

development, including what we now know about the prefrontal cortex (which influences attention, impulse inhibition, and cognitive flexibility) and maturation of the adolescent brain. Further subcortical brain areas, including the limbic system responsible for reward feedback, develop earlier, and this maturation differential may account for increased risk-taking behaviors seen in adolescents. Given the high plasticity of the brain in childhood and adolescence, environmental influences are thought to have a great impact on brain development during these periods. An example of difficult life circumstances and influences can be seen in the *Haag* case. The court records reflect that, at a young age, Mr. Haag experienced abandonment by his father, bullying, poverty, mistreatment by his stepfather, the death of his best friend, and anxiety related to the discovery of his sexual orientation in a small community. Juveniles are also more likely to be affected by positive influences and have a greater capacity for reform. The court in *Haag* made it clear that evidence of rehabilitation behind bars must be considered by the sentencing court.

Courts are recognizing that juvenile criminal offenders should be given a chance to capitalize on this difference from their adult counterparts by limiting the length and severity of sentences delivered. Additionally, introducing earlier or more frequent sentence reviews may further motivate these individuals to engage in rehabilitation services offered in prison, including schooling, employment, volunteer positions, and psychiatric care (Piel J. Term-of-years sentences since *Miller v. Alabama*. *J Am Acad Psychiatry Law*. 2020; 48(1): 98-104), and afford them some opportunity for a meaningful life after expiration of their prison term.

Strict Liability in Drug Possession

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Court Rules Washington's Strict Liability Drug Possession Law Violates Due Process

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In *State v. Blake*, 481 P.3d 521 (Wash. 2021), the Washington Supreme Court considered the constitutionality of the strict liability standard imposed by the state's drug possession statute, *Wash. Rev. Code*. § 69.50.4013 (2015). The court ruled that it is a violation of due process because the statute, which has substantial penalties for "innocent, passive conduct," exceeds the legislature's police power.

Facts of the Case

Shannon Blake was arrested in 2016 while police were serving a warrant regarding stolen vehicles. At the jail, a small bag of methamphetamine was discovered in the coin pocket of the jeans she was wearing. The state then charged Ms. Blake with violation of the drug possession statute, which made it a felony "for any person to possess a controlled substance" (*Wash. Rev. Code*. § 60.50.4013 (2015)).

At trial, Ms. Blake asserted a defense of unwitting possession, an affirmative defense established in a previous ruling, but nowhere present in the statute. She testified, and her boyfriend corroborated, that the jeans had been given to her two days prior to her arrest by a third party who had purchased them second-hand. She and her boyfriend testified that she did not use drugs. The trial court found that Ms. Blake had possessed the methamphetamine and that she had not fulfilled the burden of proof that the unwitting possession defense required, thus ruling that she was guilty. The trial court did not make any findings as to whether she had possessed the drug knowingly or intentionally.

Ms. Blake appealed on the grounds that it violates due process to impose the burden on her to prove unwitting possession. The Washington Court of Appeals ruled against her, stating that the crime of possession of a controlled substance does not mandate a *mens rea* element and the defendant's burden to show unwitting possession does not violate due process. The Washington Supreme Court granted review of Ms. Blake's subsequent appeal.

Ruling and Reasoning

The court ruled that the strict liability drug possession statute violates due process because it criminalizes “innocent passive conduct.” The court took the position that, while the statute did not explicitly impose strict liability, forty years of precedent and legislative assent had established a strict liability interpretation. The court noted that strict liability is inherently at odds with the fundamental principle of jurisprudence that *mens rea* is essential to criminality.

The court recognized exceptions to that principle when imposition of strict liability is within the state’s police power. The court emphasized that due process protection “applies with special force to passive conduct—or nonconduct—that is unaccompanied by intent, knowledge, or *mens rea*” (*Blake*, p 527) and no exception can be made in such cases. The court said that unknowing possession is necessarily innocent and passive for being unknowing. It noted the perverse effects of strict liability, giving the example of criminalizing a postal worker unknowingly carrying a package containing a controlled substance.

The court clarified that strict liability alone is allowable when not applied to innocent and passive conduct. This allows strict liability for other crimes, such as Washington’s child rape statute. The opinion focuses on the distinction between passive and unknowing conduct and either any “intentional activity,” whether knowingly illegal or not, or willful inaction. On this basis, the court found the statute unconstitutional, overturning Ms. Blake’s conviction and all other convictions under the strict liability statute.

Dissent

In a partial dissent, Justice Stephens commented that the majority’s opinion on protection for innocent and passive conduct was an unnecessary overreach, and that the result could be reached more narrowly by overturning only previous decisions and imputing a *mens rea* element to the statute.

Discussion

The court’s decision in *Blake* invalidated Washington’s strict liability statute on simple possession of a controlled substance as a violation of state and federal due process. The court found that the state’s statute

exceeded the state’s police power when it imposed harsh penalties for “innocent” or “passive” conduct without a *mens rea* element because passive and innocent nonconduct falls outside the state’s power to criminalize its citizens. This is consistent with most criminal laws, which require the prosecution to prove beyond a reasonable doubt all elements of the charged offense, including the criminal act and *mens rea* elements. Because the court in *Blake* decided that the decision applied both prospectively and retrospectively, the decision has been hailed as potentially affecting tens of thousands of people who have been convicted of simple drug possession.

But, in the aftermath of the *Blake* decision, the Washington State legislature heard mixed responses to the *Blake* decision and passed Engrossed Senate Bill (ESB) 5476 (2021), which has the effect of, again, criminalizing simple drug possession, but makes it a misdemeanor instead of a felony offense. With ESB 5476, the state legislature also passed a provision for persons charged with such offense to be offered diversion into treatment programs at least twice. The changes made by this enacted statute are currently in effect only until July 1, 2023 at which time the provisions of ESB 5476 will sunset and simple drug possession would become noncriminal again (consistent with *Blake*) unless the legislature takes further action.

The *Blake* decision and subsequent legislation in Washington highlights the tension between laws that aim to decrease substances in the community by criminalizing drug possession and competing efforts to decriminalize personal drug use and divert affected users into treatment for substance use. It is important for forensic psychiatrists to be aware of these differing approaches and the laws in the jurisdiction in which they practice.

The Right to Refuse to Answer

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