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## Strict Liability or Recklessness: Untangling the Web of Confusion Created by Ohio Revised Code Section 2901.21(B)

Felicia I. Phipps  
*University of Dayton*

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## Strict Liability or Recklessness: Untangling the Web of Confusion Created by Ohio Revised Code Section 2901.21(B)

### Cover Page Footnote

The author would like to thank her mother, Shelly, her father, Steve, and her sister, Sarah, for their loving patience and immeasurable support over the past several years, without which she would be lost. The author would also like to thank the attorneys of the Montgomery County Prosecutor's Office for introducing her to this topic and providing her with the mentorship needed to succeed in the study of law. Lastly, the author would like to thank Mark for his calming reassurance throughout the final weeks of this article's publication, which not only inspired her, but enabled her to persevere. Thank you all for your confidence and support.

**STRICT LIABILITY OR RECKLESSNESS:  
UNTANGLING THE WEB OF CONFUSION  
CREATED BY OHIO REVISED CODE SECTION  
2901.21(B)**

*Felicia I. Phipps*\*

I. INTRODUCTION

On April 9, 2008, the Ohio Supreme Court's decision in *State v. Colon*<sup>1</sup> effectively called into question every enumerated criminal offense listed in the Ohio Revised Code. In *Colon I*, the Court held that a defendant may raise a defective indictment which fails to charge a mens rea element of the offense for the first time on appeal.<sup>2</sup> This ruling had a startling and profound effect on prosecutors across the state as it begged the question—"What mental state is needed in order to effectively indict a defendant under any section of the Ohio Revised Code?"

In searching for the answer to this question, county prosecutors' offices around the state began sifting through every criminal statute contained in the Ohio Revised Code looking for any actus reus element not supported by a mens rea element. If a statute failed to specify a culpable mental state prosecutors were left to determine whether "reckless" should be added to the indictment or whether the General Assembly intended to impose strict liability.<sup>3</sup>

Prosecutors are not the only people to struggle with the default rule contained in the Ohio Revised Code. Courts have also labored in determining when strict liability or reckless is required for an accused to be guilty of certain offenses contained within the Ohio Revised Code.<sup>4</sup> This comment explores Ohio Revised Code section 2901.21(B) which establishes

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\* Managing Editor 2009-2010, Staff Writer 2008-2009, University of Dayton Law Review; J.D. expected May 2010, University of Dayton School of Law; B.A. in Sociology/Criminology and Psychology, 2007, Ohio University. The author would like to thank her mother, Shelly, her father, Steve, and her sister, Sarah, for their loving patience and immeasurable support over the past several years, without which she would be lost. The author would also like to thank the attorneys of the Montgomery County Prosecutor's Office for introducing her to this topic and providing her with the mentorship needed to succeed in the study of law. Lastly, the author would like to thank Mark for his calming reassurance throughout the final weeks of this article's publication, which not only inspired her, but enabled her to persevere. Thank you all for your confidence and support.

<sup>1</sup> 885 N.E.2d 917 (Ohio 2008) [hereinafter *Colon I*].

<sup>2</sup> *Id.* at 924. On the State's motion for reconsideration, the Court made the holding fact specific, thus limiting the holding of *Colon I* to the specific egregious facts of that case. *State v. Colon*, 893 N.E.2d 169, 170 (Ohio 2008) [hereinafter *Colon II*].

<sup>3</sup> See OHIO REV. CODE ANN. § 2901.21(B) (West 2006).

<sup>4</sup> See, e.g., *State v. Lozier*, 803 N.E.2d 770 (Ohio 2004).

a default rule for criminal statutes that fail to specify a culpable mental state. It argues the language of this statute is particularly vague so as to give little direction to an individual attempting to interpret the required culpable mental states of certain criminal offenses. The vagueness of this section creates inherent inconsistency among prosecutors' offices attempting to determine what mental state, if any, should be added to an indictment. This inconsistency consequently results in a lack of fair notice to Ohio citizens.

Part II of this comment looks at the language and legislative history of Ohio Revised Code section 2901.21(B). Moreover, it explores the Ohio Supreme Court's pre-*Colon* approach to determining what constitutes a "plain indication" to impose strict liability. Part II also explores an instance in which the General Assembly disagreed with the Ohio Supreme Court's interpretation that one particular offense required recklessness. Part III of this comment presents the many statutory interpretation issues presented by Ohio Revised Code section 2901.21(B). It investigates the problems *Colon I* imposes on both prosecutors and courts. Further, Part III seeks to illustrate the problems Ohio Revised Code section 2901.21(B) brings about by presenting one especially problematic statute that fails to specify a culpable mental state. Lastly, Part III assesses the Court's post-*Colon I* approach to interpreting a statute that fails to specify a culpable mental state and demonstrates that a resolution is still far from realization.

Finally, Part IV of this comment suggests a long-term solution and a short-term solution to this persistent problem of vagueness. The long-term solution requires the General Assembly to overhaul the default rule contained in the Ohio Revised Code by amending the vague terminology currently embodied in section 2901.21(B). The short-term solution urges the Ohio judiciary to come to a cohesive opinion regarding the mental states required for statutes that fail to specify a culpable mental state. It further requires the judiciary to insert the appropriate mental state into the Ohio Jury Instructions. In the meantime, county and city prosecutors' offices should err on the side of caution by adding "reckless" to the indictments of any questionable statutes that fail to specify a culpable mental state.

## II. BACKGROUND

Since the General Assembly enacted House Bill 511, Ohio courts have used Ohio Revised Code section 2901.21(B) as a starting point in interpreting criminal statutes that fail to specify a culpable mental state.<sup>5</sup> Naturally, whenever a statute is silent as to a mental state, attorneys fiercely litigate whether the General Assembly intended to impose strict liability. This litigation has led to inherent inconsistencies among Ohio courts as they struggled to determine what the General Assembly meant by a "plain

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<sup>5</sup> See, e.g., *Colon I*, 885 N.E.2d at 920.

indication” to impose strict liability.<sup>6</sup> This section explores the language of Ohio Revised Code section 2901.21(B), the legislative history of that section, and the inconsistent Ohio Supreme Court interpretations of that section.

*A. Statutory Language of Ohio Revised Code Section 2901.21(B)*

Section 2901.21(B) of the Ohio Revised Code (“Revised Code”) provides a default rule for statutes that fail to specify a culpable mental state. This section states:

When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.<sup>7</sup>

Taken together, the two provisions of section 2901.21(B) direct a court to construe strict criminal liability to a statute only when there is a “plain indication” that the General Assembly intended to impose strict liability for the conduct.<sup>8</sup> If a court looks to the text and legislative history, and cannot find a “plain indication” by the legislature to impose strict liability, then strict liability must not be imposed.<sup>9</sup> In such situations, the court must require the prosecution to show, at the least, recklessness<sup>10</sup> as to the conduct proscribed.<sup>11</sup>

This default rule is problematic because the General Assembly provided no guidance as to what constitutes a “plain indication” of intent to impose strict criminal liability on the part of the General Assembly. A short review of the legislative history surrounding the enactment of section 2901.21(B) provides insight and direction into this issue.

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<sup>6</sup> See *infra* Part II.D.

<sup>7</sup> OHIO REV. CODE ANN. § 2901.21(B).

<sup>8</sup> *Colon I*, 885 N.E.2d at 920-21.

<sup>9</sup> *Id.*

<sup>10</sup> Recklessness is defined as “heedless indifference to the consequences, [by] perversely disregard[ing] a known risk that [one’s] conduct is likely to cause a certain result or is likely to be of a certain nature.” OHIO REV. CODE ANN. § 2901.22(C).

<sup>11</sup> *Colon I*, 885 N.E.2d at 920-21.

