021), <https://perma.cc/X9UT-VKZP> (PDF).

175. *State v. Blake: Blake Commutation Orders*, WASH. STATE OFF. OF PUB. DEF., <https://perma.cc/7R9C-824X>.

176. See generally Mary Ellen Pitney, *Clear Your Record of Simple Possession? Not That Easy But You Should Try*, NW. PUB. BROAD. (Dec. 21, 2021), <https://perma.cc/N777-A9PC> (explaining the process for vacating convictions and suggesting that those who wish to do so should seek legal aid); Northwest Justice Project, *How to Clear (Vacate) Your Drug Possession Conviction After State v. Blake*, WASH. LAWHHELP, <https://perma.cc/75HL-P6C6> (last updated Nov. 17, 2022) (same).

177. *State v. Blake: County Information for Blake Cases*, WASH. STATE OFF. OF PUB. DEF., <https://perma.cc/D4UA-N8QG>.

178. *Blake Requests*, KING CNTY. PROSECUTING ATT'Y'S OFF., <https://perma.cc/7XLF-SMFF?type=image> (last updated Apr. 5, 2022). The King County Prosecuting Attorney's Office (PAO) also discourages people from submitting requests for relief, as King County has implemented a process to "proactively" vacate prior convictions for simple possession. *Id.* The PAO is working with the King County Superior Court Clerk's Office to compile a list of all eligible convictions. *Id.* Starting with the most recent convictions, the PAO is filing motions to vacate those convictions and to cancel any outstanding legal financial obligations or collections costs. *Id.* In addition, the PAO is working with the Clerk's Office to refund any payments made. *Id.* However, applying for a refund is its own separate process that may pose further obstacles for relief under *Blake*. See generally *State v. Blake Information*, KING CNTY. SUPER. CT. CLERK'S OFF., <https://perma.cc/BA64-X4X2?type=image>.



public defenders.<sup>179</sup> The Clark County Prosecuting Attorney's Office has no information available on any steps it may be taking to provide relief to people with invalidated convictions after *Blake*.<sup>180</sup> Depending on the county in which they were convicted, the experiences of Washingtonians in accessing justice under *Blake* will vary wildly in ease and efficiency.<sup>181</sup> Whether this type of geographic inequity will be addressed in the state's legislative responses to *Blake* remains to be seen.

### B. *The Legislative Responses*

The invalidation of RCW § 69.50.4013(1) left Washington without any law criminalizing the simple possession of controlled substances.<sup>182</sup> While preemption usually prevents municipal and county governments from enacting their own ordinances on drug possession,<sup>183</sup> some local governments across the state took matters into their own hands. The city of Marysville and Grant County both adopted ordinances “making it a gross misdemeanor to ‘knowingly’ possess a controlled substance.”<sup>184</sup> Lewis County initially proposed an ordinance making knowing possession of a controlled substance a felony,<sup>185</sup> but later decided to table the ordinance until after the upcoming

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179. *Blake Decision*, PIERCE CNTY. PROSECUTING ATT'Y'S OFF., <https://perma.cc/CWX6-8UY7>.

180. *Criminal Prosecution*, CLARK CNTY. PROSECUTING ATT'Y'S OFF., <https://perma.cc/Z9RN-LKE9>.

181. See *supra* note 177 and accompanying text. At the time of the writing of this Note, many of these links were to the website of the county's prosecuting attorney's office, although at the time of publication they now lead to the website of the county's public defender. Regardless, access to justice remains problematically linked to geography due to the fact that, in Washington, public defense is funded primarily by county and city governments with dramatically differing budgets. See *Counties Suffer from Inadequate State Funding for Trial Court Public Defense Services*, WASH. STATE ASS'N OF COUNTIES (Jan. 14, 2020), <https://perma.cc/23Z9-WF8N>.

182. Johnson, *supra* note 169.

183. See Collins, *supra* note 167 (noting that *Blake*'s invalidation of “the crime of simple possession” disrupted the state's usual preemption of the field of “setting penalties for violations of the controlled substances act”).

184. *Id.*

185. *Id.*

2021 state legislative session.<sup>186</sup> While it took state legislators slightly longer to respond, the 2021 regular session of Washington's legislature eventually saw multiple competing bills introduced to revise or replace RCW § 69.50.4013(1).<sup>187</sup> The resulting legislation, however, left several significant issues unresolved, and as a result the debate over how to respond to *Blake* extended throughout the 2022 legislative session and into the 2023 legislative session, where it continues as of the publication of this Note.

### 1. Senate Bill 5476: An Experiment in Reform

On March 1, 2021, the first response to *Blake* was introduced in the state Senate.<sup>188</sup> S.B. 5468 contained a single simple proposal: to amend RCW § 69.50.4013(1) to include the word “knowingly.”<sup>189</sup> Three days later, on March 4, state senators introduced S.B. 5471, which also amended RCW § 69.50.4013(1) to include “knowingly” and, in addition, made unwitting possession a civil infraction with a fine of \$3,000.<sup>190</sup> On March 22, a third bill was introduced: S.B. 5475.<sup>191</sup> Like S.B. 5468 and S.B. 5471, S.B. 5475 proposed amending RCW § 69.50.4013(1) to add the word “knowingly” to its text.<sup>192</sup> In addition to this amendment, S.B. 5475 also proposed a legislative working group to study the impact of *Blake* and report its findings back to the legislature.<sup>193</sup> It also established an expiration date of June 30, 2023, for the legislation.<sup>194</sup> None of these three bills, however, left the Senate Law & Justice Committee.<sup>195</sup>

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186. Claudia Yaw, *Lewis County Walks Back Criminal Drug Ordinance, Waits for State to Act*, THE CHRONICLE (Mar. 31, 2021, 4:47 PM), <https://perma.cc/334M-5GQZ>.

187. Collins, *supra* note 167.

188. S.B. 5468, 67th Leg., 2021 Reg. Sess. (Wash. 2021).

189. *Id.* § 1.

190. S.B. 5471, 67th Leg., 2021 Reg. Sess. § 1 (Wash. 2021).

191. S.B. 5475, 67th Leg., 2021 Reg. Sess. (Wash. 2021).

192. *Id.* § 1.

193. *Id.* § 2.

194. *Id.* § 3.

195. *Bill Information: SB 5468*, WASH. STATE LEG., <https://perma.cc/EP29-C9HF>; *Bill Information: SB 5471*, WASH. STATE LEG., <https://perma.cc/QYT6->

Instead, on March 24, 2021, Senator Manka Dhingra introduced S.B. 5476,<sup>196</sup> which was meant to be part of Washington's transition "away from the failed policies of the war on drugs and toward a treatment-first, public-health approach."<sup>197</sup> As originally introduced, S.B. 5476 decriminalized the possession of a "personal use amount" of controlled substances<sup>198</sup> and required police making contact with a person in possession of drugs within these limits to refer them to a "forensic navigator."<sup>199</sup> Possession of more than a personal use amount of a controlled substance, however, would remain a felony.<sup>200</sup> S.B. 5476's proposals were met with mixed responses,<sup>201</sup> and the legislature adopted various amendments before the bill's final passage on April 24, 2021.<sup>202</sup>

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LM9B; *Bill Information: SB 5475*, WASH. STATE LEG., <https://perma.cc/2ZQW-ZJ7H>.

196. Engrossed S.B. 5476, 67th Leg., 2021 Reg. Sess. (Wash. 2021).

197. Press Release, Senator Manka Dhingra, Dhingra Proposes Treatment-Focused Legal Framework for Controlled Substances (Mar. 23, 2021), [hereinafter Dhingra Press Release] <https://perma.cc/HLR4-2X6F>.

198. The original version of S.B. 5476 defined personal use amounts that varied by substance, ranging from a count of pills or "user units" to grams of a given substance or mixture of substances. S.B. 5476, 67th Leg., 2021 Reg. Sess. §§ 1, 2 (Wash. 2021). These amounts were based on the levels established in Oregon by Measure 110. Dhingra Press Release, *supra* note 197. Passed by Oregon voters in 2021, Measure 110 removed criminal penalties for the possession of small "personal use" amounts of controlled substances. Drug Addiction Treatment and Recovery Initiative of 2020, §§ 11–19, Or. Measure 110 (2020) (codified in scattered sections of OR. REV. STAT. tit. 37, ch. 475 (2021)).

199. Wash. Engrossed S.B. 5476 §§ 3, 4. Currently, forensic navigators assist individuals who have been referred for competency evaluations in criminal cases in accessing "services related to diversion and community outpatient competency restoration." WASH. REV. CODE § 10.77.074 (2021). The original version of S.B. 5476 would have permitted law enforcement to use forensic navigators as "care coordinator[s] for substance use disorder resources." Wash. S.B. 5476 § 11.

200. Wash. Engrossed S.B. 5476 § 3.

201. For a summary of public testimony offered for and against S.B. 5476 when it came before the Ways & Means Committee of the state Senate in April 2021, see Michael Goldberg, *Advocates, Prosecutors and Law Enforcement Weigh in on Bill That Would Address Blake Decision*, WASH. STATE WIRE (Apr. 5, 2021), <https://perma.cc/M6BX-8GA4>.

202. See *Bill Information: SB 5476*, WASH. STATE LEG., <https://perma.cc/C7BG-W6GL>. The text of each amendment, regardless of whether it was adopted, is available by clicking on the amendment's name.

