
NOTE

MENS REA IN ALASKA: FROM BAD THOUGHTS TO NO THOUGHTS?

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This Note examines how the most recent Alaska Supreme Court decision affirming the criminal conviction of the captain of the Exxon Valdez oil tanker for negligent discharge of oil under the civil standard of negligence departed from Alaska's prior mens rea jurisprudence. Alaska had operated under a Model Penal Code-based mens rea regime that required a somewhat heightened showing of mens rea. Although the decision has not been widely applied, it has the potential to dramatically alter the scope of protections afforded criminal defendants in Alaska.

I. INTRODUCTION: UNDERWAY WITH *STATE V. HAZELWOOD*

A. Civil Responsibility and Criminal Accountability

In the American legal system, we hold each other responsible for wrongdoing with either civil remedies or criminal punishment. The former involves paying money for harms caused. The latter involves far more serious consequences—the loss of life or liberty.

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Counsel in the criminal system, unlike in a civil suit, are rarely equally matched. The prosecutor usually commands greater resources than the defendant on trial. Despite our best efforts, that advantage sometimes places a criminal defendant in the untenable position of defending against the vast resources of government prosecutors from a position of weakness.

To help alleviate those inequities, we adhere to a structural framework that safeguards the rights of individuals. This framework is rigorous enough to ensure that every criminal defendant is afforded a fair trial, one in which the defendant is presumed innocent until proven guilty. That framework is built on statute and practice. Legislators have incorporated due process provisions in our state constitutions, in the rules of evidence and procedure, and in the criminal code itself. Yet we do not depend on the foresight of legislators alone. As the ultimate bulwark for fairness in the criminal justice system, our courts are empowered to intercede in ways both equitable and appropriate.

Courts frequently act towards that aim by reading a mens rea element into criminal codes. A criminal defendant must not only commit a bad act before punishment can be administered; the defendant must do so as the result of “bad thoughts.” In other words, in most cases, the defendant must possess a “culpable” mental state to be blameworthy of the alleged crime.¹ Alaska’s Revised Criminal Code establishes the default state of mind for criminal punishment to attach as either “knowingly” or “recklessly.”² In fact, when the Code was first enacted, only three crimes used a lower “criminal negligence” standard.³ Crimes of “inadvertence” come before Alaska’s courts through various other regulatory statutes not contained in Title 11 of the Criminal Code.

The Code distinguishes criminal from civil negligence by requiring a *gross* deviation from the standard of care that a reasonable person would have observed under like circumstances for criminal negligence, whereas civil negligence merely requires any

1. See Barry Jeffrey Stern, *Consciousness of Wrongdoing: Mens Rea in Alaska*, 1 ALASKA L. REV. 1, 1–2 (1984).

2. See ALASKA STAT. § 11.81.610(b) (2004). The default mens rea required is “knowingly” for “conduct” offenses and “recklessly” for “circumstance or result” crimes. *Id.* The code also generally requires a “culpable mental state” for criminal liability. § 11.81.600(b). A culpable mental state is defined as intentionally, knowingly, recklessly, or with criminal negligence. § 11.81.900(14).

3. See Stern, *supra* note 1, at 45 (citing ALASKA STAT. § 11.41.130(a) (1983) (criminally negligent homicide); § 11.46.430(a) (criminally negligent burning); § 11.56.370(a) (permitting an escape through criminal negligence)).

deviation from a reasonable standard of care.⁴ Alaska's Pattern Criminal Jury Instruction defines criminal negligence as "something more than the slight degree of negligence necessary to support a civil action for damages and is negligence of a degree *so gross as to be deserving of punishment*."⁵ In practical terms, this distinction affords the criminal defendant the right to emphasize to the jury the seriousness of criminal punishment.⁶ It also serves the broad policy goal of reserving criminal sanctions for criminals, and civil punishments for accidental offenders. Alaska's courts have been recognized as being among the vanguard that support this axiom of fairness. Indeed, criminal law casebooks use Alaska examples to illustrate the role mens rea plays in the criminal justice system.⁷ A recent decision of the Alaska Supreme Court, however, may signal a change. In *State v. Hazelwood*,⁸ the court let stand a criminal conviction and jail sentence under the negligence standard previously applicable only to civil matters.

B. Course Charted Herein

This Note evaluates *State v. Hazelwood*, and explores whether the conviction of the captain of the *Exxon Valdez* for negligent discharge of oil changed the criminal standard of negligence in Alaska. Part II begins with a brief overview of the events giving rise to the criminal case against Captain Hazelwood. Part III suggests that Chief Justice Compton's dissent correctly outlined the binding nature of the Rule of Lenity⁹ and determines that the Rule should have applied in this case. Part IV discusses what Chief Jus-

4. ALASKA STAT. § 11.81.900(a)(4) (2004); *see also* Andrew v. State, 653 P.2d 1063, 1066 (Alaska Ct. App. 1982) ("[C]ivil negligence [is precluded] from forming the basis for a criminal conviction.").

5. *State v. Hazelwood (Hazelwood IV)*, 946 P.2d 875, 889 (Alaska 1997) (Compton, C.J., dissenting) (emphasis added) (quoting Alaska Pattern Jury Instruction (Criminal) 81.900(a)(4)).

6. *See generally* Stern, *supra* note 1, which extensively reviewed the evolution of Alaska's mens rea requirement. This Note contributes to that discussion by considering how the *Hazelwood* decision affects that jurisprudence.

7. *See, e.g.,* JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS 237-239 (4th ed. 2000).

8. *Hazelwood IV*, 946 P.2d 875 (Alaska 1997).

9. *See* *State v. Andrews*, 707 P.2d 900, 907 (Alaska Ct. App. 1985) ("Ambiguities in criminal statutes must be narrowly read and construed strictly against the government."); BLACK'S LAW DICTIONARY 1358-59 (8th ed. 2004) ("A court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment.").

tice Compton called the majority's "violence to precedent"; and Part V highlights the majority opinion's troubling substitution of the due process protections afforded criminal defendants with those of civil litigants. The Note argues that this substitution was unnecessary and unwarranted. The facts of the case demonstrate Hazelwood's guilt under the previous criminal standard of negligence. Thus, the *Hazelwood* court could and should have preserved the requirement for *criminal* intent that Alaska law had earlier evidenced. Part VI suggests that industry standards can provide a reliable means for the courts to determine when a ship's captain merits criminal punishment.