*B. Legislative History of Ohio Revised Code Section 2901.21(B)*

In 1974, House Bill 511 became effective and brought section 2901.21(B) to life.<sup>12</sup> The General Assembly drafted this bill to “completely revise[] and recodif[y] the substantive criminal law of Ohio.”<sup>13</sup> The overall purpose of the bill was “to provide a compact yet complete substantive criminal code, easier to understand and apply, meeting modern needs, and providing the necessary foundation for effective crime prevention, law enforcement, and treatment of offenders.”<sup>14</sup> This was the first complete revision of the substantive criminal code in Ohio since 1815.<sup>15</sup> Between 1815 and 1972, criminal law had “become cumbersome and somewhat confusing for both professionals and laymen . . . .”<sup>16</sup> The General Assembly sought to clarify and provide a “fundamental basis for criminal liability,” and provide sufficient notice to citizens as to what constitutes criminal behavior.<sup>17</sup>

Section 2901.21(B) was a significant piece of House Bill 511. The General Assembly defined sections 2901.21 and 2901.22 as the “keystone of the proposed criminal code . . . .”<sup>18</sup> The General Assembly intended these two sections to specify the “fundamental distinction between criminal misconduct on the one hand, and innocent conduct . . . on the other . . . .”<sup>19</sup> Moreover, the General Assembly specifically drafted section 2901.21(B) to provide a uniform rule for when courts should impose strict criminal liability. Alternatively, the General Assembly envisioned this uniform rule as a means of determining the “appropriate degree of culpability” where a court could not readily construe legislative intent for strict liability from the statute.<sup>20</sup> In determining an appropriate default rule, the General Assembly looked to past case law.

*C. Case Law the General Assembly Codified in Ohio Revised Code Section 2901.21(B)*

In developing section 2901.21(B), the General Assembly looked at past case law that interpreted statutes which failed to specify a culpable mental state.<sup>21</sup> The legislature began with the notion that “Ohio generally

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<sup>12</sup> Am. Sub. H.B. 511, 109th Gen. Assem., Reg. Sess. (Ohio 1972); see also Harry J. Lehman & Allen E. Norris, *Some Legislative History and Comments on Ohio's New Criminal Code*, 23 CLEV. ST. L. REV. 8, 8-11 (1974) (outlining the history and formal development of House Bill 511).

<sup>13</sup> OHIO LEGIS. SERV. COMM'N, 109TH GEN. ASSEM., BILL ANALYSIS OF AM. SUB. H.B. 511, REG. SESS., at 1 (1972) (on file with the University of Dayton Law Review).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> OHIO LEGISLATIVE SERV. COMM'N, PROPOSED OHIO CRIMINAL CODE: FINAL REPORT OF THE TECHNICAL COMMITTEE TO STUDY OHIO CRIMINAL LAWS AND PROCEDURE 38 (1971).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

follows the rule . . . that unless an act is done with a guilty mind, the *mens rea*, it is not criminal.”<sup>22</sup> However, the General Assembly noted an exception to this requirement of *mens rea*.<sup>23</sup> That exception, termed *mala prohibita*, is “when an act is declared criminal by statute regardless of the offender’s state of mind . . . .”<sup>24</sup>

With this proposition in mind, the General Assembly first looked to the general rule proscribed in *State v. Huffman*.<sup>25</sup> In *Huffman*, the Court noted that Ohio does not recognize common law crimes.<sup>26</sup> Because statutory provisions govern every crime in Ohio, the Court held that when a “statute defining an offense . . . provides that it must be committed with a particular intent, then such intent becomes a material element of the offense . . . .”<sup>27</sup> Material elements must be “alleged in the indictment and proved [at] trial.”<sup>28</sup> The Court went on to clarify that if a statute is “silent on the element of intent . . . it is not necessary to allege and prove an intent to commit the offense.”<sup>29</sup> Simply put, *Huffman* provided a rigid rule that allowed a court to apply strict criminal liability whenever the statute was silent as to a mental state.<sup>30</sup>

However, in defining a default rule, the General Assembly did not stop at *Huffman*. Instead, the legislature recognized that recent decisions were reluctant to apply the strict rule set forth in *Huffman*.<sup>31</sup> Specifically, the legislature looked to *State v. Weisberg*, which held strict liability is only appropriate when “the statute defining [the] crime clearly reveals a legislative intent to omit the element of guilty knowledge or purpose . . . .”<sup>32</sup> The legislature also mentioned *State v. Williams*, which interpreted a statute that failed to specify a culpable mental element.<sup>33</sup> In *Williams*, the Court held strict liability would only be imposed when the conduct involved “is such that the public welfare imposes a duty on the offender to ascertain the fact of violation, and [the offender] fails to do so at his peril.”<sup>34</sup>

In essence, the General Assembly attempted to codify this case law.<sup>35</sup> The official comments to House Bill 511 admitted that the case law on the matter was “not entirely clear.” Despite this lack of clarity, however,

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<sup>22</sup> *Id.*; see also *Birney v. State*, 8 Ohio 230 (1837) (quashing an indictment for harboring a slave and a fugitive because the indictment failed to aver that the defendant knew of person’s status).

<sup>23</sup> OHIO LEGISLATIVE SERV. COMM’N, *supra* note 18, at 38.

<sup>24</sup> *Id.*

<sup>25</sup> 1 N.E.2d 313, 315 (Ohio 1936).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> OHIO LEGISLATIVE SERV. COMM’N, *supra* note 18, at 38.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* (citing *State v. Weisberg*, 55 N.E.2d 870, 871 (Ohio Ct. App. 1943)).

<sup>33</sup> *Id.* at 38-39 (citing *State v. Williams*, 115 N.E.2d 36 (Ohio Ct. App. 1952)).

<sup>34</sup> *Id.* (citing *Williams*, 115 N.E.2d at 40).

<sup>35</sup> *Id.* at 39.

section 2901.21(B) was designed to “provide[] a uniform rule [in] determining whether culpability is required when the statute is silent as to the offender’s mental state . . . .”<sup>36</sup> The rule appeared to be “that, even if the statute fail[ed] to specify any degree of culpable mental state, strict criminal liability [would] not be applied unless the statute plainly indicate[d] on its face that the Legislature intended strict liability.”<sup>37</sup> The drafters sought to codify this rule and specifically noted that strict liability may only be found where it is “expressly provide[d] for” or where “it can be construed no other way . . . .”<sup>38</sup>

Although section 2901.21(B) successfully provided a uniform rule, the problem of clarity persists. Courts struggle in determining what exactly constitutes a “plain indication” of legislative intent to impose strict criminal liability. The Ohio Supreme Court has provided some guidance, albeit inconsistent as to this issue, but litigation regarding what the General Assembly clearly intended continues in Ohio courts today.

*D. The Ohio Supreme Court’s Approach to Determining Whether a Statute “Plainly Indicates a Purpose to Impose Strict Criminal Liability”*

The Ohio Legislative Service Commission’s comments to House Bill 511 suggest that the General Assembly intended for section 2901.21(B) to provide a default rule for statutes which do not indicate a culpable mental state. However, the default rule proposed and enacted by the General Assembly is vague because it leaves open for interpretation what language indicates clear legislative intent to impose strict criminal liability.

The Ohio Supreme Court tackled this exact issue in two cases: *State v. Wac*<sup>39</sup> and *State v. Maxwell*.<sup>40</sup> *State v. Schlosser*<sup>41</sup> indicated the Ohio Supreme Court’s willingness to consult legislative history and the overarching purpose of the statute in determining whether the General Assembly intended strict liability.<sup>42</sup> Conversely, in *State v. Moody*,<sup>43</sup> the Court expressly rejected this proposition without so much as mentioning the Court’s decision in *Schlosser*. As evidenced by *State v. Lozier*,<sup>44</sup> the Court does not always interpret statutes as the General Assembly originally intended. After *Lozier*, the General Assembly promptly amended the statute at issue after the Court found no legislative intent to impose strict liability.<sup>45</sup>

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<sup>36</sup> OHIO LEGISLATIVE SERV. COMM’N, *supra* note 18, at 39.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> 428 N.E.2d 428, 430 (Ohio 1981).

<sup>40</sup> 767 N.E.2d 242, 256-57 (Ohio 2002).

<sup>41</sup> 681 N.E.2d 911, 913 (Ohio 1997).

<sup>42</sup> *Id.*

<sup>43</sup> 819 N.E.2d 268, 269-71 (Ohio 2004).

<sup>44</sup> 803 N.E.2d 770, 774-75 (Ohio 2004).

<sup>45</sup> *Id.* at 774; Act of June 24, 2004, Am. Sub. H.B. 163, 2004 Ohio Laws 4,620.



These precedents set the stage for subsequent interpretations of statutes that are silent as to a culpable mental state but provide an inadequate basis for such a determination.