Many of S.B. 5476's most radical reforms—most notably its decriminalization of the possession of personal use amounts of controlled substances—were tempered by the need to find a compromise that could pass both chambers of the state legislature.<sup>203</sup> By the time it was approved by the full legislature, S.B. 5476 made the knowing possession of controlled substances a misdemeanor with a maximum penalty of ninety days in jail<sup>204</sup> and required law enforcement officers to refer people “who would otherwise be subject to arrest for possession” to assessment and services instead of bringing them into the criminal legal system.<sup>205</sup> “Almost no one [was] fully satisfied” with the compromise version of S.B. 5476, however, especially the advocates and defense attorneys who had hoped that *Blake* signaled the end of Washington's wars on drugs.<sup>206</sup> While progressive legislators in Olympia argued that something had to be done in order to prevent a city-level patchwork of drug laws across the state,<sup>207</sup> not every player in the criminal legal system agreed. Some, such as the Washington Defender Association, had hoped that the legislature would “do nothing” in response to the decision, thus leaving de facto decriminalization in place.<sup>208</sup> The King County Department of Public Defense criticized the legislature's decision to continue criminalizing the possession of controlled substances, citing the “serious and predictable harm”

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203. See David Kroman, *WA Lawmakers Try to Thread Needle of Drug Possession, to Mixed Reviews*, CROSSCUT (Apr. 28, 2021), <https://perma.cc/3MRV-9SCU> (describing the final version of S.B. 5476 as “a compromise . . . that was good enough for just enough legislators anxious to do something in the wake of” *State v. Blake*).

204. See Act of May 13, 2021, ch. 311, §§ 8–12, 2021 Wash. Sess. Laws 2510, 2521–24 (codified as amended in scattered sections of WASH. REV. CODE tit. 69).

205. § 13(1), 2021 Wash. Sess. Laws at 2525. While officers are required to divert only the first two times a person is contacted for possession of a controlled substance, S.B. 5476 permits them to make additional diversion efforts at their discretion. § 13(2), 2021 Wash. Sess. Laws at 2525. In addition, S.B. 5476 “authorize[s] and encourage[s]” law enforcement officers to choose from a variety of alternatives to arrest when contacting people with known mental health and/or substance use disorders. § 6, 2021 Wash. Sess. Laws at 2519.

206. See Kroman, *supra* note 203.

207. *Id.*

208. *Id.*

that would continue to result even from misdemeanor convictions.<sup>209</sup>

While S.B. 5476 requires law enforcement officers to divert instead of arrest the first two times they encounter someone otherwise eligible to be arrested for possession of a controlled substance, any future diversion is left completely to the officer's discretion.<sup>210</sup> This leaves Washingtonians suffering from a substance use disorder vulnerable to a single police officer's decision whether to arrest them, thus subjecting them to all the possible consequences of interaction with the criminal legal system, or to divert them to treatment and services. Although some proponents of recriminalization argued that it was necessary to "incentivize treatment,"<sup>211</sup> this deterrence rationale is not supported by data: higher rates of imprisonment for drug offenses do not affect rates of substance misuse and the accompanying public health effects.<sup>212</sup> Far from encouraging treatment, the recriminalization of controlled substances by S.B. 5476 merely re-exposes Washingtonians to the discretionary—and, ultimately, discriminatory—enforcement of the state's drug laws.<sup>213</sup>

When considering its immediate impact, however, it must be remembered that S.B. 5476 was passed a mere month after its introduction in response to an unexpected Washington Supreme Court decision<sup>214</sup>—and that S.B. 5476 was never meant to be a permanent fix.<sup>215</sup> The act's expiration date of July 1, 2023, means that "the 2021 legislative session [was] not the end of the conversation on drug possession, but the beginning."<sup>216</sup> Without legislative action, possession of a

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209. *Id.*

210. Act of May 13, 2021, ch. 311, § 13, 2021 Wash. Sess. Laws 2510, 2525. It is worth noting, however, that S.B. 5476 did not establish any statewide mechanism for tracking diversions, which may conceal the extent of the need for state financial support to municipal and other local governments placed on the front line of the bill's new requirements. See ASS'N OF WASH. CITIES, ADDRESSING THE *BLAKE* DECISION 1 (2023), <https://perma.cc/6HVA-XKSB> (PDF).

211. See Kroman, *supra* note 203.

212. See *supra* note 27 and accompanying text.

213. See *supra* notes 40–57 and accompanying text.

214. See *Bill Information: SB 5476*, *supra* note 202.

215. See § 29, 2021 Wash. Sess. Laws at 2542.

216. Kroman, *supra* note 203.

controlled substance would be decriminalized once again, giving Washington lawmakers a crucial two-year opportunity to judge the effects of S.B. 5476's focus on treatment as opposed to incarceration.<sup>217</sup> To help with this evaluation, S.B. 5476 established a substance use recovery services advisory committee to work in collaboration with Washington's Health Care Authority<sup>218</sup> to report to the legislature on the state's implementation of its new "substance use recovery services plan."<sup>219</sup> The committee's final plan was submitted to the legislature on December 1, 2022, including seventeen policy and funding recommendations for implementation of the Substance Use and Recovery Services plan, as well as a recommendation that the legislature "[d]ecriminalize possession of controlled substances and paraphernalia with no civil penalty or fines."<sup>220</sup> The success of the plan remains to be seen, of course, as the Committee will continue issuing annual reports to the legislature until 2026,<sup>221</sup> but it will undoubtedly serve as a critical case study for other states considering how to address the harms of their own drug policies.<sup>222</sup>

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217. See Lininger, *supra* note 14 ("The next two years will be critical: this is when officials in . . . Washington will launch their programs, advocates around the country will consider adopting them, and Washington legislators, whose SB 5476 partially expires July 1, 2023, will determine their next steps.").

218. The Washington State Health Care Authority oversees the state's purchasing of health care services and makes recommendations "aimed at minimizing the financial burden which health care poses on the state . . . while at the same time allowing the state to provide the most comprehensive health care options possible." WASH. REV. CODE § 41.05.006 (2023).

219. § 1(7), 2021 Wash. Sess. Laws at 2514. For a description of the "recovery support services" to be implemented across Washington and reported on to the legislature, see § 1(8), 2021 Wash. Sess. Laws at 2514. However, the funding and support available for these recovery services vary drastically depending on location. See ASS'N OF WASH. CITIES, *supra* note 210 (describing the "[e]xtreme disparities in access to drug treatment" across the state).

220. SUBSTANCE USE & RECOVERY SERVS. ADVISORY COMM. & WASH. STATE HEALTH CARE AUTH., SUBSTANCE USE AND RECOVERY SERVICES PLAN 10–11, 14 (2022), <https://perma.cc/8YN6-4GQC>.

221. *Id.* at 7.

222. See Lininger, *supra* note 14

People in the criminal justice field have been working for years to create a system that treats individuals who have behavioral needs as real people in complex social circumstances that are often beyond their control. The

## 2. Senate Bill 5663: Tackling *State v. Blake*'s Unanswered Questions

On January 5, 2022, Senator Dhingra pre-filed another bill as part of Washington's response to *Blake*.<sup>223</sup> While S.B. 5663 was the subject of public hearings before the state Senate's Ways & Means and Law & Justice Committees,<sup>224</sup> the bill missed the February 15, 2022, legislative cutoff date for a bill to pass in its house of origin<sup>225</sup> and languished in the Senate Rules Committee's "X file"<sup>226</sup> until the end of the legislative session without ever coming before the full Senate for a vote.<sup>227</sup>

The goal of S.B. 5663 was to "implement a concerted and coordinated procedure" for vacating invalid convictions for possession of a controlled substance that "allow[ed] for rapid resolution of large numbers of cases over time."<sup>228</sup> To do so, however, S.B. 5663 proposed a procedure that would have put the process almost entirely in the hands—and at the discretion—of prosecutors. S.B. 5663 would have required county prosecutors' offices to review cases to determine whether "a conviction is subject to vacation and appropriate for vacation."<sup>229</sup> If vacating a conviction was found to be "appropriate," prosecutors would have been required to move

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policies in Oregon and Washington can serve as case studies through which we determine how to do that most effectively. The evaluation components in the Oregon and Washington laws will provide a crucial framework for understanding their impact.

223. *Bill Information: SB 5663*, WASH. STATE LEG., <https://perma.cc/AP27-CGH2>.

224. *Id.*

225. WASH. STATE LEG., 2022 SESSION CUTOFF CALENDAR 1 (2022), <https://perma.cc/2ZF2-LEZK> (PDF).

226. *Bill Information: SB 5663*, *supra* note 223. Being relegated to the "X" file usually means that a bill is "very unlikely" to continue its progress in the current legislative session. Curtis Bingham, *A Bill Has Been Assigned to the Rules "X" File—What Does That Mean?*, WASH. C.R. ASS'N (Mar. 22, 2021), <https://perma.cc/8W3K-8PNM>.

227. *Bill Information: SB 5663*, *supra* note 223.

228. Second Substitute S.B. 5663, 67th Leg., 2022 Reg. Sess. § 1 (Wash. 2022).

229. *Id.* § 3(3)(c).

under Superior Court Criminal Rule (“CrR”) 7.8<sup>230</sup> to vacate the conviction.<sup>231</sup>

In testimony before the state Senate, Washingtonians affected by *Blake* described the lack of information about the remedies available to them and expressed frustration at being left out of the process of responding to the Washington Supreme Court’s decision.<sup>232</sup> While S.B. 5663 was a start, the bill—like other state responses—did not go far enough to help Washingtonians reclaim their lives after an unconstitutional conviction. It remained to be seen whether future legislative efforts would incorporate criticism of S.B. 5663’s proposals from the community and legal professionals.