II. BACKGROUND: EVENTS OF THE LOG

A. Captain Hazelwood's Voyage

Just after midnight on March 24, 1989, the *Exxon Valdez* oil tanker, operated by the Exxon Shipping Company, ran aground on Bligh Reef, approximately one and a half miles outside the designated tanker lane.¹⁰ The vessel's captain, Joseph J. Hazelwood, began the outbound trek on the bridge, and stayed there while a local pilot helped steer the vessel out of Valdez Harbor and through the narrows.¹¹ But at the time of the grounding, Captain Hazelwood was in his cabin after having turned over the watch to Third Mate Gregory Cousins.¹² Captain Hazelwood returned to the bridge when the navigation error became apparent, i.e., when the ship ran aground.¹³

The grounding was not due to natural causes; seas were calm and visibility was good.¹⁴ Moreover, mechanical errors played no

10. *Hazelwood v. State (Hazelwood III)*, 912 P.2d 1266, 1268 (Alaska Ct. App. 1996); Craig Medred, *NTSB Investigates Whether Ship Tried a Shortcut Course, Perilous Move May Explain Tanker's Position*, ANCHORAGE DAILY NEWS, Apr. 2, 1989, at A1.

11. *See* Medred, *supra* note 10, at A1.

12. Although Cousins' licenses had been upgraded from third mate to second mate two months earlier, his title remained that of third mate because he was hired by Exxon to fill that role. Cousins was qualified to run the ship at sea with a second mate's license; however, he was not certified to pilot the ship through Prince William Sound. Even so, it is generally accepted that someone with Cousins' skill and experience should have had sufficient expertise to guide the ship safely out of the Sound, although it would have been technically illegal. *Id.*

13. *See Hazelwood v. State (Hazelwood I)*, 836 P.2d 943, 944 (Alaska Ct. App. 1992).

14. Medred, *supra* note 10, at A1.

part.¹⁵ Both the vessel and the navigation aids in the channel were in perfect working order, and the bridge team had at its disposal some of the most sophisticated commercial navigation equipment available.¹⁶ The channel was relatively easy to navigate, and the reef had been “charted and named” since 1794.¹⁷ Nevertheless, *Valdez* ran aground—and the consequences were catastrophic. *Valdez* eventually spilled eleven million gallons of oil into Prince William Sound, directly causing enormous economic and environmental damage.¹⁸

Though his outbound journey had ended, Captain Hazelwood’s legal trek had just begun with his now-infamous radio call. Captain Hazelwood reported the incident by radio to the Coast Guard Traffic Center in Valdez, approximately twenty minutes after the grounding (likely after the vessel’s inability to free herself became apparent).¹⁹ The federal and state investigations that followed provided evidence of errors in seamanship.²⁰ These findings

15. *In re Exxon Valdez*, 296 F. Supp. 2d 1071, 1077 (D. Alaska 2004).

16. Apart from traditional navigational aids like charts, *Valdez* employed a LORAN (Long-Range Navigation System), a kind of Global Positioning System (“GPS”) that is augmented by shore-based emitters. This gear should have been able to pinpoint the ship’s exact location. *Valdez* also had two radars that could have been used to calculate the distance to the shoreline and all of the channel’s charted dangers in an instant. See Medred, *supra* note 10, at A1.

17. See *In re Exxon Valdez*, 270 F.3d 1215, 1221 (9th Cir. 2001).

Bligh Island and Bligh Reef have been known to navigators for a long time. Captain George Vancouver charted and named the island on his third voyage to the North Pacific on the *Discovery* [sic] in 1794. The Bligh Island Reef has long been mapped on U.S. Coast and Geodetic Survey maps, shortened to Bligh Reef by the Coast and Geodetic Survey in 1930. Captain William Bligh and Vancouver had been officers together sixteen years earlier, on the *Resolution* [sic], when Captain James Cook, among the greatest navigators in history, explored Alaska and the South Pacific. Captain William Bligh is infamous from Fletcher Christian’s mutiny on the *Bounty* [sic]. The infamy was refreshed in 1989, the 200th anniversary of the mutiny on the *Bounty*, by Captain Joseph Hazelwood of the *Exxon Valdez* [sic].

Id. (notations and citations omitted).

18. See *id.* at 1223–24.

19. *Hazelwood v. State (Hazelwood I)*, 836 P.2d 943, 944 (Alaska Ct. App. 1992).

Ah, it’s *Valdez* back. Ah, we’ve—ah, should be on your radar there—we’ve fetched up, ah, hard aground north of, ah, Goose Island off Bligh Reef. And, ah, evidently, ah, leaking some oil, and, ah, we’re going to be here for awhile. And, ah, if you want, ah, so you’re notified. Over.

Id.

20. See *id.* at 945. But blame was not limited to the crew of *Valdez*. Both the oil industry and state regulators received considerable criticism. For a brief survey of some of the regulatory changes that went into effect in Alaska and other states

became the basis for Hazelwood's subsequent indictment and prosecution for reckless endangerment, operating a watercraft while intoxicated, and negligent discharge of oil.²¹ The last charge is the focus of this Note, which argues that Hazelwood's conviction changed Alaska's requirement that the prosecutor show the defendant possessed mens rea sufficiently culpable to be "deserving of [criminal] punishment."²²

B. Captain Hazelwood's Legal Trek

At the outset, Captain Hazelwood moved to dismiss all of the charges against him.²³ He argued that he was immune from prosecution because he had immediately reported the *Exxon Valdez's* grounding and its discharge of oil to the Coast Guard in compliance with the Federal Water Pollution Control Act.²⁴ Hazelwood's claim rested on a paragraph that conferred immunity on any person who complies with the requirement to make an immediate report.²⁵ The trial court found both the independent source rule²⁶ and

along the West Coast, see James E. Beaver et al., *Stormy Seas? Analysis of New Oil Pollution Laws in the West Coast States*, 34 SANTA CLARA L. REV. 791 (1994).

21. *Hazelwood I*, 836 P.2d at 945.

22. *Hazelwood IV*, 946 P.2d 875, 889 (Alaska 1997) (Compton, C.J., dissenting) (quoting Alaska Pattern Jury Instruction (Criminal) 81.900(a)(4)).