### 1. Ohio Supreme Court Precedent – *State v. Wac*: Example of Clear Legislative Intent to Impose Strict Criminal Liability on the Face of the Statute

In *Wac*, the Court interpreted Revised Code sections 2915.02(A)(1) and 2915.03(A)(1), both of which failed to specify a culpable mental state.<sup>46</sup> Appellant argued that pursuant to section 2901.21(B), recklessness was an element of both bookmaking and operating a gambling house.<sup>47</sup> The Court disagreed and found that the statute clearly indicated legislative intent to impose strict liability for the two offenses.<sup>48</sup>

The Court first looked at Revised Code section 2915.02 which provides: “(A) No person shall . . . (1) Engage in bookmaking, or knowingly engage in conduct that facilitates bookmaking. . . .”<sup>49</sup> The Court specifically took into account the fact that the General Assembly included the culpable mental state of “knowingly” in facilitating bookmaking, but failed to include a culpable mental state for “bookmaking per se.”<sup>50</sup> In holding bookmaking per se constitutes strict liability, the Court determined the inclusion of a mental state in one part of a subsection and the exclusion of a mental state in another part of the subsection “plainly indicates a purpose to impose strict criminal liability . . . .”<sup>51</sup>

The Court then interpreted 2915.03(A)(1), operating a gambling house, which provides in pertinent part: “(A) No person, being the owner or lessee, or having custody, control, or supervision of premises, shall: (1) Use or occupy such premises for gambling . . . .”<sup>52</sup> In determining whether strict liability was the appropriate standard for division 2915.03(A)(1), the Court looked to division (A)(2) which provides: “[r]ecklessly permit such premises to be used or occupied for gambling . . . .”<sup>53</sup> Because the General Assembly provided a culpable mental state in division (2) but not in division (1), the Court determined the exclusion of a mental state in division (1) “plainly indicate[d] a purpose to impose strict criminal liability.”<sup>54</sup>

Thus, in *Wac*, the Court provided two examples of how to determine whether the General Assembly clearly intended to impose strict criminal

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<sup>46</sup> *Wac*, 428 N.E.2d at 431.

<sup>47</sup> *Id.* at 430-31.

<sup>48</sup> *Id.* at 431.

<sup>49</sup> OHIO REV. CODE ANN. § 2915.02(A)(1).

<sup>50</sup> *Wac*, 428 N.E.2d at 431.

<sup>51</sup> *Id.* (quoting OHIO REV. CODE ANN. § 2901.21(B)).

<sup>52</sup> *Id.* (quoting OHIO REV. CODE ANN. § 2915.03(A)(1)).

<sup>53</sup> *Id.* (quoting OHIO REV. CODE ANN. § 2915.03(A)(2)) (emphasis in original).

<sup>54</sup> *Id.* (quoting OHIO REV. CODE ANN. § 2901.21(B)).

liability. The first example includes a single subsection which contains two discrete clauses. The inclusion of a culpable mental state in one of the discrete clauses and the exclusion of a mental state in the other clause indicates intent on the part of the General Assembly to impose strict criminal liability. The second example involves two separate divisions. The inclusion of a mental state in one division and the exclusion of a mental state in another division indicates the General Assembly's intent to impose strict criminal liability. The Court in *Wac* further held that a "crime may have different degrees of mental culpability for different elements."<sup>55</sup>

## 2. Ohio Supreme Court Precedent – *State v. Maxwell*: Another Example of Clear Legislative Intent to Impose Strict Criminal Liability on the Face of the Statute

In *Maxwell*, the Ohio Supreme Court held that Revised Code section 2907.321(A)(6) "plainly indicate[d] an intention to impose strict liability on the act of bringing child pornography into the state of Ohio . . . ."<sup>56</sup> In reversing the appellate court's holding, the Court agreed with the State that section "2907.321(A)(6) demonstrate[d] the clear intent of the General Assembly to impose strict liability . . . ."<sup>57</sup>

In *Maxwell*, the Ohio Supreme Court interpreted section 2907.321(A)(6) which provides: "(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following . . . (6) Bring or cause to be brought into this state any obscene material that has a minor as one of its participants . . . ."<sup>58</sup> In doing so, the Court opined that a court must ask two questions when determining what level of culpability, if any, a statute requires: "(1) does the section defining an offense specify any degree of culpability, and (2) does the section plainly indicate a purpose to impose strict criminal liability?"<sup>59</sup> In order to apply recklessness pursuant to section 2901.21(B), a court must answer both questions in the negative.<sup>60</sup>

The State argued, and the Court agreed, that "the court of appeals misinterpreted the word 'section' in R.C. 2901.21(B) to mean 'division' of a Revised Code section . . . ."<sup>61</sup> The Court recognized that the "General Assembly distinguishes between sections and divisions" within the Revised Code,<sup>62</sup> and cited several instances where the General Assembly used the

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<sup>55</sup> See *Maxwell*, 767 N.E.2d at 246.

<sup>56</sup> *Id.* at 244.

<sup>57</sup> *Id.*

<sup>58</sup> OHIO REV. CODE ANN. § 2907.321(A)(6).

<sup>59</sup> *Maxwell*, 767 N.E.2d at 245.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* (emphasis omitted)

<sup>62</sup> *Id.*

word “section” and “division.”<sup>63</sup> In doing so, it determined that in order to “supply the mental element of recklessness to R.C. 2907.321(A)(6), [it must] determine whether the entire *section* includes a mental element, not just whether *division* (A)(6) includes such an element.”<sup>64</sup>

With this in mind, the Court turned to the Revised Code section at issue, 2907.321.<sup>65</sup> The Court recognized that division (A) of section 2907.321 “includes the element of knowledge.”<sup>66</sup> Thus, the State was required to prove “knowledge of the character of the material or performance involved.”<sup>67</sup> Applying the rationale from *Wac*, the Court rejected the defendant’s argument that the knowledge element also pertains to the act of bringing the obscene material into the state.<sup>68</sup> Because “knowledge is a requirement only for the discrete clause within which it resides,” the state was not required “to prove that [the defendant] knew that in downloading files . . . he was also transmitting those files” across state lines.<sup>69</sup>

*Maxwell* expanded on the Court’s decision in *Wac* by specifically holding that where a division of one Revised Code section includes a culpable mental state, section 2901.21(B) cannot supply a standard of recklessness to any other division within that section. The Court clarified the difference between sections and divisions within the Revised Code. Moreover, the Court expressly determined that the inclusion of a mental state in one division of a section plainly indicates legislative intent to impose strict criminal liability in the division not containing a culpable mental state.

### 3. Ohio Supreme Court Precedent – *State v. Schlosser*: Example of Clear Legislative Intent Found in the Legislative History and Purpose of the Statute at Issue

Courts do not always stop at the statutory text in determining whether the General Assembly intended to impose strict liability. Some courts have looked to the legislative history and overall purpose of the statute at issue. For example, in *Schlosser*, the Ohio Supreme Court interpreted Revised Code section 2923.32 division (A)(1) and held that it “plainly indicates a purpose to impose strict liability.”<sup>70</sup> In so holding, the

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<sup>63</sup> *Id.* The Court pointed to specific language within the Revised Code that distinguished between divisions and sections. The Court cited section 2901.21(A), as an example: “Except as provided in *division* (B) of this *section*.” *Id.* Thus, the General Assembly used the term “section” to refer to all of 2901.21, but used the term “division” to refer only to part (B) of section 2901.21.

<sup>64</sup> *Id.*

<sup>65</sup> *Maxwell*, 767 N.E.2d at 246.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* (quoting OHIO REV. CODE ANN. § 2907.321(A)).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Schlosser*, 681 N.E.2d at 913.