### 3. Senate Bill 5536: A “Public-Health Approach” with “Criminal-Justice Consequence”<sup>233</sup>

The expiration date of S.B. 5476 meant that the question of how to deal possession of controlled substances would return to

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230. While S.B. 5663 did not specify which provision of CrR 7.8 applied, see WASH. SUPER. CT. CRIM. R. 7.8(b)(4), providing relief from void judgments, as the most likely possibility.

231. Wash. Second Substitute S.B. 5663 § 3(3)(c). S.B. 5663 did not provide a required form or language for the proposed order to be submitted along with the motion to vacate. See Memorandum from the Wash. Def. Ass’n, the Wash. State Off. of Pub. Def., the Wash. Ass’n of Crim. Def. Laws., and the Off. of Civ. Legal Aid to Sen. Manka Dhingra, Chair, S.L. & Just. Comm. 2 (Dec. 17, 2021) (on file with author) [hereinafter Defense Bar Memorandum] (arguing that the language in orders resulting from a prosecutor’s motion to vacate should be prescribed by statute). For a further description of the prosecutor’s proposed duties, see Wash. Second Substitute S.B. 5663 §§ 3(3), (7).

232. See Senate Bill Report: SB 5663, S. 5663 SBR WM OC 22, 2022 Reg. Sess., at 7 (Wash. 2022), <https://perma.cc/69TY-24JN> (PDF) (reporting public testimony asserting that “[l]istening to those affected by the criminal justice system will restore faith in the system” and that “[f]ast tracking [S.B. 5663] without an equity lens and without those impacted at the table will just create more harm”). The Civil Survival Project, a Washington nonprofit working to remove the many barriers to reentry after incarceration, called on its membership to oppose S.B. 5663, criticizing the bill’s lack of input from the “voices of impacted people” and calling for the legislature to “convene a group of stakeholders” who could provide the perspective of people whose lives were altered by a conviction under RCW § 69.50.4013(1). Civil Survival Project, FACEBOOK (Feb. 9, 2022, 6:36 PM), <https://perma.cc/88KA-GC6V>.

233. Joseph O’Sullivan, *Push to Decriminalize Fades as WA Senate Considers New Drug Law*, CROSSCUT (Feb. 16, 2023), <https://perma.cc/87RF-2YT3>.



a legislature that “remain[s] sharply divided over how Washington should treat drug use and treatment.”<sup>234</sup> Cities throughout the state, frustrated with what local law enforcement perceived to be “a ‘hole’” in S.B. 5476 that “resulted in police being unable to stop those suspected of using or possessing drugs in public,” enacted ordinances making the use of controlled substances in public a misdemeanor.<sup>235</sup> When four competing bills were proposed as possible legislative responses to *Blake*, the “fractured political landscape” of the legislative effort to provide a state-level remedy became clear.<sup>236</sup>

S.B. 5035 proposed, yet again, to reclassify possession of a controlled substance as a felony, although it contained a nod to S.B. 5476’s diversion requirement by encouraging prosecutors “to divert such cases for assessment, treatment, or other services for a person’s first two violations” of the law.<sup>237</sup> In stark contrast, S.B. 5624 proposed decriminalization of the possession of personal use amounts of controlled substances<sup>238</sup> and the implementation of some of the recommendations of the Substance Use Recovery Services Advisory Committee.<sup>239</sup> A third bipartisan bill “attempted to find middle ground” by repealing S.B. 5476’s diversion requirement<sup>240</sup> and replacing it with a sentencing scheme for possession of a controlled substance that offered probation conditioned on treatment

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234. *Id.*

235. George Ftikas, Jr., *Public Drug Use in Lynnwood Now a Misdemeanor*, LYNNWOOD TIMES (Feb. 16, 2023), <https://perma.cc/7K55-CENZ>; *see, e.g.*, Press Release, City of Marysville, Marysville Gets Tough on Public Drug Use, Inappropriate Transit Behavior (Dec. 20, 2022), <https://perma.cc/T6LQ-7X7A>; Press Release, City of Kent, A Safer Kent (Updated): Four New Public Safety Ordinances Passed (Nov. 4, 2022), <https://perma.cc/K68S-77PE>.

236. O’Sullivan, *supra* note 233.

237. S.B. 5035, 68th Leg., 2023 Reg. Sess. § 1 (Wash. 2023).

238. S.B. 5624, 68th Leg., 2023 Reg. Sess. §§ 2–5 (Wash. 2023).

239. *Id.* §§ 7–10, 12–22; *see* SUBSTANCE USE & RECOVERY SERVS. ADVISORY COMM. & WASH. STATE HEALTH CARE AUTH., *supra* note 220, at 15–39 (detailing the Committee’s recommendations for the Substance Use and Recovery Services plan).

240. S.B. 5467, 68th Leg., 2023 Reg. Sess. § 10 (Wash. 2023). Instead, S.B. 5467 would have “authorized and encouraged law enforcement officers to refer people suffering from substance use disorders to a relevant treatment facility while allowing prosecutors to re-file the original charges if the person violated any conditions of their treatment. *Id.* § 8.

instead of jail time.<sup>241</sup> Following a public hearing of the Law & Justice Committee on their options, state senators ultimately chose a fourth bill, S.B. 5536, to be the vehicle for the legislature's response to *Blake*.<sup>242</sup>

S.B. 5536 attempts to combine a “public-health approach . . . with criminal-justice consequence[s].”<sup>243</sup> In its original form, S.B. 5536 reclassified possession of a controlled substance as a gross misdemeanor,<sup>244</sup> encouraged pre-booking referral to recovery services,<sup>245</sup> created a pretrial diversion program for people charged with possession of a controlled substance that would result in the dismissal of charges following the successful completion of drug treatment,<sup>246</sup> and repealed S.B. 5476's diversion requirement.<sup>247</sup> By the time it passed the Law & Justice Committee, S.B. 5536 had incorporated a portion of S.B. 5624's implementation of the Substance Use Recovery Services Advisory Committee recommendations.<sup>248</sup> The Ways & Means Committee made even more changes, such the incorporation of S.B. 5467's sentencing scheme and requirement that courts vacate convictions for possession following the successful completion of treatment as a condition of probation.<sup>249</sup> Now, under S.B. 5536, a person convicted of possession of a controlled substance would have the choice between a suspended sentence with probation conditioned on successful completion of drug treatment or a mandatory minimum

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241. *Id.* § 5(1)(a).

242. O'Sullivan, *supra* note 233.

243. *Id.*; *see id.* (noting that the gross misdemeanor penalty was part of a bipartisan attempt “to find a middle ground”); Jeremy Lott, *After Floor Fight, Washington Senate Passes Gross Misdemeanor for Drug Possession*, CTR. SQUARE (Mar. 4, 2023), <https://perma.cc/C5FM-8MVY> (describing S.B. 5536 as a “gross-misdemeanor-for-treatment bargain”).

244. S.B. 5536, 68th Leg., 2023 Reg. Sess. § 2 (Wash. 2023). The possession of an ounce or more of marijuana, however, would remain a misdemeanor. *Id.* § 3.

245. *Id.* § 3.

246. *Id.* § 8.

247. *Id.* § 14.

248. *Compare* Substitute S.B. 5336, 68th Leg., 2023 Reg. Sess. §§ 15–17, 19–28 (Wash. 2023), *with* Wash. S.B. 5624 §§ 7–10, 12–19.

249. *Compare* Second Substitute S.B. 5536, 68th Leg., 2023 Reg. Sess. §§ 11–12, *with* Wash. S.B. 5467 §§ 5–6.

sentence of twenty-one days in jail.<sup>250</sup> While successful completion of treatment would result in the vacation of the conviction,<sup>251</sup> a finding by the court that “the sentenced individual has willfully abandoned or demonstrated a consistent failure to comply with the recommended treatment” would result in reinstated sentences of increasing length.<sup>252</sup>

On March 3, 2023, a deeply-divided Senate passed S.B. 5536, with twenty-eight senators voting in favor of the bill and twenty-one senators, including a majority of the Democratic caucus, voting against it.<sup>253</sup> S.B. 5536 now moves to the state House of Representatives, where it has been referred to the Community Safety, Justice, & Reentry Committee.<sup>254</sup> It remains to be seen how the House will respond to the bill, which is supported by the same flawed assumption that recriminalization—which would increase in severity from a misdemeanor under S.B. 5476 to a gross misdemeanor under S.B. 5536—will incentivize treatment that drove S.B. 5476.<sup>255</sup>

250. Wash. Second Substitute S.B. 5536 § 11(2)(a).

251. *Id.* § 11(12).

252. See *id.* § 11(10)(a) (directing the court to “use its discretion in determining an appropriate amount of time of the individual’s suspended sentence to reinstate” for an individual sentenced for possession for the first time); § 11(10)(b) (setting a mandatory minimum of twenty-one days reinstated for a second sentencing); § 11(10)(c) (setting a mandatory minimum of forty-five days for a “third or subsequent” sentencing). While the bill would prevent courts from sanctioning people if they have made “reasonable efforts to comply . . . but cannot . . . either due to a lack of available treatment or,” for indigent people, “due to a lack of funding for treatment,” *id.* § 11(9)(a), it contains no definition of “reasonable efforts” and no guidance for determining whether treatment is practically available.

253. Lott, *supra* note 243. The bill was amended from the floor, raising the requirement for successful completion of pretrial diversion under S.B. 5536 from “meaningful engagement” to “substantial compliance” with the recommended drug treatment. *Id.* Numerous other amendments were defeated or withdrawn, including one that would have removed the escalating sanction scheme for abandonment of treatment, one that would have introduced a “three strikes” scheme for pretrial diversion, and one that would have raised the mandatory minimum for refusal to attend treatment as a condition of probation to forty-five days. *Id.*

254. *Bill Information: SB 5536*, WASH. STATE LEGISLATURE, <https://perma.cc/YNK8-MYVQ>.