23. *Hazelwood I*, 836 P.2d at 945.

24. 33 U.S.C. § 1321 (1988).

25. *Id.* In pertinent part, the statute provides:

Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. . . . Any such person (A) in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(i) of this subsection, or (B) in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(ii) of this subsection and who is otherwise subject to the jurisdiction of the United States at the time of the discharge, or (C) in charge of an onshore facility or an offshore facility, who fails to notify immediately such agency of such discharge shall, upon conviction, be fined in accordance with Title 18, or imprisoned for not more than 5 years, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

Id. § 1323(b)(5).

26. BLACK'S LAW DICTIONARY 786 (8th ed. 2004) ("[E]vidence obtained by illegal means may nonetheless be admissible if that evidence is also obtained by legal means unrelated to the original illegal conduct.").

the inevitable discovery doctrine²⁷ applicable to Hazelwood's case and denied Hazelwood's motion to dismiss.²⁸ A jury convicted Hazelwood of the negligent discharge of oil charge, a misdemeanor.²⁹ The trial judge sentenced Hazelwood to ninety days in jail and ordered him to pay a \$1,000 fine.³⁰ The trial court, however, suspended both the jail time and the fine,³¹ and conditioned the suspension on Hazelwood completing one year of probation, performing 1,000 hours of community work, and paying \$50,000 in restitution.³²

Hazelwood appealed his conviction on the grounds that the trial court improperly denied his motion to dismiss for immunity, failed to suppress certain evidence of intoxication, and incorrectly instructed the jury regarding the applicable mens rea element required for a proper conviction.³³ Hazelwood also appealed his sentence.³⁴ The Alaska Court of Appeals held that Hazelwood's conviction was barred by immunity and that due process prohibited his prosecution based on evidence resulting from his report.³⁵ When the Alaska Supreme Court reversed that decision,³⁶ the court of

27. See *Hazelwood I*, 836 P.2d. at 950 (noting that a prosecutor may avoid suppression of illegally obtained evidence by demonstrating that the "same evidence would inevitably have been discovered through lawful, untainted means had the illegality not occurred").

28. *Id.* at 945.

29. *Id.* at 944 (citing ALASKA STAT. § 46.03.740 & § 46.03.790(a)(1)) (1988).

30. *Id.*

31. The trial judge later explained his reasoning to the press. See Marilee Enge, *Hazelwood Sentenced to Cleanup: Judge Gives Him 1,000 Hours on Oiled Beaches*, ANCHORAGE DAILY NEWS, Mar. 24, 1990, at A1 ("[t]he captain has already suffered 'enormous shame' and has undoubtedly been deterred from future crimes").

32. *Hazelwood I*, 836 P.2d at 946.

33. *Id.*

34. *Id.*

35. *Id.* at 954. The court reversed his conviction after considering only Hazelwood's asserted immunity defense and not ruling on the merits of his other claims. *Id.* at 944.

36. *State v. Hazelwood (Hazelwood II)*, 866 P.2d 827, 828 (Alaska 1993) (allowing prosecution under the "inevitable discovery doctrine" even though urine evidence showing intoxication might not have been collected without Captain Hazelwood's report). *But see Hazelwood III*, 912 P.2d 1266, 1276 n.12 (Alaska Ct. App. 1996).

[B]ecause Hazelwood was aware that he was entitled to immunity from prosecution by virtue of his immediate report and thus had no reason to fear criminal prosecution, he stood to lose little by being fully cooperative when he dealt with investigators who responded to his report. Had the investigation been initiated independently of the immediate report,

appeals again overturned Hazelwood's conviction, on the basis of the trial court's failure to correctly instruct the jury.³⁷ Over Hazelwood's objection, the trial court had instructed the jury that the defendant would be negligent if he "fail[ed] to perceive an unjustifiable risk that the result will occur; the risk must be of such a nature and degree that the failure to perceive it constitutes a deviation from the standard of care that a reasonable person would observe in the situation."³⁸ The trial court thus adopted the civil standard for negligence.

The Alaska Supreme Court again reversed.³⁹ It held that the civil standard for negligence could be used in Hazelwood's criminal conviction and remanded the case to the court of appeals for any unresolved issues.⁴⁰ The court of appeals subsequently found that admission of Hazelwood's statements concerning intoxication was harmless error and thus the sentence was reasonable.⁴¹ The second Alaska Supreme Court decision departs from Alaska's prior mens rea jurisprudence, which shall now be examined.

III. RULE OF LENITY: A STARE DECISIS TO STEER HER BY

A. Ambiguous Mens Rea Requirement in the Statute

The criminal statute under which Captain Hazelwood was convicted for negligent discharge of oil did not specify the requisite level of mens rea required for conviction.⁴² It reads as follows:

Hazelwood would have had no reason to consider himself immune from prosecution; consequently, he might not have been motivated to be as cooperative with investigators as he was when he believed himself immune. In particular, the record indicates that Hazelwood helped investigators locate urine sampling kits, yet nothing in the record provides assurance that he would have assisted in the same manner had he not believed himself immune from prosecution.

Id. (citations omitted).

37. *Id.* at 1279–80. In no uncertain terms, the court found that "[c]ivil negligence cannot be relied on to define 'standard criminal offenses such as this'"; rather, "[t]o convict Hazelwood of a crime, the jury should have been required to find him criminally negligent." *Id.* at 1279.

38. *Id.* at 1278.

39. *Hazelwood IV*, 946 P.2d 875, 886 (Alaska 1997).

40. *Id.*

41. *Hazelwood v. State (Hazelwood V)*, 962 P.2d 196, 197–98 (Alaska Ct. App. 1998).

42. Captain Hazelwood was acquitted of criminal mischief, reckless endangerment, and operating a watercraft while intoxicated. See Don Hunter, *Hazelwood Cleared on Three Counts, Jury Finds Exxon Valdez Skipper Guilty Only of Misdemeanor Oil Discharge*, ANCHORAGE DAILY NEWS, Mar. 23, 1990, at A1.