Court looked to the statutory text and the legislative history of both the Federal and Ohio statutes encompassing the Racketeer Influenced and Corrupt Organization Act (“RICO”).<sup>71</sup>

Division (A)(1) of the Ohio RICO statute did not include a culpable mental state.<sup>72</sup> In interpreting whether section 2901.21(B)<sup>73</sup> should impose the culpable mental state of recklessness, the Court looked to other divisions of the statute. In particular, the Court observed division (A)(3) included the culpable mental state of “knowingly,” but no other divisions of section 2923.32 included a culpable mental state.<sup>74</sup>

The Court did not stop at the exclusion of a culpable mental state in division (A)(1). It delved further into the legislative history of Ohio’s RICO statute. The Court specifically pointed to the statute’s Senate sponsor’s comments which described the RICO statute as “the toughest and most comprehensive [RICO] Act in the nation . . . .”<sup>75</sup> The Court determined that the “[o]ffenses under RICO, R.C. 2923.32, are *mala prohibita*, *i.e.*, the acts are made unlawful for the good of the public welfare regardless of the [offender’s] state of mind.”<sup>76</sup> For these reasons, the Court found clear legislative intent to impose strict criminal liability under section 2923.32(A)(1).<sup>77</sup>

#### 4. Ohio Supreme Court Precedent--*State v. Moody*: Example of No Clear Legislative Intent to Impose Strict Liability

Courts do not always find a “plain indication” on the part of the General Assembly to impose strict liability. Oftentimes a court finds the exact opposite.<sup>78</sup> For example, in *Moody*, the Court interpreted Revised Code section 2919.24(A)(1), contributing to the unruliness of a minor.<sup>79</sup> Section 2919.24(A)(1) states “(A) No person shall . . . (1) Aid, abet, induce, cause, encourage, or contribute to a child . . . becoming an unruly child . . . .”<sup>80</sup> The State conceded that this section of the Revised Code did not specify a culpable mental state but argued that the words “[n]o person

<sup>71</sup> *Id.* at 913-14.

<sup>72</sup> *Id.* at 913.

<sup>73</sup> For clarity and brevity, the author of this comment refers to 2901.21(B) as “section 2901.21(B)” and not section 2901.21 division (B). The author will use this approach throughout this comment when referring to any sections and division cited together in the text.

<sup>74</sup> *Schlosser*, 681 N.E.2d at 913.

<sup>75</sup> *Id.* at 914.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *See, e.g.*, *State v. McGee*, 680 N.E.2d 975, 975 (Ohio 1997) (holding Ohio Revised Code Annotated section 2919.22(A) requires the culpable mental state of recklessness); *see also* *State v. O’Brien*, 508 N.E.2d 144, 144 (Ohio 1987) (holding Ohio Revised Code Annotated section 2919.22(B)(3) requires the culpable mental state of recklessness); *State v. Adams*, 404 N.E.2d 144, 145 (Ohio 1980) (holding Ohio Revised Code Annotated section 2919.22(B)(2) requires the culpable mental state of recklessness).

<sup>79</sup> *Moody*, 819 N.E.2d at 269.

<sup>80</sup> *Id.* at 270 (quoting former OHIO REV. CODE ANN. § 2919.24(A)(1)).

shall” and public policies including the “protection of the health, safety, and well-being of children,” were evidence of a clear legislative intent to impose strict liability.<sup>81</sup>

The Ohio Supreme Court rejected the State’s arguments and noted that “[i]t is not enough that the General Assembly in fact intended imposition of liability without proof of mental culpability. Rather the General Assembly must plainly indicate that intention in the language of the statute.”<sup>82</sup> Thus, the Ohio Supreme Court recognized “strong public policy concerns” may support the imposition of strict liability; however, they were to play no part in determining whether the General Assembly intended to impose strict liability.<sup>83</sup> In holding that recklessness is required by section 2919.24, the Court determined the statutory language was “clear and unambiguous” and thus dispositive in the case at hand.<sup>84</sup> The Ohio Supreme Court specifically held section 2919.24 “neither specifies a degree of culpability nor plainly indicates that the General Assembly intended to impose strict liability,” and thus recklessness is an essential element of the offense.<sup>85</sup>

These cases indicate inconsistency in rulings within the Ohio Supreme Court’s decisions. How can one reconcile *Moody* with the Court’s approach in *Schlosser*? The *Schlosser* Court specifically consulted outside legislative materials as well as the statutory language, which admittedly was both clear and unambiguous. However, the *Moody* Court expressly rejected this approach requiring a clear indication on the face of the statute. These inconsistencies indicate that even the Ohio Supreme Court is ill-equipped to evaluate whether a statute “plainly indicates a [legislative intent] to impose strict criminal liability” and requires reevaluation into the vagueness of section 2901.21(B).<sup>86</sup>

##### 5. Ohio Supreme Court Precedent – *State v. Lozier*: Example of Disagreement Between the Ohio Supreme Court’s Interpretation of Intent and the General Assembly’s Interpretation of that Intent

The Ohio Supreme Court does not always interpret statutes as the legislature originally intended. For example, in *Lozier* the Court interpreted a felony enhancement provision at Revised Code section 2925.03(C)(5)(b).<sup>87</sup> Section 2925.03(C)(5)(b), pursuant to section 2925.03(A), elevates trafficking in LSD to a fourth degree felony when the LSD is sold or offered

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.* (quoting *State v. Collins*, 773 N.E.2d 1118, 1123-24 (Ohio 2000)).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 271.

<sup>85</sup> *Moody*, 819 N.E.2d at 271.

<sup>86</sup> OHIO REV. CODE ANN. § 2901.21(B).

<sup>87</sup> *Lozier*, 803 N.E.2d at 771.

in the “vicinity of a school.”<sup>88</sup> The direct issue presented to the Court in *Lozier* was whether 2925.03(C)(5)(b) requires recklessness as to whether the defendant knew he was within the vicinity of a school or only provides for strict criminal liability, regardless of the defendant’s state of mind as to the location of the drug sale.<sup>89</sup>

In holding that 2925.03(C)(5)(b) requires recklessness, the Court focused on two factors. First, the Court noted that section 2925.03(A), with which the defendant was charged, required a mental state of “knowingly.”<sup>90</sup> The Court then applied the rationale of *Wac*, and determined that the language at issue in 2925.02(C)(5)(b), like the language interpreted in *Wac*, included a pair of discrete clauses separated by “or.”<sup>91</sup> Specifically, the language of 2925.03(C)(5)(b) applies to trafficking in LSD either “*in the vicinity of a school or in the vicinity of a juvenile . . .*”<sup>92</sup> The Court then looked to the chapter’s definitional section to define the two alternative provisions.<sup>93</sup> In doing so, the Court noted that the General Assembly defined the two provisions separately within the definitional section.<sup>94</sup> The second term, “in the vicinity of a juvenile” is defined by 2925.01(BB) and includes the language “regardless of whether the offender knows . . .”<sup>95</sup>

Conversely, the term “in the vicinity of a school” did not contain the same “strict liability language” as defined by the “vicinity of a juvenile” provision.<sup>96</sup> In construing the language the Court noted that the “regardless of whether the offender knows” language “perfectly illustrates what [section] 2901.21(B) calls a ‘purpose to impose strict liability.’”<sup>97</sup>

Second, the Court determined “that the differing degrees of mental culpability for offenses committed near a school as opposed to near a juvenile are consistent with a coherent legislative policy.”<sup>98</sup> The Court then determined that the mental state of knowingly did not apply to trafficking in the vicinity of a school; moreover, the fact that the General Assembly chose not to use the same “strict liability language” as it did in the vicinity of a juvenile definition showed there was no clear intent to impose strict criminal

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<sup>88</sup> *Id.* at 771-72.

<sup>89</sup> *Id.* at 771.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 773.

<sup>92</sup> *Id.*

<sup>93</sup> *Lozier*, 803 N.E.2d at 773. In her dissenting opinion, Justice O’Connor rejected the Court’s use of the definitional section to interpret legislative intent pursuant to section 2901.21(B). *Id.* at 776 (O’Connor, J., dissenting) (explaining that 2901.21(B) applies only to “the section that defines the offense,” not a different section containing definitions).

<sup>94</sup> *Id.* at 773.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 773-74.

<sup>98</sup> *Id.* at 774. The Court noted that children who were within one hundred feet or within view of a drug transaction presented more potential physical and psychological damage to the child, while the 1,000 feet vicinity for the school provision did not present such danger and could be applied to instances where no child was actually present. *Id.*

liability.<sup>99</sup> Because the statute was silent as to a mental state, and did not contain a clear intent to impose strict criminal liability, the Court determined section 2901.21(B) applied to supply the mental state of recklessness.<sup>100</sup>

The General Assembly quickly reacted to the Court's flawed interpretation of their legislative intent regarding these two provisions.<sup>101</sup> The General Assembly amended the definitional section to include the "regardless of whether the offender knows" language—the exact language the Court noted perfectly illustrated a "purpose to impose strict liability."<sup>102</sup> Thus, the Court's interpretation of recklessness into the definitional section provided in section 2925.01(P) incorrectly interpreted the General Assembly's intent as to the mental element. This illustrates that even the Ohio Supreme Court, let alone attorneys or average citizens, cannot always correctly interpret whether or not the General Assembly intended to impose strict liability.