255. See *supra* note 211 and accompanying text; Jerry Cornfield, *A Blake Fix Centers on a Harsher Penalty, More Treatment Options*, EVERETT HERALD (Feb. 11, 2023, 7:27 AM), <https://perma.cc/5Q85-7VFT> (describing the perspective that “the core of the problem . . . is to compel people to get help”).

4. House Bill 1492: Another Attempt to Tackle *State v. Blake*'s Unanswered Questions

After the failure of S.B. 5563, the issue of a procedure for statewide relief under *State v. Blake* was left for another day. Over a year later, on January 23, 2023, the state House of Representatives began to consider H.B. 1492, the legislature's latest attempt to address the inequities of current remedies available across the state.<sup>256</sup> Baked into the bill, however, is a suggestion that the political will to provide a fully funded and complete solution to the procedural problems that have arisen in the wake of the Washington Supreme Court's decision: a provision that "[i]f specific funding for the purposes of this act, referencing this act by bill or chapter number, is not provided by June 30, 2023, in the omnibus appropriations act, this act is null and avoid."<sup>257</sup>

a. *State v. Blake Left Key Legal Questions Unresolved*

Although Washington's criminal legal system moved quickly to respond to the obvious ramifications of *Blake*, the decision itself left many legal questions unresolved—and raised new ones, as well.<sup>258</sup> One of the most important is the question of how prosecutors will respond to hundreds of thousands of vacated convictions: will they seek to punish Washingtonians for seeking relief, or will they work with Washingtonians to clear their records of unconstitutional convictions? The prosecutorial responses across the state have varied dramatically, leading to the need for state-level standardization of a procedure for handling the hundreds of thousands of convictions invalidated under *Blake*.<sup>259</sup> While H.B. 1492 is a start, the bill—like other

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256. *Bill Information: HB 1492*, WASH. STATE LEGISLATURE, <https://perma.cc/2L74-QM24>.

257. Second Substitute H.B. 1492, 68th Leg., 2023 Reg. Sess. § 18 (Wash. 2023).

258. See Scott Ketterling, Special Counsel for Expert Servs. & Legal Contracting, King Cnty. Dep't of Pub. Def., Ethical Constraints and Concerns About Resentencing Under *Blake*, Panel at the Washington Defender Association's 2021 Defender Conference (May 21, 2021).

259. See Defense Bar Memorandum, *supra* note 231, at 1 ("The promise of *State v. Blake* depends on a uniform, consistent, and streamlined state-wide process.").

state responses—unfortunately does not go far enough to help Washingtonians reclaim their lives after an unconstitutional conviction.

b. *House Bill 1492 Leaves the Vacation of Convictions Almost Entirely in the Hands of the Criminal Legal System*

A standardized procedure to bring relief for Washingtonians whose convictions were invalidated under *Blake* is undeniably necessary to avoid the risk of “justice by geography,” where chances at vacating a conviction under an unconstitutional statute might depend on the elected prosecutor.<sup>260</sup> In King County, for example, the Prosecuting Attorney’s Office is not only proactively vacating convictions for simple possession, but also “convictions where a prior conviction for simple drug possession was an element of the subsequent offense.”<sup>261</sup> In contrast, in Benton County, the prosecutor’s *Blake* relief form requires anyone seeking the vacation of an invalid conviction to acknowledge that “the Benton County Prosecutor’s Office is considering [their] request for relief as a courtesy in the interests of justice and may require that [they] file a motion for relief with the court at any time.”<sup>262</sup> The speed and quality of remedies for unconstitutional convictions must not depend so heavily on the whims of the local electorate.<sup>263</sup>

Despite being standardized across the state, however, the process that H.B. 1492 has created puts the process almost entirely in the hands of the criminal legal system. While the state Administrative Office of the Courts must “develop comprehensive reports . . . of all persons” eligible for relief

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260. *Id.* at 1.

261. *Blake Requests*, *supra* note 178.

262. *Prosecuting Attorney’s Blake Relief Request Form*, BENTON CNTY. PROSECUTING ATT’Y’S OFF., <https://perma.cc/R26Z-5XE2>.

263. As a possible solution, numerous indigent defense organizations have suggested that “the best approach to *Blake* relief may be one that divests it from local authorities and instead establishes a uniform, state-wide process housed in a special tribunal.” Defense Bar Memorandum, *supra* note 231, at 1. Additionally, this approach could help Washingtonians avoid the issues identified below in Part IV.B.2.c.

under *Blake*,<sup>264</sup> H.B. 1492 would leave the bulk of the work to county prosecutors' and clerks' offices. As proposed by H.B. 1492, the prosecutor must "review all qualifying convictions and qualifying nonconvictions within his or her jurisdiction."<sup>265</sup> Following the review of qualifying cases, the prosecutor would be required to "develop a list of all legal financial obligation amounts and readily ascertainable collection costs paid"<sup>266</sup> and, by January 1, 2026, file an ex parte motion with the "applicable sentencing court" to dismiss and vacate qualifying convictions<sup>267</sup> or to refund any legal financial obligations and collection costs for qualifying nonconvictions.<sup>268</sup> H.B. 1492 would not require the prosecutor to notify defendants of a motion to vacate a conviction or to refund legal financial obligations, and would instruct courts to consider these motions "without requiring the presence of parties or counsel."<sup>269</sup> While public testimony on H.B. 1492 reflects some concern regarding this issue surrounding immigration consequences,<sup>270</sup> public testimony in hearings on S.B. 5663 also included Washingtonians expressing their frustration at being left out of the process.<sup>271</sup>

Regardless of whether the defendant's presence is required at the hearing on the motion to vacate, however, H.B. 1492 clarifies that, "[f]or all purposes, including responding to

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264. For a description of the proposed preliminary steps involving the state Administrative Office of the Courts and county clerks, see Wash. Second Substitute H.B. 1492 § 10.

265. *Id.* § 3. Under H.B. 1492, qualifying convictions and nonconvictions are based on the underlying qualifying offense, which is defined as possession of a controlled substance "criminalized without proof that the person knowingly possessed the substance," *id.* § 1(9)(a)–(b), any attempt, conspiracy, or solicitation to commit possession of a controlled substance, *id.* § 1(9)(c), or unlawful possession of a firearm when predicated upon a conviction for possession of a controlled substance, *id.* § 1(9)(d).

266. *Id.* § 3(1)(a)(i).

267. *Id.* § 3(1)(b). This motion can also include a request to refund legal financial obligations and collection costs. *Id.* § 3(1)(d).

268. *Id.* § 3(1)(c).

269. *Id.* § 3(1)(d).

270. See House Bill Report: HB 1492, H. 1492 APP 23, 2023 Reg. Sess., at 9 (Wash. 2023), <https://perma.cc/6TQL-ANEM> ("There is concern that allowing these cases to be handled through ex parte orders deprives persons of notice, which can have negative immigration consequences.").

271. See *supra* note 232 and accompanying text.

questions on employment applications, a person whose qualifying conviction has been vacated may state that he or she has never been convicted of that crime.”<sup>272</sup> While this is good news for people seeking relief under *Blake* if H.B. 1492 or another version of it passes, the bill contains no mechanism to correct any errors made in vacations prior to its enactment.<sup>273</sup> In the first five months following *Blake*, many convictions for possession of a controlled substance were coded as “dismissal,” and as a result were disseminated by the Washington State Patrol as “guilty” dispositions.<sup>274</sup> H.B. 1492 lacks any language requiring these errors to be corrected. In addition to a lack of procedure for correcting clerical errors, H.B. 1492 does not address the expungement of nonconvictions records.<sup>275</sup> Adding language requiring the expungement of these records would prevent further dissemination of a “criminal history” of arrests for the violation of an unconstitutional statute,<sup>276</sup> allowing Washingtonians to avoid the barriers and consequences that can arise as the result of a reported arrest.

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272. Second Substitute H.B. 1492, 68th Leg., 2023 Reg. Sess. § 5(4) (Wash. 2023).

273. S.B. 5663 had a similar flaw. See Defense Bar Memorandum, *supra* note 231, at 3 (suggesting the inclusion of a requirement for the Washington State Patrol and clerks’ offices to correct any errors made in updating criminal records after vacations pursuant to *Blake*).

274. *Id.*

275. See Letter from Vitaliy Kertchen to Members of the Wash. State S.L. & Just. Comm. 1 (Jan. 24, 2022), <https://perma.cc/8U5E-WLQA> (arguing for the inclusion of a provision to expunge arrest records pursuant to *Blake*, because “[s]ince simple possession of a controlled substance has never been a valid crime, . . . it stands to reason that all arrests for such an offense were without the authority of law”). H.B. 1492 does prohibit the Washington State Patrol from disseminating or disclosing any vacated qualifying conviction, except to “other criminal justice enforcement agencies.” Wash. Second Substitute H.B. 1492 § 5(3).

276. Under the Washington State Criminal Records Privacy Act, WASH. REV. CODE §§ 10.97.010–10.97.140 (2023), nonconviction data may be disseminated to criminal justice agencies, researchers, and contractors who “provide services related to the administration of criminal justice.” *Id.* § 10.97.050. It may also be disseminated for the purpose of background checks and other investigations in industries as varied as horseracing, *id.* § 67.16.045, insurance, *id.* § 51.04.024, health care, *id.* § 18.130.080, and loan agencies, *id.* § 19.146.300.