A person may not discharge, cause to be discharged, or permit the discharge of petroleum, acid, coal or oil tar, lampblack, aniline, asphalt, bitumen, or a residuary product of petroleum, into, or upon the waters or land of the state except in quantities, and at times and locations or under circumstances and conditions as the department may by regulation permit or where permitted under art. IV of the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended.⁴³

The notes for this section of the statute contained no guidance as to what level of mens rea might be appropriate for the prohibited conduct.⁴⁴

As Chief Justice Compton pointed out in his dissent, the majority in *Hazelwood IV* spent a considerable portion of its analysis contemplating the correct interpretation of the statute.⁴⁵ The majority would not have done so were the mens rea required for conviction clear from the statute's text.⁴⁶ In the face of this ambiguity, the Rule of Lenity provided the only safe course for the Alaska Supreme Court to have navigated.

B. The Rule of Lenity, Not Ambiguous at All

Alaska courts have accepted the Rule of Lenity as a default rule of statutory construction for some time. In *State v. Andrews*,⁴⁷ the supreme court found that “[a]mbiguities in criminal statutes must be narrowly read and construed strictly against the government.”⁴⁸ In his dissent in *Hazelwood*, Chief Justice Compton cited two earlier opinions that both require construing the mens rea

43. ALASKA STAT. § 46.03.740 (1990). The exceptions contained in art. IV of the International Convention for the Prevention of Pollution of the Sea by Oil allow for small discharges that may be necessary for the ship's health, if in deep water and at considerable distance from land. Int'l Convention for the Prevention of Pollution of the Sea by Oil, art. IV, May 12, 1954, 12 U.S.T. 2989, 2005 WL 3759644.

44. *Id.* The amended statute now explicitly states that “a person who with *criminal negligence* discharges oil in violation of AS 46.03.740” is guilty of either a class C or A felony depending on the volume released. ALASKA STAT. § 46.03.790(d) (2004) (emphasis added).

45. *Hazelwood IV*, 946 P.2d 875, 886 n.1 (Alaska 1997) (Compton, C.J., dissenting).

46. *Id.*

47. 723 P.2d 85, 86 (Alaska 1986).

48. *Id.* at 86–87 (affirming this statement from *State v. Andrews*, 707 P.2d 900, 907 (Alaska Ct. App. 1985)).

element in an otherwise ambiguous criminal statute as more than mere civil negligence.⁴⁹

More recently, in *Kenai Peninsula Borough v. Cook Inlet Region*,⁵⁰ the Alaska Supreme Court held that “[s]tatutes are to be construed to avoid a substantial risk of unconstitutionality where adopting such a construction is reasonable.”⁵¹ Hazelwood was defending against criminal charges and faced the possibility of jail time. Incarceration for a criminal offense absent an adequate showing of mens rea raises serious due process concerns.⁵² Further, it would have been quite reasonable to construe the statute to require criminal negligence. The court could have instructed the jury to render a guilty verdict only if Hazelwood possessed a mens rea greater “than the slight degree of negligence necessary to support a civil action” and “of a degree *so gross as to be deserving of punishment*.”⁵³ Thus, under the court’s prior jurisprudence, the Rule of Lenity was applicable.

While not binding on the Alaska Supreme Court, it is helpful to examine the application of the Rule of Lenity under federal notions of due process. The United States Supreme Court recently incorporated a broad reading of the Rule into its interpretation of a criminal statute in favor of the criminal defendant.⁵⁴ The Court considered the mens rea required by a Florida statute to determine if the conduct criminalized therein constituted a “crime of violence.”⁵⁵ In considering the section of the statute proscribing the

49. *Hazelwood IV*, 946 P.2d at 886 (Compton, C.J., dissenting) (citing *Wells v. State*, 706 P.2d 711, 713 (Alaska Ct. App. 1985) (finding that the Rule of Lenity requires “ambiguities in penal statutes must be resolved in favor of the accused”); *Manderson v. State*, 655 P.2d 1320, 1323 (Alaska Ct. App. 1983) (deferring to the criminal defendant’s argued interpretation under the Rule of Lenity because both the state’s and the defendant’s positions were “arguably reasonable”)).

50. 807 P.2d 487 (Alaska 1991).

51. *Id.* at 498.

52. *State v. Fremgen*, 914 P.2d 1244, 1245 (Alaska 1996).

[I]t would be a deprivation of liberty without due process of law to convict a person of a serious crime without the requirement of criminal intent. . . . [W]e adhere to the principles articulated in *Speidel*, *Alex*, *Kimoktoak*, and *Guest* that, except for public welfare type of offenses, strict criminal liability without some form of mens rea is violative of Alaska’s Constitution.

Id. at 1245–46. *See also Hazelwood IV*, 946 P.2d at 890 n.5 (Compton, C.J., dissenting) (“all cases which carry the possibility of incarceration must include a mens rea requirement, unlike cases which do not”).

53. *Hazelwood IV*, 946 P.2d at 889 (Compton, C.J., dissenting) (emphasis added).

54. *See generally* *Leocal v. Ashcroft*, 543 U.S. 1, 8–12 (2004).

55. *Id.* at 10–11.

use of physical force, the court read in “a higher degree of intent than negligent or merely accidental conduct,” based on the context in which the contested terms were used.⁵⁶ The Court held that even if the statute’s language was ambiguous, it “would be constrained to interpret any ambiguity in the statute in petitioner’s favor” because of its potential application in criminal proceedings.⁵⁷ Thus, the Court affirmed the Rule of Lenity’s role in statutory interpretation and required a higher level of mens rea when the statute might apply to criminal defendants.⁵⁸

In contrast, in a separate case, the Court declined to apply the Rule of Lenity when a straightforward reading of the statute revealed no ambiguity.⁵⁹ The Court held that because the statute’s “mens rea requirements narrow the sweep of the statute,” its interpretation “is not a case of guesswork reaching out for lenity.”⁶⁰ In other words, the statute was narrow enough as enacted; fairness demanded no application of the Rule of Lenity. As these and related decisions rest on federal constitutional principles of the appropriate protections for criminal defendants,⁶¹ Alaska courts must consider carefully the boundaries they define.⁶² For Hazelwood’s

56. *Id.* at 9.

57. *Id.* at 12 n.8.

58. *Id.* (citing *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517–18 (1992) (“[The statute] is a criminal statute, and it has both criminal and noncriminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.”)).

59. *United States v. Wells*, 519 U.S. 482, 499 (1997) (“The rule of lenity applies only if, after seizing everything from which aid can be derived . . . we can make no more than a guess as to what Congress intended.”).