### III. ISSUES

The inherently vague language of section 2901.21(B) is a virtual breeding ground for litigation and inconsistency. Litigation is an apparent necessity that arises from section 2901.21(B) because it requires courts to decide whether the General Assembly clearly intended to impose strict liability. After *Colon I*, prosecutors were required to reevaluate what mental element was necessary to effectively indict a defendant for any crime contained in the Revised Code. Inevitably, prosecutors from county to county began to disagree on certain criminal statutes which failed to specify a culpable mental state.

This disagreement may lead to inconsistencies when charging offenses because one county may view the statute as requiring recklessness and another may view it as strict liability. Moreover, county prosecutors must expend a considerable amount of resources attempting to determine what the culpable mental state for a given statute is – resources that may be better used elsewhere. The inconsistencies in charging necessarily lead to a lack of notice to average citizens of what conduct constitutes criminal behavior. The decision in *Colon I* illustrates the inevitable problems that arise from section 2901.21(B).

#### A. State v. Colon – *Ramifications of Not Having a Concrete Default Rule*

The ramifications of the vague default rule contained in the Revised Code reared its head in *Colon I*. In *Colon I*, the Court addressed whether a

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<sup>99</sup> *Lozier*, 803 N.E.2d at 773-74.

<sup>100</sup> *Id.* at 774-75.

<sup>101</sup> Act of June 24, 2004, Am. Sub. H.B. 163, 2004 Ohio Laws 4,620.

<sup>102</sup> *Id.* at 4,640; *Lozier*, 803 N.E.2d at 774.

defendant waived a defective indictment that failed to specify a culpable mental state of the crime when the defendant did not initially raise the issue at trial.<sup>103</sup> In *Colon I*, the offense of robbery codified at Revised Code section 2911.02(A)(2) was at issue.<sup>104</sup> Prosecutors used the Revised Code language for the offense of robbery to indict the defendant.<sup>105</sup> The indictment read: “[I]n attempting or committing a theft offense, as defined in Section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense upon [the victim, the defendant did] inflict, attempt to inflict, or threaten to inflict physical harm on [the victim].”<sup>106</sup> The defendant was convicted of robbery and subsequently appealed and argued that his “state constitutional right to a grand jury indictment and state and federal constitutional rights to due process were violated’ [because] . . . [t]he indictment did not expressly charge the mens rea element of the crime of robbery.”<sup>107</sup>

Because the robbery statute failed to specify a mental element for the actus reus element of “[i]nfract, attempt to infract, or threaten to infract physical harm on another,” the prosecution did not dispute that the indictment was defective.<sup>108</sup> The Court then began the task of determining what mental element was needed for robbery pursuant to 2911.02(A)(2) and noted that the statute did not “expressly state the degree of culpability required for subsection (2) . . . .”<sup>109</sup> Thus, the Court began its analysis with the Revised Code’s default rule—section 2901.21(B).<sup>110</sup>

The Court’s statutory interpretation on this issue was brief to say the least. The Court merely stated that the robbery statute did not “specify a particular degree of culpability for the act of ‘[i]nfract[ing], attempt[ing] to infract, or threaten[ing] to infract physical harm,’ nor [did] the statute plainly indicate that strict liability [was] the mental standard.”<sup>111</sup> The Court did not discuss why there was no “plain indication” on the part of the General Assembly to impose strict liability.<sup>112</sup> Instead, the Court simply held that

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<sup>103</sup> *Colon I*, 885 N.E.2d at 919.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 920.

<sup>106</sup> *Id.* at 919.

<sup>107</sup> *Id.* at 920.

<sup>108</sup> *Id.* (citing OHIO REV. CODE ANN. § 2911.02(A)(2)). It is curious to say the least that the prosecution stipulated to the defect in the indictment. Scholars have noted that Revised Code section 2901.21(B) has a “nonpervasive culpability requirement.” See Guyora Binder, *Felony Murder and Mens Rea Default Rules: A Study in Statutory Interpretation*, 4 BUFF. CRIM. L. REV. 399, 423 (2000). This means that the Revised Code does not require that every material element be supported by a culpable mental state. *Id.* at 411. Thus, the prosecution could have argued that the mental state was provided by the theft offense defined in Revised Code section 2913.01 (i.e. knowingly) and that no further mens rea element was needed for “inflicts, attempts to infract, or threatens to infract physical harm on another.”

<sup>109</sup> *Colon I*, 885 N.E.2d at 920 (emphasis omitted).

<sup>110</sup> *Id.*; OHIO REV. CODE ANN. § 2901.21(B) (“When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.”).

<sup>111</sup> *Colon I*, 885 N.E.2d at 921.

<sup>112</sup> *Id.*



the prosecution was “required to prove, beyond a reasonable doubt, that the defendant recklessly inflicted, attempted to inflict, or threatened to inflict physical harm.”<sup>113</sup>

The court went on to determine that the defendant had not waived the defect in the indictment because failure to specify the culpable mental state of an offense is “structural error” and may properly be brought up for the first time on appeal.<sup>114</sup> In so holding, the court found support in the Ohio Constitution, which provides that “no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury.”<sup>115</sup> The court held that an indictment that does not charge a mental element, an “essential element[] of the offense,” does not “properly inform[] [the defendant] of the charge so that he [can] put forth [a] defense.”<sup>116</sup> Therefore, an indictment that does not charge a mens rea for the offense is unconstitutional and, as such, constitutes structural error that may be challenged for the first time on appeal.<sup>117</sup>

This ruling evidences a new problem regarding the vague language of section 2901.21(B). An indictment that charges an offense in the exact language of the Revised Code may be held defective where the statute itself fails to specify a culpable mental state. If a court then determines that “recklessness” is the appropriate mental state pursuant to section 2901.21(B), the defendant may challenge this defect for the first time on appeal.<sup>118</sup> This places the state in the precarious situation of having a conviction overturned for a defect in the indictment, even though the indictment charges the exact language of the offense embodied in the Revised Code.

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.* Structural error “involves the deprivation of a constitutional right.” *State v. Fischer*, 789 N.E.2d 222, 228 (Ohio 2003) (citing *State v. Issa*, 752 N.E.2d 904, 929-30 (Ohio 2001)). Such an error must “affect[] the framework within which the trial proceeds, rather than simply [being] an error in the trial process itself.” *State v. Perry*, 802 N.E.2d 643, 647 (Ohio 2004) (quoting *Fischer*, 789 N.E.2d at 226 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991))). An error that is “structural” in nature “mandates a finding of ‘per se prejudice.’” *Fischer*, 789 N.E.2d at 225.

<sup>115</sup> *Colon I*, 885 N.E.2d at 921 (quoting OHIO CONST. art. I, § 10).

<sup>116</sup> *Id.* at 923.

<sup>117</sup> *Id.*

<sup>118</sup> *See Colon II*, 893 N.E.2d at 170. On motion for reconsideration, the Court noted that the ruling in *Colon I* applies only “prospectively” and applies only to the cases pending on the date *Colon I* was announced. *Id.* Moreover, the Court limited its holding regarding structural error to the “unique” facts of *Colon I*. *Id.* at 170-71. The Court pointed to other factors of the defendant’s case that affected his constitutional rights including: the defective indictment; the lack of notice to the defendant that recklessness was an element of the offense; the failure of the state to argue recklessness at trial; the failure of the trial judge to include the element of recklessness when instructing the jury as to the elements of the offense; and the prosecutor’s treatment of the offense as if it were strict liability during the closing argument. *Id.* at 171.

*B. Problems Caused by Colon I and the Vague Language of Ohio Revised Code Section 2901.21(B)*

The foregoing material presents several obvious problems. First, how is a prosecutor to know what the correct mental element is without first litigating the vague issue of what “plainly indicates a purpose to impose strict criminal liability”?<sup>119</sup> Perhaps more troubling, how is an average citizen of the state of Ohio to determine what the essential elements of an offense are, so as to avoid conduct that is potentially criminal in nature?