H.B. 1492 does contain language affirming the right to counsel for people seeking resentencing under *Blake*<sup>277</sup> and for people challenging the prosecutor's, clerk's, or court's determination of the amount of legal financial obligation and collection cost refunds owed to them.<sup>278</sup> While the bill permits people to move to vacate their convictions without waiting for the prosecutor to file an ex parte motion, it does not contain language providing for counsel to be appointed for indigent Washingtonians seeking relief prior to H.B. 1492's filing deadline of January 2026.<sup>279</sup> This limitation works to keep the process of seeking relief under *Blake* out of the hands of the people most affected by the decision of the Washington Supreme Court and under the control of county prosecutors and courts.

c. *House Bill 1492 Raises Its Own Legal Questions*

Despite being an attempt to answer the legal questions left unresolved by the Washington Supreme Court's opinion in *Blake*, H.B. 1492 introduces new issues of its own. The bill explicitly prohibits prosecutors from "refil[ing] any charges for acts alleged in the original indictment, information, or affidavit of probable cause filed in relation to the qualifying conviction," as well as from "fil[ing] new or additional charges based on acts alleged in any law enforcement report from which the qualifying conviction arose."<sup>280</sup> During public testimony before the House Committee on Appropriations, this broad proscription drew criticism asserting that the bill "limits the constitutional duty of a prosecutor."<sup>281</sup> Whether an enacted H.B. 1492 would actually

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277. Wash. Second Substitute H.B. 1492 § 6(1).

278. *Id.* § 8(2). The availability of court-appointed counsel, however, is "subject to funding appropriated for this specific purpose" to the Office of Civil Legal Aid or the Office of Public Defense. *Id.*

279. *Id.* § 4.

280. *Id.* § 5(4).

281. See House Bill Report: HB 1492, H. 1492 APP 23, 2023 Reg. Sess., at 12 (Wash. 2023), <https://perma.cc/6TQL-ANEM>. While S.B. 5663 contained a similar provision, its language did not sweep quite so broadly and it did not attract any comment from prosecutors during public testimony before the state senate. Compare Second Substitute H.B. 1492, 68th Leg., 2023 Reg. Sess. § 5(4) (Wash. 2023), with Second Substitute S.B. 5663, 67th Leg., 2022 Reg. Sess. § 3(3)(c) (Wash. 2022) ("By filing [a motion to vacate pursuant to *Blake*], the prosecutor agrees not to file additional or new charges for the acts described in the information."). In general, S.B. 5663 was far more deferential



be susceptible to legal challenges on those grounds, however, is an open question.

The Washington Supreme Court has recognized that “[a] prosecuting attorney’s most fundamental role . . . is to decide whether to file criminal charges against an individual and, if so, which available charges to file.”<sup>282</sup> Indeed, the court has held that the legislature is constitutionally restrained by the separation of powers doctrine from requiring prosecutors to file specific charges.<sup>283</sup> These, however, are restraints on statutes requiring prosecutors to act; H.B. 1492, in contrast, would prohibit prosecutors from acting. Even so, the rule seems to be quite clear: “under the Washington State Constitution, legislative usurpation of prosecutorial charging discretion is not an available option.”<sup>284</sup> Prohibiting prosecutors from refileing charges reflecting RCW § 69.50.4013(1)’s new mens rea requirement or filing new, otherwise legally valid charges based on the acts leading to the original conviction is likely to be considered an impermissible “legislative usurpation of prosecutorial charging discretion.”<sup>285</sup> The legislature should consider allowing some prosecutorial discretion regarding how to proceed following the vacation of unconstitutional convictions—the question is how to do so equitably.

After all, if H.B. 1492 is revised to permit more prosecutorial discretion in refileing old charges or filing new

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to prosecutors than H.B. 1492, leaving the questions of whether a conviction for possession of a controlled substance was “appropriate for vacation” and whether to file additional or new charges to the prosecutor. Wash. Second Substitute S.B. 5663 § 3(3)(c).

282. *State v. Rice*, 279 P.3d 849, 858 (Wash. 2012) (en banc). The Revised Code of Washington also recognizes this fundamental role. WASH. REV. CODE § 9.94A.411(1) (2022) (“A prosecuting attorney may decline to prosecute, even though technically sufficient evidence to prosecute exists, in situations where prosecution would serve no public purpose, would defeat the underlying purpose of the law in question or would result in decreased respect for the law.”).

283. *Id.* at 857. The judiciary is similarly limited. *See State v. Agustin*, 407 P.3d 1155, 1159 (Wash. Ct. App. 2018) (“If the legislative branch cannot mandate that the executive branch prosecute a charge if it supported by sufficient evidence, then neither can the judicial branch.”).

284. *Rice*, 279 P.3d at 859; *see id.* (“Although the legislature can fashion the duties of prosecuting attorneys, the legislature cannot interfere with the core functions that make them ‘prosecuting attorneys’ in the first place.”).

285. *Id.*

charges based on old information, the risk of “justice by geography” returns. The Washington state legislature must provide protection under H.B. 1492 from a prosecutor’s decision to “punish” a person for seeking the vacation to which they are entitled. This type of punishment is already happening in Washington, and an emphasis on the prosecutor’s free rein would only embolden those who choose to take these retaliatory actions.<sup>286</sup> In Clark County, for example, after a defendant moved for resentencing pursuant to *Blake*, the Prosecuting Attorney’s Office chose to file a motion asking for permission to refile dismissed charges and enhancements, arguing that the defendant’s motion was a breach of his plea agreement.<sup>287</sup> The potential vindictiveness of these kinds of motions aside,<sup>288</sup> these prosecutorial actions raise further questions about how challenges to unconstitutional convictions under *Blake* would be handled if the state legislature was unable to provide protection from prosecutors intent on preserving their wins.

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286. See Lindsey Webb, *The Immortal Accusation*, 90 WASH. L. REV. 1853, 1855 (2015) (describing the “overarching systemic goal” of the criminal legal system not as “the search for truth, but rather obtaining and preserving findings of guilt.”).

287. See State’s Motion to Refile Dismissed/Withheld Charge(s) and Enhancements Pursuant to Defendant’s Breach of the Plea Agreement at 1, *State v. Huizar*, No. 18-1-00624-4 (Wash. Super. Ct., Oct. 20, 2021).

288. The State also explicitly states that “if [defendant] elects to withdraw his . . . motion, the State will also withdraw its motion [to refile dismissed charges and enhancements].” *Id.* at 4. It is unclear whether Washington precedent prohibits this type of prosecutorial response. A person who has been convicted of an offense is entitled to appeal that conviction or pursue collateral attacks against it “without apprehension that the State will retaliate by substituting a more serious charge for the original one.” *Blackledge v. Perry*, 417 U.S. 21, 28 (1974). In these types of situations, “the likelihood of vindictiveness justifie[s] a presumption that would free the defendants of such a retaliatory motive on the part of the prosecutor.” *United States v. Goodwin*, 457 U.S. 368, 376 (1982). However, the Washington Supreme Court has found that *Blackledge*’s presumption of vindictiveness is inapplicable where a conviction is vacated by new case law and the prosecutor must decide what charges to bring for retrial. *State v. Gamble*, 225 P.3d 973, 987 (Wash. 2021) (en banc). Whether the court would find the actions of the Clark County Prosecuting Attorney’s Office to be vindictive when it was filed in response to a collateral attack on a conviction required to be vacated under *Blake* is difficult to predict. In this case, the issue may be moot, as the docket appears to show that the defendant’s motion was withdrawn. *Odyssey Portal – Washington Courts Online Case Search*, WASH. CTS., <https://perma.cc/QJ9Z-LHWY> (search “18-1-00624-4”; then click “submit”).

There is also the issue of the constitutional protection against double jeopardy to consider.<sup>289</sup> Under Washington case law, “basic double jeopardy principles apply where an individual is threatened with a second trial without his own voluntary act continuing jeopardy.”<sup>290</sup> This suggests that, if Washingtonians wait for the prosecutor to move to vacate their convictions under H.B. 1492, double jeopardy may bar them from being retried for the same offense.<sup>291</sup> It is less clear, however, whether Washingtonians who move on their own to vacate their convictions will benefit from the same double jeopardy protections. When convictions are reversed for any other reason than insufficiency of evidence, “the defendant may be retried for the convicted offense and any lesser included offenses.”<sup>292</sup> For example, in cases following the court’s decision in *In re Andress*,<sup>293</sup> which held that assault cannot serve as the predicate felony for second-degree felony murder and required convictions for that offense to be vacated,<sup>294</sup> the court held that double jeopardy did not prevent retrial when defendants appealed their convictions.<sup>295</sup> This precedent may mean that, under an enacted H.B. 1492 or another bill with similar provisions, Washingtonians who do not wait for a prosecutor’s ex parte motion to vacate their convictions for possession of a controlled substance will not have the benefit of double jeopardy protections without the same kind of language protecting those who choose to wait.

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289. The Washington Supreme Court has held that “[t]he double jeopardy clauses of the federal and state constitutions function identically.” *State v. Aguirre*, 229 P.3d 669, 677 (Wash. 2010) (en banc).

290. *State v. Hall*, 177 P.3d 680, 685 (Wash. 2008) (en banc).

291. *See id.* (“Fairness and justice dictate that an individual who has served his sentence, and is not seeking any relief other than that imposed in the original action, should not be retried by the State for the same offense.”).

292. *State v. Anderson*, 638 P.2d 1205, 1207 (Wash. 1982) (en banc).