60. *Id.*

61. *See, e.g., Morissette v. United States*, 342 U.S. 246, 263 (1952) (declining to “radically change the weights and balances in the scales of justice” because “[t]he purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution’s path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries”).

62. *Cf. 2 SUTHERLAND STATUTORY CONSTRUCTION* § 4509 (Horack 3d ed. 1943) (recognizing that the legislature and the courts both promise to support the state and federal constitutions and that it must be presumed that they intended to do so; anything contrary must necessarily have been by mistake); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 350 (1994) (arguing that the Rule of Lenity, for federal criminal law at least, furthers “legislative supremacy not just by preventing courts from covertly undermining legislative decisions, but also by forcing Congress to shoulder the entire burden of criminal lawmaking even when it prefers to cede some part of that task to the courts”). *See*

case, the Rule of Lenity directed an interpretation of the statute that avoided infringement of the constitutional protections afforded him as a criminal defendant; namely, that he not be convicted for his bad act unless the state could show he acted with some level of criminal intent.

Prior to *Hazelwood*, criminal defendants in Alaska could not be convicted of serious offenses on the basis of simple negligence.⁶³ This allowed criminal defendants to put one important question to the jury: Did I act in a non-accidental way or with so little regard for the welfare of others as to deserve criminal penalties? The practical effect of this mens rea requirement was that a juror had to pause to consider whether a defendant merited the full range of criminal penalties that the state could impose. This is a procedural safeguard, any curtailment of which should be narrowly tailored in accordance with constitutional principles. The legislature recognized the need for this safeguard when it adopted the 1978 Revised Criminal Code.⁶⁴ Alaska courts perceived the need to secure criminal defendants against an otherwise acceptable civil construction of a statute precisely because the punitive consequences of the criminal system tend to be so much more severe. Prior to *Hazelwood IV*, courts had met this need by construing statutory ambiguity against the government.

IV. VIOLENCE TO PRECEDENT: TURNING INTO THE WIND

A. *Speidel* Rejects the Civil Standard of Negligence

In *Speidel v. State*,⁶⁵ the Alaska Supreme Court rejected outright the civil standard of negligence as the appropriate level of mens rea for criminal punishment. There, the defendant was prosecuted and convicted for failing to return a rented motor vehicle.⁶⁶ The court dealt with the inherent ambiguity in the statute with a Rule of Lenity methodology, without actually using that term⁶⁷—it categorized the State’s interpretation as “contrary to the

generally Bruce A. Markell, *Bankruptcy, Lenity, and the Statutory Interpretation of Cognate Civil and Criminal Statutes*, 69 IND. L.J. 335, 336–43 (1994).

63. *Hazelwood IV*, 946 P.2d 875, 877–78 (Alaska 1997).

64. See Stern, *supra* note 1, at 40. The legislature carefully limited the role of criminal negligence in the penal system. See *id.* (citing ALASKA SENATE J. SUPP. NO. 47, at 144 (June 12, 1978)) (“‘Criminal negligence’ will not apply unless the term is expressly included in the statute defining the offense.”).

65. 460 P.2d 77 (Alaska 1969).

66. *Id.* at 78.

67. See *id.* at 80–82.

general conditions of penal liability requiring not only the doing of some act by the person to be held liable, but also the existence of a guilty mind during the commission of the act.”⁶⁸

The statute in *Speidel* defined the requisite culpable mental state to mean that the defendant “willfully neglects,” or, in other words, the defendant “omits, fails, or forebears, with a conscious purpose to injure, or without regard for the rights of the owner, or with indifference whether a wrong is done the owner or not.”⁶⁹ The court rejected a reading of the statute that allowed for conviction when the defendant merely acted “unwittingly or inadvertently or negligently.”⁷⁰ In unambiguous terms, it declared those portions of the statute that supported such a construction to be “invalid and of no effect.”⁷¹ With its 1969 decision in *Speidel*, the Alaska Supreme Court put its imprimatur on the principle that for the state to convict a defendant for a criminal offense “without proving criminal intent, is to deprive such person of due process of law.”⁷² What then caused the court to accept the civil standard for negligence in 1997?

The majority did not clearly distinguish *Speidel* in upholding Captain Hazelwood’s conviction.⁷³ Chief Justice Compton’s dissent, however, identified one possible distinction: he recognized that the conviction in *Speidel* involved a felony with more severe punishment than the misdemeanor for which Hazelwood was convicted.⁷⁴ The majority opinion made no such felony-misdemeanor distinction. But as the Chief Justice eloquently pointed out, “[s]uch a rule would be preferable to that which the court adopt[ed].”⁷⁵ A rule of construction of this nature, one that limited civil negligence to misdemeanor offenses, would contain its own

68. *Id.* at 80.

69. *Id.* at 78 (quoting ALASKA STAT. § 28.35.026(a)–(b) (1968)).

70. *Id.* at 80.

71. *Id.*

72. *Id.*

73. The majority briefly recognized the contrary nature of *Speidel*, but justified the *Hazelwood* holding by comparison to strict liability offenses. *Hazelwood IV*, 946 P.2d 875, 879–80 (“Further decisions reveal, however, that in some situations more will be required, and sometimes less. *Speidel* found a denial of due process where the defendant had been convicted of . . . negligent failure to return a rented automobile. . . . On the other hand, elsewhere we have allowed the mens rea element to be dispensed with entirely. We have allowed strict liability to be read into public welfare offenses.”).

74. *Id.* at 886–87 n.3 (Compton, C.J., dissenting) (“It could be argued that the greater the potential punishment, the greater must be the minimum mens rea for the crime.”).

75. *Id.*

limits and provide a meaningful marker for the lower courts.⁷⁶ Such a rule would be far more preferable than the one *Hazelwood* adopted because it would have a limit, unlike *Hazelwood's* near evisceration of the prosecutorial burden for showing a culpable mental state.