Secondly, the ruling in *Colon I* forces county prosecutors to speculate as to what statutes require recklessness and place such a requirement in the indictment for fear of having a conviction overturned. The fear of a court overturning a conviction, and the county prosecutors’ quick response to *Colon I*, will undoubtedly lead to inconsistency in charging between counties across the state. If each county does not take the time to collaborate and come to an agreement regarding what mental states are required for statutes that currently fail to specify a culpable mental state, they will inevitably disagree. The result will be one county unwittingly charging recklessness to commit an offense, with another county, equally unaware of the other, charging strict liability to commit the same offense. The possibility of inconsistency in charging only furthers the lack of fair notice to citizens of what conduct is criminal and what conduct is innocent.<sup>120</sup>

Moreover, section 2901.21(B) requires prosecutors’ offices to spend a considerable amount of energy and resources determining or litigating legislative intent as to statutes that fail to specify a culpable mental state. County prosecutors could use such funding elsewhere to combat clearly criminal acts or help victims of violent crimes, via support groups or counseling sessions.<sup>121</sup>

Lastly, the default rule in section 2901.21(B) does not effectuate the original purpose intended by the General Assembly.<sup>122</sup> While it may

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<sup>119</sup> OHIO REV. CODE ANN. § 2901.21(B).

<sup>120</sup> The United States Supreme Court has recognized that “[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). One problem a vague statute presents is that it “may trap the innocent by not providing fair warning,” in that a vague law disallows a citizen “to steer between lawful and unlawful conduct . . .” *Id.* Thus, the Supreme Court recognized that the Constitution requires that a law provide a “person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Id.*

<sup>121</sup> See, e.g., Montgomery County Prosecutor, Victim Witness Division, <http://www.mcoho.org/Prosecutor/Divisions/VictimWitness/index.cfm> (last visited Mar. 9, 2010).

<sup>122</sup> OHIO LEGISLATIVE SERV. COMM’N, *supra* note 18, at 38. The General Assembly intended section 2901.21(B) to provide “a uniform rule for imposing strict liability, or for establishing an appropriate degree of culpability where legislative intent to impose strict liability is not readily apparent.” *Id.* Moreover, the overall goal of revising the Ohio’s criminal code was to “provide a compact yet complete substantive criminal code, easier to understand and apply, meeting modern needs, and providing the

provide a uniform rule, the manner in which the Ohio courts have interpreted the rule shows that the only consistency the statute provides is consistent confusion with respect to what mental state a statute requires.<sup>123</sup> Moreover, it allows courts to apply strict liability—an aberration in criminal law, originally to be used only for regulatory offenses—in instances which it arguably was not intended to apply.<sup>124</sup>

*C. Receiving Stolen Property – An Illustration of the Perpetual Problems Caused by Ohio Revised Code Section 2901.21(B)*

In some situations, the statute will obviously define what level of culpability will suffice to commit the crime. These statutes fall into one of two categories. The first category includes statutes that clearly specify what mental element is required to commit the crime.<sup>125</sup> The second category includes statutes that do not specify a culpable mental state but have already undergone the arduous task of statutory interpretation pursuant to section 2901.21(B).<sup>126</sup> However, not all statutes within the Revised Code fit neatly into one of these two categories.<sup>127</sup> It is these statutes which are the current cause for concern because they do not specify a culpable mental state and have not yet established precedent as to an appropriate mental state. For instance, the crime receiving stolen property fails to specify a culpable mental state.<sup>128</sup> Thus, the same questions begin to surface—whether the legislature clearly intended to impose strict liability and whether recklessness should be added to the indictment in order to escape the same fate handed down in *Colon I*.

An individual could read the receiving stolen property statute in one of two ways. Section 2913.51(A) states “[n]o person shall receive, retain, or dispose of property of another knowing or having reasonable cause to

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necessary foundation for effective crime prevention, law enforcement, and treatment of offenders.” *Id.* at 1.

<sup>123</sup> *Id.*; see also *supra* Part II.D.1-5 (illustrating inconsistencies in Ohio Supreme Court interpretations and application of Revised Code section 2901.21(B)).

<sup>124</sup> See, e.g., *Maxwell*, 767 N.E.2d at 244; *Wac*, 428 N.E.2d at 431 (both imposing strict liability for conviction of the offense in question); see also *State v. Wilcox*, 827 N.E.2d 832 (Ohio Ct. App. 2005).

<sup>125</sup> See, e.g., OHIO REV. CODE ANN. §§ 2903.01(A)-(E), 2903.11(A), 2905.11(A) (all defining a mental element in the statute).

<sup>126</sup> See, e.g., *McGee*, 680 N.E.2d at 975 (holding recklessness is an essential element of endangering children pursuant to Revised Code section 2919.22(A)); *Adams*, 404 N.E.2d at 145 (holding recklessness is an essential element of the crime of endangering children as defined under Revised Code section 2919.22(B)(2)); *State v. Parrish*, 465 N.E.2d 873, 874 (Ohio 1984) (holding prostitution is not a strict liability offense, thus recklessness is sufficient culpability).

<sup>127</sup> Some “problematic statutes” include: OHIO REV. CODE ANN. §§ 2913.51(A) (receiving stolen property); 2903.15 (permitting child abuse); 2903.341(B) (patient endangerment); 2907.24(A) (soliciting after a positive HIV test); 2911.01(A)(3) (aggravated robbery); 2911.02(A)(3) (robbery); 2911.11(A)(1) (aggravated burglary); 2919.23(B) (interference with custody); 2919.231 (interfering with action to issue or modify support order); 2919.24(A)(1)-(3) (contributing to unruliness or delinquency of a child); 2923.162(A)(1)-(3) (discharge firearm on or near prohibited premises); 2927.27(A)-(B) (illegal bail bond agent practices).

<sup>128</sup> See OHIO REV. CODE ANN. § 2913.51(A) (receiving stolen property).

believe that the property has been obtained through commission of a theft offense.”<sup>129</sup> Although the statute specifically lists the mental element of “knowing or having reasonable cause to believe,” it is most naturally read to apply only to whether the defendant knew or had reasonable cause to believe that the property was stolen.<sup>130</sup> The issue thus becomes what mental state, if any, must the State show for the actions of “receiv[ing], retain[ing], or dispos[ing] of property . . . .”<sup>131</sup>

There are two plausible interpretations. A court or an attorney would most likely begin their analysis with section 2901.21(B), because the statute fails to specify a mental state as to the “receive, retain, or dispose of property” language.<sup>132</sup> Once consulting section 2901.21(B), one could argue that the “no person shall” language clearly illustrates the intent on the part of the General Assembly to impose strict criminal liability.<sup>133</sup> However, there is equal authority that one should at the very least prove the culpable mental state of recklessness as to the receiving, retaining, or disposing of the property because the phrase “no person shall” does not clearly indicate legislative intent to impose strict criminal liability.<sup>134</sup>

These two arguments show the substantial likelihood for charging inconsistencies and a lack of fair notice, both of which come hand-in-hand with the vague language of section 2901.21(B). Add to this the possibility of having a conviction overturned for failing to specify the culpable mental state of recklessly for receiving, retaining, or disposing of property and one gets a very real sense of the practical problems caused by the Revised Code’s default rule.

#### *D. State v. Lester – A year after Colon I and Colon II but Still No Closer to a Solution*

Over a year after the Court decided *Colon I* and *Colon II*, the problems described above manifested themselves in *State v. Lester*.<sup>135</sup> After

<sup>129</sup> *Id.*

<sup>130</sup> *See, e.g., State v. Purcell*, No. 94APA02-234, 1994 WL 485578, at \*2 (Ohio Ct. App. Sept. 6, 1994).

<sup>131</sup> OHIO REV. CODE ANN. § 2913.51(A).

<sup>132</sup> *See id.* § 2901.21(B); *see also Colon I*, 885 N.E.2d at 920 (consulting the Revised Code default rule where the statute failed to specify the required mens rea for a particular section of the statute). Although, one could argue there is no need to consult the default rule in this situation because the receiving stolen property statute lists a culpable mental state for the offense and Ohio’s default rule is nonpervasive. *See Binder, supra* note 108, at 411, 423.

<sup>133</sup> *See, e.g., City of Brecksville v. Marchetti*, Nos. 67719, 67722, 1995 WL 693091, at \*3 (Ohio Ct. App. Nov. 22, 1995) (“It is well-established that when a statute reads, ‘No person shall . . .,’ absent any reference to the requisite mental state, the statute is clearly indicative of a legislative intent to impose strict liability.”).

<sup>134</sup> *See Moody*, 819 N.E.2d at 270 (holding the “no person shall” language does not clearly indicate the General Assembly’s intention to impose strict criminal liability and that such an intention must be stated in the language of the statute only). *But see Schlosser*, 681 N.E.2d at 913 (using legislative history and the purpose of the statute to determine the General Assembly’s intent).