293. 56 P.3d 981 (Wash. 2002) (en banc).

294. *See id.* at 982.

295. *See, e.g., State v. Schwab*, 185 P.3d 1151, 1156 (Wash. 2008) (en banc) (holding that conviction for manslaughter following the vacation of convictions for first-degree manslaughter and second-degree felony murder did not “raise a double jeopardy concern” when the defendant “successfully challenged” his conviction and the reversal did not involve insufficiency of the evidence); *Gamble*, 155 P.3d at 967 (holding that retrial on “properly drafted homicide charges” are not barred by double jeopardy following vacation of conviction for second-degree felony murder).

The threat of additional charges, whether old or new, waiting for them after a vacated conviction may discourage people from attempting to speed up a process that could otherwise potentially take years. This may be especially true in instances where people entered a guilty plea to possession of a controlled substance in exchange for the dismissal of other, more serious charges.<sup>296</sup> The significant backlog of cases in Washington’s criminal legal system, however, may mean that prosecutors find it unreasonable to proceed with revived charges—especially very old charges—in the face of “swamped” courts.<sup>297</sup> Forcing people to take this kind of gamble in order to vacate invalid and unconstitutional convictions, however, is unacceptable: Washingtonians should not have to consider whether their county prosecutor is overworked and therefore unlikely to file new charges against them when deciding whether to seek the relief to which they are constitutionally entitled, especially when that relief is already incomplete.

C. *The Executive and Legislative Responses Both Leave Significant Room for Improvement*

While it is undoubtedly a good thing that both the executive and legislative branches of Washington’s government have taken steps to address the *Blake* decision, neither have gone far enough. Governor Inslee’s clemency initiative and current state legislation, whether proposed or enacted, do not take any steps toward ameliorating the collateral consequences which can still haunt Washingtonians even after the vacation of a conviction.<sup>298</sup> As previously discussed in this Note, these consequences are many and varied and affect almost every aspect of life.<sup>299</sup> For

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296. See Charlie Ban, *Changing 50 Years of Washington State Criminal Records Proves Less Than Simple*, NAT’L ASS’N OF COUNTIES: CNTY. NEWS (June 28, 2021), <https://perma.cc/BM98-8FPU> (describing the question facing prosecutors of whether “to charge that offender with the other crime” after a vacation pursuant to *Blake*).

297. See Green, *supra* note 105.

298. While H.B. 1492 contains language providing that a person whose conviction is vacated pursuant to *Blake* “must be released from all penalties and disabilities resulting from the offense,” the bill does not actually contain any mechanisms for actually doing so. Second Substitute H.B. 1492, 68th Leg., 2023 Reg. Sess. § 5(4) (Wash. 2023).

299. See *supra* notes 58–71 and accompanying text.

now, it is unclear whether a vacation of the kind proposed in H.B. 1492 will also automatically restore the civil rights lost upon conviction—or whether people seeking relief under *Blake* will have to run the gauntlet of certificates and petitions that characterizes escape from collateral consequences in Washington.

Under current Washington law, a person convicted of a Class C felony<sup>300</sup> is not eligible to vacate their conviction until five years have passed from the later of release from community custody, release from incarceration, or their sentencing date.<sup>301</sup> Upon the completion of the requirements of their sentence,<sup>302</sup> however, a person may apply for a certificate of discharge.<sup>303</sup> This certificate has the effect of “restoring all civil rights”<sup>304</sup>—except for the right to possess firearms, which must be restored through a separate process.<sup>305</sup> Unfortunately, a certificate of discharge does not remove all the barriers that arise as a consequence of a felony conviction. In order to obtain professional licenses, work for the state or a county or municipal government, or hold an occupation that requires unsupervised contact with vulnerable individuals, a person with a felony conviction must apply for a certificate of restoration of opportunity.<sup>306</sup> To be eligible, two years must have passed since release from incarceration for a Class C felony, and any legal financial obligations must be either fully paid or in compliance

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300. Possession of a controlled substance was a Class C felony prior to the enactment of S.B. 5476. WASH. REV. CODE § 69.50.4013(2) (2021), *invalidated* by State v. Blake, 481 P.3d 521 (Wash. 2021) (en banc).

301. WASH. REV. CODE § 9.94A.640(2)(f) (2023).

302. Including “any and all” legal financial obligations, which of course may take much longer than the five-year wait for vacation of a conviction. WASH. REV. CODE § 9.94A.637(1) (2023).

303. *Id.*

304. WASH. REV. CODE § 9.94A.637(9) (2023).

305. See WASH. REV. CODE § 9.41.040(4)(a)(ii)(B) (2023) (providing that an individual may petition to have the right to possess a firearm restored “after five or more consecutive years in the community without being convicted [of] . . . or currently charged with any felony, gross misdemeanor, or misdemeanor crimes”). To do so, a person must petition the court of record that ordered their prohibition on the possession of firearms or the superior court of the county where they currently reside. WASH. REV. CODE § 9.41.040(4)(b) (2023).

306. WASH. REV. CODE § 9.97.020 (2023).

with a payment plan.<sup>307</sup> Neither of these certificates removes a conviction from a person's criminal history.<sup>308</sup>

Although a person whose conviction is vacated under RCW § 9.94A.640 may state that they have never been convicted of that crime and the record is no longer disseminated by the Washington State Patrol,<sup>309</sup> there is no statutory authority for courts to automatically seal the record, either.<sup>310</sup> In general, vacated convictions cannot be sealed without a written finding by the court "that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record."<sup>311</sup> Without further action by the state legislature, it seems that Washingtonians whose convictions are vacated pursuant to *Blake* will continue to have findable "criminal records" in the files of court clerks across the state.

#### V. LESSONS FROM *STATE V. BLAKE*

After fifty years of a failed war on drugs, states are beginning to act on the fact "that with appropriate support, many people who have behavioral health needs," such as substance use disorder, "can live in their communities with greater stability, safety, and dignity."<sup>312</sup> Studies have shown the successful effects of full decriminalization and increased investment in harm reduction in Portugal,<sup>313</sup> and the first two

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307. WASH. REV. CODE § 9.97.010 (2023).

308. See WASH. REV. CODE § 9.94A.637(7) (2023) (requiring the county clerk of the sentencing county to record the certificate of discharge, but not to seal any records of conviction); WASH. REV. CODE § 69.97.020(10) (20213 (requiring the Washington State Patrol to record the certificate of opportunity, but not to stop disseminating any conviction).

309. WASH. REV. CODE § 9.94A.640(4)(a) (2023).

310. See *State v. McEnry*, 103 P.3d 857, 861 (Wash. Ct. App. 2004) (finding that RCW § 9.94A.060 does not provide statutory authority to seal vacated convictions without considering "the constitutional right of access" under Article I, Section 10 of the Washington Constitution).

311. WASH. STATE CT. GEN. R. 15(c)(2).

312. Lininger, *supra* note 14.

313. See DRUG POL'Y ALL., DRUG DECRIMINALIZATION IN PORTUGAL: LEARNING FROM A HEALTH AND HUMAN-CENTERED APPROACH 2 (2018), <https://perma.cc/ZSH6-ZBNP> ("Since Portugal ceased criminalizing drug use, the results have been dramatic. The number of people voluntarily entered treatment has increased significantly, while overdose deaths, HIV infections,

years of Measure 110 in Oregon have seen over \$300 million invested in recovery and harm reduction services.<sup>314</sup> Decriminalization, in combination with harm reduction, can make significant progress in addressing the harms caused by harsh federal and state drug policies.<sup>315</sup> By providing “better access to harm reduction, housing, treatment, health care, and other essential community-based services,” states can help their citizens remain outside of the criminal legal system entirely.<sup>316</sup> Or, if full decriminalization seems like a step too far, concepts like retroactive legality, a framework in which the state works to restore those convicted of crimes involving controlled substances which are now legalized or decriminalized “to the rights and civic status they would have had if their conduct had never been illegal,” can help mend the harms caused by the past half-century of the failed war on drugs.<sup>317</sup> Regardless of which

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problematic drug use, and incarcerated for drug-related offenses have plummeted.”). Even so, “in some ways, Portugal’s harm reduction practices lag behind those of other European countries, indicating a potential stagnancy in innovation since it adopted its decriminalization model. Portugal does not have take-home naloxone programs, supervised consumption services, heroin-assisted treatment, or prison-based syringe exchanges.” *Id.*

314. See Amelia Templeton, *Oregon’s First Round of Measure 110 Funding Is Finally out the Door*, ORE. PUB. BROAD. (Sept. 20, 2022, 5:23 PM), <https://perma.cc/Z4FB-J67S>.

315. See Miki Saito, Note, *Decriminalize Drugs Now: A Dire Situation Becomes Much More Urgent*, 20 SEATTLE J. SOC. JUST. 357, 392 (2021).

316. Lininger, *supra* note 14. The availabilities of these services are crucial and have played a significant role in the success of Portugal’s decriminalization model. See DRUG POL’Y ALL., *supra* note 313, at 7–8. In contrast, Oregon has a “meager treatment landscape,” with “the highest rates of drug use and the least access to treatments” in the United States. Dirk VanderHart, *Addiction Experts Tell Oregon Lawmakers the State Has Been Too Lax on Drug Use*, ORE. PUB. BROAD. (Sept. 21, 2022, 5:44 PM), <https://perma.cc/9KCN-C6D8>. It also lacks the incentive structure of Portugal’s decriminalization model. DRUG POL’Y ALL., *supra* note 313, at 4. Professor Keith Humphreys urges “increasing societal and legal pressure for people to end problematic drug use,” although cautions against “a return to drug war policies.” VanderHart, *supra*. But without substantial state support for access to treatment and other services—as well as some kind of incentive for people to seek out that treatment—experts suggest that they “expect to see exactly what Oregon is experiencing: extensive drug use, extensive addiction, and not much treatment seeking.” *Id.*

317. Deborah M. Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 110 J. CRIM. L. & CRIMINOLOGY 379, 379 (2020).

path states decide to take toward healing the wounds of fifty years of severe drug laws, lawmakers should consider relief that meets the following criteria.