Nevertheless, the majority in *Hazelwood* did not attempt to limit the reach of its opinion in this manner, likely because of a problem that Chief Justice Compton highlighted: Captain Hazelwood's ninety-day jail sentence stood in the path of a distinction premised on the severity of punishment.⁷⁷ The Alaska Supreme Court has recognized the repercussions of a jail sentence since at least 1981. In *State v. Rice*,⁷⁸ Justice Matthews suggested that Due Process requires a "culpable mental state" in order to impose a prison sentence on a criminal defendant.⁷⁹ He categorized a prison sentence as "an important, even traumatic, event in the life of a human being" regardless of its duration or the level of incarceration.⁸⁰ "In my view due process requires that there be a culpable mental state in every case where a sentence of imprisonment may be imposed."⁸¹ This dividing line between crimes for which jail sentences may be imposed and other less-serious crimes exists in other areas of criminal law, including the right to trial by jury and the right to appointed counsel.⁸²

The considerable stigma associated with being imprisoned as well as the potential danger of incarceration suggest Captain Hazelwood was owed every measure of protection from wrongful conviction—including a requirement that the state establish that he possessed a mens rea deserving of criminal punishment.⁸³ Thus, had the court adhered more closely to its own precedent, it would have overturned Captain Hazelwood's conviction and required a showing of criminal negligence.

76. Indeed, there is some precedent for construing ambiguous misdemeanor statutes in this way. See *Langesater v. State*, 668 P.2d 1359, 1360 (Alaska Ct. App. 1983); *Gudjonson v. State*, 667 P.2d 1254, 1256 (Alaska Ct. App. 1983); *Reynolds v. State*, 655 P.2d 1313, 1315–17 (Alaska Ct. App. 1982).

77. *Hazelwood I*, 836 P.2d 943, 944 (Alaska Ct. App. 1992) ("Superior Court Judge Karl S. Johnstone sentenced Hazelwood to ninety days in jail.").

78. 626 P.2d 104, 116 (Alaska 1981) (Matthews, J., concurring).

79. *Id.*

80. *Id.*

81. *Id.*

82. See *id.* at 116 n.1 (citing *Alexander v. City of Anchorage*, 490 P.2d 910, 915 (Alaska 1971); *Baker v. City of Fairbanks*, 471 P.2d 386, 401–02 (Alaska 1970)).

83. *Hazelwood IV*, 946 P.2d 875, 886–87 n.3 (Alaska 1997) (Compton, C.J., dissenting).

B. *Guest's* and *Rice's* Rejection of Strict Liability Are Not Equivalent to an Acceptance of Civil Negligence

The *Hazelwood* majority invokes two cases that reject strict liability in criminal prosecutions and require a showing of a culpable mental state: *State v. Rice*⁸⁴ and *State v. Guest*.⁸⁵ The opinion does not delve deeply into the substance of these cases; rather, it gives them one paragraph.⁸⁶ That is not surprising. Neither *Guest* nor *Rice* support using the civil standard of negligence as the default level of mens rea required for a criminal conviction.

In *Rice*, the defendant was charged with the crime of “transporting meat taken illegally.”⁸⁷ Mr. Rice, a “big game guide,” flew his clients to a hunting area to hunt moose.⁸⁸ Because they flew and hunted on the same day, the conduct was illegal.⁸⁹ Although Mr. Rice’s clients were charged as co-defendants for the unlawful hunt, only Mr. Rice’s transporting offense presented a mens rea question.

The Supreme Court of Alaska considered whether the administrative regulation under which Rice was charged required violative intent.⁹⁰ The court was asked to reverse and uphold the jury instruction Rice’s counsel requested but did not receive: “[I]n order to convict, the jury must be satisfied that the person either knew, or reasonably should have known, that the game or parts of game were illegally taken.”⁹¹

The court characterized its inquiry as one of “whether a statute, which does not explicitly require criminal intent, implicitly requires it.”⁹² The *Rice* court did not confuse the “reasonably should have known” standard, which fits within the bounds of a civil proceeding, with the distinct characteristics of actual criminal intent.⁹³ *Rice* did not equate the standard of ordinary negligence required in tort law with the mens rea required in criminal trials. Indeed, *Rice*

84. 626 P.2d 104 (Alaska 1981).

85. 583 P.2d 836 (Alaska 1978).

86. *Hazelwood IV*, 946 P.2d at 879.

87. *Rice*, 626 P.2d at 106.

88. *Id.*

89. Specifically, they violated former section 81.070(b)(6) of the Alaska Administrative Code. ALASKA ADMIN. CODE tit. 5, § 81.070(b)(6) (repealed 1981) (a “person who has been airborne may not thereafter take or assist in taking big game until after 3:00 a.m. following the day in which the flying occurred.”).

90. *Rice*, 626 P.2d at 106.

91. *Id.* at 107.

92. *Id.*

93. *See id.*

approvingly cited *State v. Guest*, the other case on which the *Hazelwood* court depended:

We recognized in *Speidel v. State*, that consciousness of wrongdoing is an essential element of penal liability. It is said to be a universal rule that an injury can amount to a crime only when inflicted by intention that conduct cannot be criminal unless it is shown that one charged with criminal conduct had an awareness or consciousness of some wrongdoing.⁹⁴

Unlike the *Hazelwood* court, the *Rice* court drew a bright and clear distinction between civil injuries resulting from negligence and harms inflicted by criminal conduct.⁹⁵

The *Rice* court also recognized its obligation to adhere to the Rule of Lenity, though again without actually using that term: “Criminal statutes will be strictly construed to require some degree of mens rea absent a clear legislative intent to the contrary.”⁹⁶ The supreme court assigned to lower courts an obligation “to determine whether mens rea must be made part of the definition of the particular offense.”⁹⁷ Unlike *Hazelwood*, the *Rice* court acknowledged that, although exceptions might sometimes be made (in particular for strict liability offenses), those exceptions would not support applying the civil standard of negligence in criminal cases.

In other words, the existence of some strict liability offenses does not equate to an across-the-board erosion of the mens rea requirement in criminal cases. The *Rice* court cautioned that strict liability must always remain “an exception to the rule which requires *criminal* intent.”⁹⁸ In contrast, the *Hazelwood* court devotes the bulk of its opinion to a discussion of strict liability offenses;⁹⁹ its not-so-subtle suggestion is that if the mens rea requirement is flexible enough to accommodate strict liability, it must surely be able to accommodate a civil negligence standard. But neither *Speidel* nor *Rice* tolerates the civil negligence standard in criminal cases. To the contrary, the second case the *Hazelwood* court relied on, *State v. Guest*, reinforced the importance of the defendant’s right to force the state to establish criminal intent.