<sup>135</sup> 916 N.E.2d 1038, 1039 (Ohio 2009).

*Colon I*, prosecutors and defendants charged with aggravated robbery under Revised Code section 2911.01(A)(1) disagreed as to whether the element of brandishing, displaying, using, or indicating possession of a deadly weapon required a mens rea of recklessness.<sup>136</sup> Again, prosecutors charged the defendant in the precise language of the statute, which stated:

(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 . . . or in fleeing immediately after the attempt or offense, shall do any of the following: (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it . . . .<sup>137</sup>

The Court held that this language plainly indicated the General Assembly's intent to impose strict liability for "the element of displaying, brandishing, indicating possession of, or using a deadly weapon."<sup>138</sup> The Court's rationale centered around its previous interpretation, in *State v. Wharf*,<sup>139</sup> of former Revised Code section 2911.02(A)(1),<sup>140</sup> which specified the offense of robbery. In *Wharf*, the Court held that "the deadly weapon element of R.C. 2911.02(A)(1) [did] . . . not require the *mens rea* of recklessness."<sup>141</sup> The *Wharf* Court reasoned that the General Assembly "employ[ed] language making mere possession or control of a deadly weapon, as opposed to actual use or intent to use, a violation," which made it clear it intended the offense to be strict liability.<sup>142</sup>

In *Lester*, the Court followed *Wharf*'s rationale to a tee and disregarded the statute's obvious similarities to the robbery statute at issue in *Colon I*.<sup>143</sup> Thus, over a year after *Colon I* and *Colon II*, the Court has yet to set a clear and consistent method of determining when the General Assembly clearly indicated a purpose to impose strict criminal liability. In

<sup>136</sup> *Id.*

<sup>137</sup> OHIO REV. CODE ANN. § 2911.01(A)(1).

<sup>138</sup> *Lester*, 916 N.E.2d at 1039.

<sup>139</sup> 715 N.E.2d 172, 176 (Ohio 1999) (emphasis omitted). One should note the Court's eagerness to consult previous case law. This tactic seemingly contradicts the Court's approach in *Moody* as it goes beyond the face of the statute in determining whether the General Assembly plainly indicated an intention to impose strict criminal liability. See *Moody*, 819 N.E.2d at 269.

<sup>140</sup> Former Revised Code section 2913.02(A)(1) provided that: "[n]o person, in attempting . . . or in fleeing immediately after the attempt or offense, shall . . . [h]ave a deadly weapon on or about the offender's person or under the offender's control." *Wharf*, 715 N.E.2d at 173.

<sup>141</sup> *Wharf*, 715 N.E.2d at 176.

<sup>142</sup> *Id.* at 175. Specifically the Court noted that the mere possession of the weapon "is the potentially dangerous factual condition warranting the more severe penalty," the mere presence of the weapon elevates the risk of harm to the victim justifying the use of strict liability. *Lester*, 916 N.E.2d at 1042 (quoting *Wharf*, 715 N.E.2d at 175).

<sup>143</sup> *Lester*, 916 N.E.2d at 1041-42. Recall that the statute at issue in *Colon I* lacked a mens rea element as to the "[i]nflict, attempt to inflict, or threaten to inflict physical harm" element of Revised Code section 2911.02(A)(2). *Colon I*, 885 N.E.2d at 919-20. The Court dismissed these similarities by simply stating that "in *Colon I* there was 'no dispute' that the defendant's indictment for robbery . . . was defective for failure to allege a mens rea." *Lester*, 916 N.E.2d at 1043.

fact, Justice Lanzinger pointed out this exact conundrum in her concurring opinion in *Lester*.

In concurring in the judgment only, Justice Lanzinger flatly disagreed that the statute at issue “plainly indicated an intention to impose a standard of strict liability . . . .”<sup>144</sup> She noted that the case directly came to the Court “courtesy of the quagmire created by”<sup>145</sup> *Colon I* and *Colon II*. In discussing her disdain for the opinions, she observed that: “Now, every indictment that does not specify the degree of culpability for each statutory element is subject to challenge for the first time on appeal. This is a boon to defendants, a headache to appellate courts, and a nightmare to prosecutors.”<sup>146</sup> Her resolution to the problem was to “call the *Colon* cases aberrant.”<sup>147</sup> While this may be a step in the right direction, preventing defendants from challenging a defective indictment for the first time on appeal, it does nothing to clarify the vague language of Revised Code section 2901.21(B) and does little to remedy the Court’s conflicting interpretations of what signifies a “plain indication” to impose strict liability. The problems presented by Revised Code section 2901.21(B) have gone unrecognized for far too long and beg a long overdue solution from the General Assembly.

#### IV. SOLUTIONS

There are two solutions that will solve inevitable charging inconsistencies, wasteful allocation of resources, and lack of fair notice to Ohio citizens. The first is a long-term solution that urges the General Assembly to amend the vague language contained in section 2901.21(B). The best solution is for the General Assembly to adopt the default rule contained in the Model Penal Code (“MPC”). By adopting the MPC default rule,<sup>148</sup> the General Assembly will finally be able to meet their original goal and purpose of providing a uniform rule that provides fair notice to Ohio citizens.<sup>149</sup>

A short-term solution urges the Ohio judiciary to come to a uniform conclusion on each statute that fails to specify a culpable mental state. By requiring the judiciary to make a uniform decision as to whether a culpable mental state is required, county prosecutors’ offices will be able to look to

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<sup>144</sup> *Lester*, 916 N.E.2d at 1044 (Lanzinger, J., concurring in judgment only).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 1048.

<sup>148</sup> The “objective” of section 2.02 is to express the “basic requirement that unless some element of mental culpability is proved with respect to each material element of the offense, no valid criminal conviction may be obtained.” MODEL PENAL CODE § 2.02 cmt. 1 (Official Draft and Revised Comments 1985). Moreover, section 2.02 rejects the use of strict criminal liability except for a limited class of offenses that impose “no severer sentence than a fine . . . .” *Id.*

<sup>149</sup> OHIO LEGISLATIVE SERV. COMM’N, *supra* note 18, at 38.

the Ohio Jury Instructions to charge individuals consistently. Moreover, average citizens would have a consistent frame of reference to consult, thus providing fair notice to the people of Ohio. If the Ohio judiciary cannot or will not specify their statutory interpretation on these problematic statutes, prosecutors should err on the side of caution and insert recklessness into future indictments to avoid the possibility of having a conviction overturned.

*A. Long-Term Solution – Amendment of Ohio Revised Code Section 2901.21(B) by the General Assembly*

The problems discussed above are a direct consequence of the vague default rule provided by section 2901.21(B). Thus, the General Assembly can do away with these problems by amending the vague language and providing a concrete default rule that provides a clear understanding to courts, attorneys, and citizens of what constitutes criminal behavior. Perhaps the best template for the amendment of section 2901.21(B) can be found in MPC section 2.02(3).<sup>150</sup>

The MPC default rule states: “When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.”<sup>151</sup> Thus, the MPC default rule “establishes recklessness as the default provision of mens rea” because the prosecution must at the very least establish that the defendant was reckless with regard to the element.<sup>152</sup> Moreover, MPC section 2.02(3) has been defined as encompassing an “element analysis” structure and as such “provides the comprehensiveness, clarity, and precision needed to give fair notice and to limit governmental discretion . . . .”<sup>153</sup> The “element analysis” structure of the MPC allows a “single crime [to] employ different *mens rea* criteria for different elements . . . .”<sup>154</sup>

The MPC requires interpreters to assign a mental state to every material element<sup>155</sup> regardless of whether the statute specifies a culpable

<sup>150</sup> MODEL PENAL CODE § 2.02(3). A majority of state jurisdictions adopted the Model Penal Code in full or in part. See George P. Fletcher, *Reflections on Felony-Murder*, 12 SW. U. L. REV. 413, 414 (1981) (“[T]he Model Penal Code has stimulated an extraordinary level of legislative activity. In the last two decades thirty-four states have adopted at least some portion of the recommendations embodied in the Model Code. The most popular provisions are those defining the four kinds of culpability . . . .”).