A. *Relief Must Be Automatic, Standardized, and Complete*

The failure of S.B. 5663 to pass the state legislature and the legislature's delay in proceeding with H.B. 1492 have left Washingtonians with the responsibility of clearing their own records. In doing so, Washington lawmakers have increased the risk of significant numbers of their constituents falling into the "second chance gap," the difference between eligibility for and receipt of a given second chance.<sup>318</sup> Even prior to *Blake*, researchers estimated that "less than 3% of individuals eligible for vacation relief" in Washington "have taken advantage of this remedy."<sup>319</sup> In California, where the passage of Proposition 64 in 2016 created a way for people with old marijuana convictions to downgrade or clear their convictions, only 3% of eligible Californians had petitioned to do so by 2018.<sup>320</sup> Across the country, the estimated uptake for the expungement of conviction records ranges from a high of 30% in Rhode Island to less than 1% in Missouri.<sup>321</sup> As did the laws that resulted in the convictions requiring expungement, the difficulties in obtaining relief fall unevenly on the most vulnerable and marginalized communities. Many states erect financial barriers to obtaining a clean record that prevent poor people from accessing relief, creating a "two-tiered system of justice: one for people with financial means, and one for people without."<sup>322</sup> These barriers

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318. Colleen Chien, *America's Paper Prisons: The Second Chance Gap*, 119 MICH. L. REV. 519, 527 (2020).

319. Colleen V. Chien et al., *The Washington State Second Chance Expungement Gap* 1 (2020) (unpublished paper), <https://ssrn.com/abstract=3529777>. At the rate of vacations as of 2020, "it would take over 4,000 years to clear the backlog of eligible charges using current, petition-based methods." *Id.*

320. See Chien, *supra* note 318, at 549 ("In the fall of 2018, a California Senate report . . . estimated that 218,094 individuals were eligible for resentencing or reclassification. But by March 2018, only 6,251 petitions statewide had been filed, representing less than 3 percent of that total, or a gap of 97 percent.").

321. *Id.* at 556 tbl.4-1.

322. CAROLINE COHN ET AL., NAT'L CONSUMER L. CTR. & COLLATERAL CONSEQUENCES RES. CTR., *THE HIGH COST OF A FRESH START: A STATE-BY-STATE*



are “particularly problematic” for people of color, whose communities disproportionately bear the burden of legal financial obligations while at the same time lacking the wealth to repay those debts.<sup>323</sup> For many seeking relief from past convictions, it must feel like states are purposefully trying to prevent them from managing to do so.<sup>324</sup> To fully achieve the promise of reform and to protect people from falling into the second change gap, expungements of past convictions for crimes involving drugs that are now legalized or decriminalized should be “routine, automatic, and non-discretionary.”<sup>325</sup>

Not only should vacating and sealing or expunging past convictions be automatic, but the process should be standardized at a state level to avoid the geographic unfairness discussed earlier in this Note.<sup>326</sup> Allowing relief to be handled at a county or municipal level perpetuates “justice by geography,”<sup>327</sup> essentially punishing people for living in a certain city or part of a state by denying them the same access to justice that might be available mere miles away. All of a state’s citizens are entitled to justice that is equal under the law, not justice based on where they happen to reside.<sup>328</sup> Even in California, where automatic sealing of criminal records for marijuana-related offenses is mandated by law, counties have shown vastly different levels of proactiveness in implementing

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ANALYSIS OF COURT DEBT AS A BAR TO RECORD CLEARING 6, 11 (2022), <https://perma.cc/365A-RC8Y> (PDF).

323. *See id.* at 12.

324. Eisha Jain, *Contributions: Proportionality and Other Misdemeanor Myths*, 98 B.U.L. REV. 953, 970 (2018) (“Judging from administrative relief mechanisms, the ideal candidate appears to have extra cash, ample time, and the ability to navigate considerable procedural hurdles.”).

325. Ahrens, *supra* note 317, at 433.

326. *See supra* Part IV.B.2.b.

327. Defense Bar Memorandum, *supra* note 231, at 1.

328. *See* Letter from Pub. Def. Ass’n, Columbia Legal Servs., & the Civil Survival Project to Clerk of the Sup. Ct. of Wash. (Apr. 30, 2021), <https://perma.cc/S6DK-PXPN> (PDF) (noting that local discretion will likely result in “individuals in jurisdictions with prosecutors who understand the importance of reducing reentry barriers [being] more likely to get relief than individuals in jurisdictions in which prosecutors are not as inclined to recognize the importance of reducing these barriers”).

the legislation, leaving thousands of convictions unprocessed.<sup>329</sup> Courts in some California counties “haven’t fully processed a single case” despite the fact that the law was enacted almost four years ago.<sup>330</sup> A special state-level tribunal for processing invalidated convictions or other convictions requiring expungement, as suggested by indigent defense organizations in Washington,<sup>331</sup> would be a helpful mechanism for removing discretion from local authorities and ensuring that all convictions requiring vacation and expungement were handled uniformly.

Finally, relief mechanisms must include respite from the collateral consequences of conviction. “[C]ontinuing to expose persons convicted of criminal offenses to the constraints of collateral consequences where the underlying activity has been legalized [or decriminalized] and where people receive economic benefit from the activity’s current iteration may itself undermine the rule of law.”<sup>332</sup> For example, in places where marijuana has been legalized, it is impossible not to see “the dichotomy between the poor, minority persons who continue to be imprisoned for or constrained by marijuana convictions and the affluent, mostly white citizens who are profiting from the cannabis industry.”<sup>333</sup> The collateral consequences of any conviction are already alienating to those who carry them.<sup>334</sup> By including the removal of collateral consequences as part of the vacation and expungement of convictions for crimes involving legalized or decriminalized drugs, states can begin the process of returning their disenfranchised citizens to “full civic engagement”—and to “make amends for having subjected those persons to criminal prosecutions in the first place.”<sup>335</sup>

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329. Kiera Feldman, *California Was Supposed to Clear Cannabis Convictions. Tens of Thousands Are Still Languishing*, L.A. TIMES (Jan. 13, 2022, 5:00 AM), <https://perma.cc/NR66-RGCZ>.

330. *Id.*

331. Defense Bar Memorandum, *supra* note 231, at 1.

332. Ahrens, *supra* note 317, at 439.

333. *Id.*

334. *See supra* notes 59–71 and accompanying text.

335. Ahrens, *supra* note 317, at 439–40.

B. *Any Relief Must Include the Right to Assistance of Counsel*

To help bridge the second chance gap in accessing postconviction relief, states must pair their automatic, standardized, and complete relief with an explicit right to the assistance of counsel throughout the process.<sup>336</sup> Depending on how states structure access to relief from prior convictions, people trying to clear their records could find themselves in adversarial proceedings where an attorney might be a “critical component.”<sup>337</sup> Even if the proceedings are automatic, the assistance of counsel can be critical in instances where, for example, relief is denied or a failure in the system results in an eligible conviction being passed over.<sup>338</sup> In fact, one scholar has suggested that the mere presence of a lawyer may influence a court’s decision on postconviction relief.<sup>339</sup> This serves to reinforce the “two-tiered system of justice” described in Part V.A: “one for the represented and one for the unrepresented, one for the wealthy and one for the poor.”<sup>340</sup> This kind of result, where people without counsel are unable to actually access the relief to which they are entitled, cuts directly against the effort states are making in reforming their criminal legal systems. It ensures that the same communities that were most affected by harsh drug laws will remain those most affected even after reform.

C. *States Must Consider the Consequences of Any Substitute for Felony Convictions*

The common perception of misdemeanors is one of a low-stakes infraction that frequently results in little to no prison

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336. See Irene Oritseweyinmi Joe et al., *The Reform Blindspot*, 74 SMU L. REV. 555, 556 (2021) (noting that “even with the easier navigation of expungement law, ordinary citizens have found it difficult to expunge their convictions without the help of legal counsel”).

337. *Id.* at 557.

338. See Bridget M. McCormack, *Let’s Move Criminal Justice Reforms Upstream: A Perspective from the Bench*, 74 SMU L. REV. 575, 580–82.

339. See Joe, *supra* note 336, at 563–64.

340. *Id.*

time.<sup>341</sup> This perception, however, is false.<sup>342</sup> Although many people believe that misdemeanors are minor, low-stake affairs, they can “trigger massive collateral consequences, often without adequate notice or meaningful process.”<sup>343</sup> Even a misdemeanor conviction that results in no jail time can have devastating consequences on someone’s life.<sup>344</sup> Arrest alone can have far-reaching effects, sometimes resulting in the loss of a job or even a home.<sup>345</sup> For this reason alone, the substitution of felony charges for possession of a controlled substance with misdemeanor charges is an unacceptable step in the process of criminal justice reform.