In *Guest*, the Supreme Court of Alaska firmly rejected any inkling of a flexible mens rea requirement for non-general welfare

94. *Id.* (quoting *State v. Guest*, 583 P.2d 836, 838 (Alaska 1978)).

95. The *Rice* court reaffirmed an earlier holding that mandated a case-by-case inquiry into the mens rea level required by a criminal statute. *See id.* at 108 (citing *Kimoktoak v. State*, 584 P.2d 25, 31 (Alaska 1978)).

96. *Id.*

97. *Id.*

98. *Id.* (emphasis added).

99. *See Hazelwood IV*, 946 P.2d 875, 879–86 (Alaska 1997).

offenses in Alaska's criminal justice system.¹⁰⁰ *Guest* involved two defendants, Mr. Moses Guest and Mr. Jacob Evan, both of whom were charged with the statutory rape of T.D.G., a fifteen-year-old minor female.¹⁰¹ The defendants claimed "an honest and reasonable mistake of fact regarding the victim's age."¹⁰² The supreme court reviewed a jury instruction recognizing a mistake-of-fact defense.¹⁰³ In essence, the issue was whether a mens rea requirement was to be read into the statutory rape law, or whether statutory rape imposed strict liability on a defendant.¹⁰⁴

Although most states had not allowed such a defense to statutory rape, it was a case of first impression in Alaska.¹⁰⁵ The court recognized in a footnote that such a defense, premised on the defendants having acted knowingly, was not unprecedented.¹⁰⁶ Other states allowed it by statute, including Arkansas, Montana, and Washington;¹⁰⁷ California case law allowed the defense.¹⁰⁸ More significantly, the drafters of the Alaska Criminal Code incorporated such a defense into the law, effective in 1980.¹⁰⁹ But the court did not rely on the revised Code; instead it based its opinion on its own precedent.

Writing for the majority, Justice Matthews declared that, "in such cases, where the particular statute is not a public welfare type of offense, either a requirement of *criminal intent* must be read into the statute or it must be found unconstitutional."¹¹⁰ In particular, "it would be a deprivation of liberty without due process of law to convict a person of a serious crime without the requirement of criminal intent."¹¹¹ Thus, the requirement of criminal intent for

100. See generally Benjamin L. Reiss, *Alaska's Mens Rea Requirements for Statutory Rape*, 9 ALASKA L. REV. 377 (1992) (reviewing *Guest* and the mens rea required for conviction of statutory rape in Alaska).

101. *State v. Guest*, 583 P.2d 836, 837 (Alaska 1978).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 837-38.

106. *Id.* at 838 n.2.

107. *Id.* (citing ARK. STAT. ANN. § 41-1802(3) (1947); MONT. CODE ANN. § 94-5-506(1) (1974); WASH. REV. CODE § 9.79.160(2) (1976)).

108. *People v. Hernandez*, 393 P.2d 673 (Cal. 1964).

109. *Guest*, 583 P.2d at 838 n.2 (quoting ALASKA CRIM. CODE § 11.41.445(b) (1980) (if an offense requires that the victim be "under a certain age, it is an affirmative defense that, at the time of the alleged offense, the defendant reasonably believed the victim to be that age or older, unless the victim was under 13 years of age at the time of the alleged offense").

110. *Id.* at 839 (emphasis added).

111. *Id.* at 838.

criminal convictions took on constitutional status in Alaska. The disputed jury instruction was proper. The court held that the requirement to show “criminal intent” necessarily permitted the defendants’ affirmative defense of showing a mistake of fact.¹¹²

Unlike in *Hazelwood*, the majority in *Guest* found ample authority allowing a reasonable mistake of fact defense.¹¹³ That criminal intent must be read into a non-general welfare statute for it to be constitutional had even greater precedential support.¹¹⁴ The court again required adherence to the Rule of Lenity; it affirmed that, “[s]ince statutes should be construed where possible to avoid unconstitutionality, it is necessary to infer a requirement of *criminal intent*.”¹¹⁵ When faced with such clear and unambiguous language in the court’s own jurisprudence, why the *Hazelwood* court would cite *Guest* as allowing any level of mens rea other than those inherent in Alaska’s criminal justice system is unclear.¹¹⁶

112. *See id.* at 839 n.5 (quoting WAYNE R. LAFAYE & AUSTIN W. SCOTT, CRIMINAL LAW, § 47, at 356–57 (1972) (“[T]he practice has developed of dealing with such mistakes as a matter of defense, perhaps because the facts showing their existence are usually brought out by the defendant.”). Note how important this procedural safeguard becomes—a person may be civilly responsible for an accident even if he looked at the traffic light, believed it was green, but was mistaken. Whatever injustice might be created by punishing the defendant under these circumstances is mitigated by the fact that the civil defendant pays only damages. He cannot receive a jail sentence for his error. The law makes a distinction, however, when the defendant looks at the traffic light, believes it to be red but likely to change, and then drives through the intersection anyway. Under those circumstances, the defendant may be punished by the criminal justice system as well as under the civil system.

113. *Id.* at 839 (citing *Kimoktoak v. State*, 584 P.2d 25, 28–30 (Alaska 1978); *Alex v. State*, 484 P.2d 677, 677 (Alaska 1971); *Speidel v. State*, 460 P.2d 77, 80 (Alaska 1969)).

114. *Id.* (citing *Kimoktoak*, 584 P.2d at 30; *Gottschalk v. State*, 575 P.2d 289, 296 (Alaska 1978); *State v. Martin*, 532 P.2d 316, 321 (Alaska 1975); *Hoffman v. State*, 404 P.2d 644, 646 (Alaska 1965)).

115. *Id.* (emphasis added) (footnote omitted).