<sup>151</sup> MODEL PENAL CODE § 2.02(3). The drafters of the Model Penal Code wanted to create a “convenient norm for drafting purposes.” *Id.* at cmt. 5. Section 2.02(3) assumes that “[w]hen purpose or knowledge is required” it will be explicitly stated. *Id.* Moreover, the drafters considered negligence to be “an exceptional basis of liability, [that] should be excluded as a basis unless explicitly prescribed.” *Id.* Thus, this left recklessness as the appropriate default rule in the element analysis scheme.

<sup>152</sup> Richard G. Singer & John Q. La Fond, *CRIMINAL LAW: EXAMPLES AND EXPLANATIONS* 81 (4th ed. 2007).

<sup>153</sup> Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 703 (1983).

<sup>154</sup> Kenneth W. Simmons, *Should the Model Penal Code’s Mens Rea Sections Be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 181 (2003).

<sup>155</sup> Binder, *supra* note 108, at 411.

mental state—this is sometimes termed the “pervasive culpability requirement.”<sup>156</sup> Furthermore, material elements are defined as encompassing any “conduct, circumstance, or result defining an offense or defense of justification or excuse.”<sup>157</sup> By employing this “pervasive culpability requirement,” the MPC prohibits the use of “any strict liability offense that can give rise to imprisonment.”<sup>158</sup> Last but not least, the MPC default rule does not contain the problematic “clear statement rule”<sup>159</sup>—i.e., the language encompassed in section 2901.21(B) allowing strict liability where the General Assembly plainly intended to impose no culpable mental state.<sup>160</sup>

Because the MPC and its default rule have been widely adopted by other state jurisdictions,<sup>161</sup> amending section 2901.21(B) to reflect the MPC default rule carries heavy precedential value and support. An Ohio court interpreting the newly amended section 2901.21(B) could draw on other state interpretations of the default rule for guidance.

As many scholars have noted, the substantive criminal law “protects the most important societal interests and authorizes the most serious sanctions the government may impose . . . .”<sup>162</sup> Moreover, these sanctions carry a severe negative stigma, and require that a “criminal code, more than any other body of law . . . be rational, clear, and internally consistent.”<sup>163</sup> By amending section 2901.21(B) to reflect the default rule contained in the MPC, the General Assembly will be able to avoid problems of judicial interpretation, inconsistencies among charges, and the lack of fair notice to citizens that section 2901.21(B) encourages. By alleviating these problems, the General Assembly will be able to ensure the negative stigma associated with conviction is suffered only by the truly guilty.

### *B. Short-Term Solutions—Ohio Jury Instructions and Insertion of Recklessness into Indictments*

In the interim, there are two short-term solutions the Ohio judiciary and the state may put into action before an amendment by the General Assembly becomes effective. First, the Ohio judiciary should review the Revised Code in its entirety and determine which statutes are problematic—those that fail to specify a culpable mental state and do not have any

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<sup>156</sup> *Id.* at 410.

<sup>157</sup> *Id.* at 408; MODEL PENAL CODE § 1.13(9).

<sup>158</sup> Binder, *supra* note 108, at 411.

<sup>159</sup> *Id.*; *see also* OHIO REV CODE ANN. § 2901.21(B) (where the statute fails to specify a culpable mental state, this section provides that recklessness is sufficient culpability unless there is a clear indication on the part of the General Assembly to impose strict criminal liability).

<sup>160</sup> OHIO REV. CODE ANN. § 2901.21(B).

<sup>161</sup> *See* Fletcher, *supra* note 150, at 414.

<sup>162</sup> Robinson, *supra* note 153, at 682.

<sup>163</sup> *Id.*



precedent specifying the appropriate mental state.<sup>164</sup>

Once the judiciary has identified these problematic statutes, they must come to a cohesive opinion as to the General Assembly's intent and ultimately determine the appropriate mental state required by the statute.<sup>165</sup> After the appropriate mental state is determined for a problematic statute, the judiciary must place the requirement of the mental element into the Ohio Jury Instructions. By providing a consistent mental element for problematic statutes in the Ohio Jury Instructions, it provides prosecutors with a consistent frame of reference for charging individuals. Moreover, it alleviates the possibility of having a conviction overturned on appeal, as was the fate of the indictment in the *Colon* cases.<sup>166</sup>

Lastly, prosecutors may wish to err on the side of caution by simply supplying the culpable mental state of recklessness in the indictment of individuals charged under a problematic statute. By placing recklessness in the indictment and proving the element at trial, the state can avoid the possibility of being overturned for a structural error—failing to specify a culpable mental state.<sup>167</sup> Even if the court later determines that the culpable mental state of recklessness is not required, the State protects against reversal by proving a higher culpable mental state than that which is actually required. As a result, these short-term solutions allow the state and the courts to apply, with some consistency, the problematic language maintained in section 2901.21(B).

## V. CONCLUSION

In light of the Ohio Supreme Court's decision in *Colon I*, the problems associated with section 2901.21(B) have become all too apparent. The Ohio Supreme Court has constantly applied differing approaches in determining what "plainly indicates a purpose to impose strict criminal liability . . . ."<sup>168</sup> These inconsistent approaches and the Court's ruling in *Colon I*, that an indictment which fails to charge a mental element constitutes structural error,<sup>169</sup> requires prosecutors to revisit the vagueness issues subsumed in section 2901.21(B). The Court's inconsistencies and its ruling in *Colon I* taken together lead to three main problems.

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<sup>164</sup> See, e.g., OHIO REV. CODE ANN. §§ 2903.15 (permitting child abuse); 2903.341(B) (patient endangerment); 2907.24(A) (soliciting after a positive HIV test); 2911.01(A)(3) (aggravated robbery); 2911.02(A)(3) (robbery); 2911.11(A)(1) (aggravated burglary); 2913.51(A) (receiving stolen property); 2919.23(B) (interference with custody); 2919.231 (interfering with action to issue or modify support order); 2919.24(A)(1)-(3) (contributing to unruliness or delinquency of a child); 2923.162(A)(1)-(3) (discharge firearm on or near prohibited premises); 2927.27(A)-(B) (illegal bail bond agent practices).

<sup>165</sup> See OHIO REV. CODE ANN. § 2901.21(B).

<sup>166</sup> *Colon II*, 893 N.E.2d at 170-71 (finding significant to the structural error analysis the fact that the judge did not instruct the jury as to the appropriate mental state); see also *supra* note 118.

<sup>167</sup> *Colon I*, 885 N.E.2d at 921-22.

<sup>168</sup> OHIO REV. CODE ANN. § 2901.21(B); see *supra* Part II.D.1-5 and accompanying footnotes.

<sup>169</sup> *Colon I*, 885 N.E.2d at 921.

First, the vague language of section 2901.21(B) leads to inherent inconsistencies in charging among prosecutors' offices throughout the state. Second, this inconsistency in charging will undoubtedly lead to a lack of fair notice to Ohio citizens, thus posing serious concerns regarding their due process rights. Third, prosecutors will undoubtedly spend a considerable amount of resources researching and litigating whether problematic statutes should be charged as reckless or strict liability. These resources would most definitely be better spent advocating for victims of crimes and further developing programs to prevent or deter criminal behavior.

The General Assembly can avoid these problems by amending the clear statement rule currently embodied in section 2901.21(B). The best solution is to adopt the MPC default rule, which encompasses an element analysis approach and a consistent default to recklessness. Moreover, the MPC only provides for strict liability in limited circumstances where the only punishment considered by the statute is the imposition of a fine. By applying the MPC default rule, the General Assembly will finally be able to provide a uniform rule that provides fair notice to the citizens of Ohio.

In the meantime, the Ohio judiciary should specify a cohesive opinion as to statutes that fail to specify a culpable mental state and have no case law determining what mental state is appropriate under section 2901.21(B). Once determining the appropriate mental state for these problematic statutes,<sup>170</sup> the judiciary must place an appropriate instruction into the Ohio Jury Instructions. By providing these instructions, the judiciary can ensure consistency among charging and provide a consistent frame of reference to Ohio citizens, thus alleviating the problems of fair notice and due process.

Prosecutors can avoid unwanted legal hassle by simply inserting the element of recklessness into the indictments of problematic statutes. By erring on the side of caution, the prosecution can avoid a defendant's use of the rationale in *Colon I* to overturn an otherwise legitimate conviction. Of course, the overall and best solution is for the General Assembly to correct the vague language of 2901.21(B), and thus untangle the web of confusion currently embodied by the default rule of the Ohio Revised Code.

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<sup>170</sup> See *supra* note 127.