When outcomes “systematically appear arbitrary, disproportionate, and procedurally unfair, as they do with misdemeanors,”<sup>346</sup> continued criminalization merely perpetuates the same inequities that reform of the criminal legal system should seek to end. Unfortunately, “[e]ven low-level contact with the criminal justice system triggers significant noncriminal penalties” that can be difficult to undo.<sup>347</sup> If states are reluctant to fully decriminalize controlled substances, thirteen states have already reduced the simple possession of a

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341. See Jain, *supra* note 324, at 956–57 (describing the ways in which the criminal legal system “creates the impression” that the stakes surrounding misdemeanor charges are low).

342. See *id.* at 957

Misdemeanors are significant if only for their scale, with an estimated thirteen million cases filed each year. Although mass incarceration tends to dominate conversations about criminal justice reform, most defendants will never serve a formal criminal sentence in prison. Jail time, however, is another story; many misdemeanants are jailed or face the threat of jail time while their cases are pending.

343. *Id.* at 954.

344. See, e.g., *id.* at 966 (describing the case of a woman whose conviction for misdemeanor possession of marijuana resulted in the loss of her home and “over \$2,000 in fines, fees, and nonrefundable payments to a bail bondsman”). In contrast to the effects of conviction, a study of the effects of prosecuting nonviolent misdemeanors on future involvement in the criminal legal system in Suffolk County, Massachusetts, found that *not* being prosecuted decreases a person’s likelihood of being arrested again in the next two years by 58%. Amanda Y. Agan et al., *Misdemeanor Prosecution* 3 (Nat’l Bureau of Econ. Rsch., Working Paper No. 28600, 2021).

345. Jain, *supra* note 324, at 959 (citation omitted).

346. *Id.*

347. *Id.* at 955.

personal use amount of marijuana to a civil infraction “resulting in no arrest and no criminal record.”<sup>348</sup> One of the main objectives of reform around drug laws is to reduce the devastating consequences associated with even minor contact with law enforcement for the possession of a controlled substance,<sup>349</sup> and removing the threat of arrest and a resulting criminal record would go far toward achieving that goal.

However, civil penalties—even relatively small fines like those issued for possession of marijuana in states such as Connecticut<sup>350</sup> and Montana<sup>351</sup>—can result in continuing contact with the criminal legal system.<sup>352</sup> Even a fine of a few hundred dollars can be difficult to pay, resulting in courts issuing warrants or sending the debt to private debt collectors, raising the risk of arrest and incarceration for nonpayment.<sup>353</sup> And yet, despite these debt collection tactics and the ever-present risk of incarceration for failure to pay a fine, a study of Oklahoma misdemeanor courts found that they recouped less than five percent of the fees imposed for “drug, public order, and other low-level offenses.”<sup>354</sup>

When rates of payment are so low and courts recoup so little, it seems as if fines are not being imposed for the stated purposes of “recovering costs or ensuring personal

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348. Eric Blumenson & Eva Nilsen, *No Rational Basis: The Pragmatic Case for Marijuana Law Reform*, 17 VA. J. SOC. POL'Y & L. 43, 73 n.119 (2009).

349. *See id.* at 60.

350. *See* CONN. GEN. STAT. § 21a-279a (2021) (setting a civil fine of \$150 for the first instance and \$250 for any subsequent instance of possession of more than 1.5 ounces of marijuana).

351. *See* MONT. CODE ANN. § 16-12-106 (2021) (setting a civil fine of \$200 for the first instance, \$300 for the second instance, and \$500 for any subsequent instance of possession of more than one ounce of marijuana).

352. *See* Pager et al., *supra* note 56, at 3 (“Court-ordered fines and fees imposed on individuals with little capacity to pay create a direct connection between criminalization and poverty.”).

353. *Id.* at 4. This kind of “coercive financialization” is often disproportionate to the offense itself, especially if court costs are imposed alongside the fine, as a court’s monitoring of legal financial obligations can continue for years. *Id.* The continuing legal jeopardy resulting from the inability to pay a civil fine creates an “enduring disadvantage” characterized by the lingering threat of punishment and the “procedural hassle” of constant contact with the criminal legal system. *Id.* at 18.

354. *Id.* at 18.

accountability.”<sup>355</sup> Instead, the imposition of fines on those who are unable to pay “create[s] a pure criminalization of poverty,” where it is the inability to pay rather than the crime of possession that keeps people caught in the criminal legal system.<sup>356</sup> Rather than trying to draw blood from a stone, or payment of fines from “people who experience[] high levels of poverty, unemployment, homelessness, and poor health,”<sup>357</sup> lawmakers must consider what they are trying to accomplish by imposing a fine for possession at all.

D. *Lawmakers Must Seek Input from Affected Communities in the Creation and Implementation of Relief*

Lastly, relief must include input from the communities most affected by old, harmful drug policies. To undo the alienation<sup>358</sup> and othering<sup>359</sup> of those impacted by the war on drugs, their voices must play a key role in determining the next steps to take.<sup>360</sup> People who have personally experienced the results of these outdated policies “have important perspectives, insights, and solutions that could otherwise be overlooked.”<sup>361</sup> Their input—in the form of “experiences, stories, and challenges”—not only humanizes those who used to or still suffer from substance use disorder, but “may serve to facilitate the successful adoption, implementation, and sustainability” of reform, as well.<sup>362</sup> Members of marginalized communities can become “creators of valuable knowledge, not just passive

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355. *Id.* at 16.

356. *Id.* at 18.

357. *Id.*

358. *See* Task Force 1.0, *supra* note 44, at 545 (noting the “political alienation” and “sense of impotence” in the communities most affected by harsh drug policies).

359. *See* Ahrens, *supra* note 317, at 439 (“We have institutionalized the notion that persons with criminal convictions are ‘other’ and lesser and have imposed formal and structural barriers to their full civic engagement.”).

360. *See* Lininger, *supra* note 14 (“It will be important in this effort to center the perspectives of people who have been most impacted by our traditional approach to drugs and addiction, and people who have no stake in preserving the status quo.”).

361. *Id.*

362. Amanda Sharp et al., *Community Perceptions of Harm Reduction and Its Implications for Syringe Exchange Policy*, 50 J. DRUG ISSUES 507, 518–19 (2020).

subordinates and consumers of the criminal justice apparatus.”<sup>363</sup> In fact, the inclusion of stakeholder voices in the development of new policies has resulted in broader support from the communities affected by reform of the criminal legal system.<sup>364</sup>

Communities must be invited to participate not only when creating new laws and policies, but when implementing them, as well. After all, the Constitution itself calls for “substantial and direct popular participation” in the criminal legal system.<sup>365</sup> This popular participation should not be limited to the increasingly frequent community assistance with bail or citizen police oversight.<sup>366</sup> By including the people affected by harsh drug laws in the implementation of new laws meant to correct those old harms, reform of the criminal legal system is brought “out of institutions and into the streets.”<sup>367</sup> Their lived experiences and knowledge of their communities can help bring relief offered by state efforts at reform into neighborhoods that may otherwise be skeptical of help coming from the same governments that prosecuted the war on drugs.<sup>368</sup> Instead of forcing the people whose lives have been impacted by years of failed drug policies to become involved extra-electorally in the criminal legal system,<sup>369</sup> welcoming the input of their lived

363. Monica C. Bell, *The Community in Criminal Justice: Subordination, Consumption, Resistance, and Transformation*, 16 DU BOIS REV.: SOC. SCI. RSCH. ON RACE 197, 211 (2019).

364. Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C.L. REV. 523, 579 (2020).

365. Susan N. Herman, *Getting There: On Strategies for Implementing Criminal Justice Reform*, 23 BERKELEY J. CRIM. L. 34, 67 (2018).

366. See Ouziel, *supra* note 364, at 578–79 (describing the rise of “citizen involvement in criminal justice” in ways such as “social justice movements, citizen lobbying, and community intervention in processes such as bail and police stops”).

367. Jill Owczarzak et al., “*We Know the Streets*”: *Race, Place, and the Politics of Harm Reduction*, 64 HEALTH & PLACE 1, 6 (2020). For an in-depth case study of the impacts of utilizing peer counselors with experience of substance use disorder or addiction when they educate their community in harm reduction principles, see generally *id.*

368. See *id.* at 4 (describing a harm reduction group’s work in the neighborhoods of their community as “deinstitutionaliz[ing] the public health response” and “creat[ing] access points to communities that may not be reached by other large-scale, agency based public health responses”).

369. See Ouziel, *supra* note 364, at 578 (“[E]lections, even at the local level, are a necessary but insufficient mechanism of translating the diverse,

experience into the development of new policies can hopefully help to ensure their support—and to ensure that new policies are actually helping the people they are meant to help.

#### CONCLUSION

After fifty years of a failed war on drugs, many states are just now beginning to take steps toward attempting to repair a half-century of harm. By examining the response of Washington's government at the executive and legislative levels to the Washington Supreme Court's decision in *State v. Blake*, the stakeholders involved in transforming the criminal legal system can identify some key factors that must be present in the paths forward for all states in their own processes of reform. Any relief from the harsh consequences of severe drug policy must be automatic, standardized, and complete, including the lifting of collateral consequences. It must also include an explicit right to the assistance of counsel. Lawmakers creating relief must additionally consider the impact of any punishment replacing felony convictions before simply substituting a misdemeanor or a fine. Finally, the voices of the people most affected by the failed war on drugs must be involved in the creation and implementation of these new policies.

Although Washington has taken some steps to respond to *Blake*, the moderate nature of statutory reforms and the failure of the state legislature to enact any sort of process to access relief have left the state's government an opportunity to embrace truly bold and meaningful reform. By applying the factors identified in this Note, Washington can live up to the promise of *Blake* and lead the way in the national process of creating a fair and equitable criminal *justice* system.

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complicated, and unstable viewpoints that characterize public preferences on criminal justice.”).