116. It may well be that the *Hazelwood* court found that the civil negligence standard and the criminal negligence standard were too similar to merit extending the trial further. Captain Hazelwood’s legal ship had been adrift for some time. Recall that the *Valdez* ran aground on Bligh Reef in March 1989 but *Hazelwood* was not decided by the court until October 1997. However, this is speculation, and an express desire for closure is nowhere written into the *Hazelwood* opinion. But interestingly, in language that is remarkable for its understatement, the United States District Court for the District of Alaska characterized Captain Hazelwood’s legal trek as one involving “complexities.” *In re Exxon Valdez*, 296 F. Supp. 2d 1071, 1079 (Alaska 2004). The court observed that after Captain Hazelwood was prosecuted, his case “became involved in legal complexities which

The court of appeals considered one exception that would have held Captain Hazelwood accountable under a strict liability theory: it recognized that merchant ships and their crews work in a heavily regulated environment and their right to a showing of criminal mens rea might therefore be lessened.¹¹⁷ However, the court rejected this position because the statute was not limited to merchant ship drivers alone.¹¹⁸

Perhaps an underlying belief in the merits of this exception tilted the Alaska Supreme Court towards the ordinary negligence standard:¹¹⁹ the court might have sought to limit the applicability of the statute's criminal punishments as constitutional if the provision assigning jail terms was enforced only against participants in heavily regulated industries. Such a construction, while nonetheless flawed in other ways, would have been preferable to the wholesale abandonment of criminal intent in which the court engaged instead.

The *Hazelwood* court did not embrace an exception for heavily regulated industries with any precision. What is certain, however, is that an experienced and well-paid merchant ship captain like Captain Hazelwood would have found no safe harbor in the customs of his trade, because the unwritten laws of the sea place high expectations on ship captains.

C. Law of the Sea: Responsibility, Authority, and Accountability

It is sometimes difficult for those who have not spent time at sea to understand the "law of the sea." Indeed, the number and complexity of tasks that a reasonably prudent ship captain is expected to handle might seem overly harsh in comparison to other professions. In an editorial commenting on the 1952 nighttime collision between the aircraft carrier *Wasp* and the destroyer *Hobson*, the Wall Street Journal explained the ship captain's duties of care as rooted in history and tradition:

On the sea there is a tradition older even than the traditions of the country itself and wiser in its age than this new custom. It is the tradition that with responsibility goes authority and with them both goes accountability. . . . [M]en will not long trust lead-

led to multiple appeals. *Some nine years after the grounding, a single misdemeanor conviction, for negligent discharge of oil was affirmed on appeal.*" *Id.* (emphasis added).

117. See *Hazelwood III*, 912 P.2d 1266, 1279 (Alaska Ct. App. 1996).

118. *Id.*

119. See *Hazelwood IV*, 946 P.2d at 883 ("Persons operating in rule-laden environments, and whose actions have a substantial impact on public health, safety, or welfare, can reasonably be assumed aware of their governing codes.").

ers who feel themselves beyond accountability for what they do. And when men lose confidence and trust in those who lead, order disintegrates into chaos and purposeful ships into uncontrollable derelicts.¹²⁰

A Navy inquiry placed the blame for the accident squarely with the captain of the *Hobson*, Lieutenant Commander Tierney.¹²¹ It did so even though Captain Tierney had no visual references to steer by (the *Wasp* was running dark, meaning its running lights were out for wartime steaming). Testimony indicated that Captain Tierney failed to fully understand the implications of a radio warning *Wasp* issued informing him that *Wasp* had turned into the wind to launch and recover her aircraft.¹²² Once the navigation hazard, the unplanned proximity to the aircraft carrier, became apparent, Captain Tierney reportedly made several ill-fated rudder orders that took *Hobson* dangerously close and then directly in front of *Wasp*.¹²³ The ensuing collision destroyed a ninety-foot section of *Wasp*'s bow and split *Hobson*'s hull wide open. In just minutes, she dropped into the sea, taking with her 176 of the 237 souls onboard, including her captain.¹²⁴

According to the Admirals who comprised the incident review board, Captain Tierney committed a "grave error of judgment" by issuing the final rudder orders that were the "sole cause" of the collision.¹²⁵ This assignment of blame might appear harsh if the inquiry were limited to the single, perhaps negligent, rudder order that led to *Hobson*'s crossing *Wasp*'s bow. However, whether he had given the order or not, Captain Tierney would have been held accountable under the law of the sea for what happened on the ship. In a manner of speaking, this story illustrates a kind of strict liability for the heavily regulated industry that is the U.S. Navy.¹²⁶

120. *Hobson's Choice*, WALL ST. J., May 14, 1952, at 10.

121. *Riddle of the Hobson*, TIME MAGAZINE, Aug. 25, 1952, available at <http://www.time.com/time/archive/preview/0,10987,816769,00.html>.

122. *Id.*

123. *Id.*

124. See The USS *Wasp* vs. The USS *Hobson* Incident, <http://www.cv18.com/hist/hobson.html> (last visited Mar. 29, 2006).

125. *Riddle of the Hobson*, TIME MAGAZINE, Aug. 25, 1952, available at <http://www.time.com/time/archive/preview/0,10987,816769,00.html>.

126. See Chief Naval Education and Training Commanding Officer Course, Assignment 1, available at http://www.ntcnet.navy.mil/cls/CO%20assignment_2.htm (last visited Apr. 1, 2006).

The determination of criminal responsibility is therefore properly the province of our system of military justice. The acquittal of a commanding officer by a duly constituted court-martial absolves him of criminal responsibility for the offenses charged. It does not, however, absolve

Merchant vessels are also beholden to these unwritten laws of the sea.

Taken in this context, it is easy to understand the instinctual response to hold the captain of the ship responsible for one of the worst environmental tragedies in history. The evidence of Captain Hazelwood's culpability was considerable and likely played a part in the trial court's acceptance of the disputed jury instruction.¹²⁷ The crew's actions and the conduct of the ship's operations were a direct reflection of Captain Hazelwood's leadership. Even if he did not drive the ship into Bligh Reef, Captain Hazelwood laid the framework for the conditions that led to that event. I do not intend this Note to suggest that Captain Hazelwood may not have been criminally negligent for the events leading up to and during that fateful night. Even under the more stringent standard of criminal negligence, I believe the jury would have convicted him.

Despite the likelihood of Captain Hazelwood's conviction under the criminal standard of negligence, the court's decision to let stand this conviction and jail term based on the civil standard carries with it serious negative consequences for due process. It is tempting to resort to a balancing here, admitting the error of the standard used but justifying it nonetheless because of the scale of the tragedy. Enforcing individual rights often involves balancing. Indeed, "[d]ue process under Alaska's Constitution requires that social interests be weighed against those of the individual."¹²⁸ Over the long term, however, the interests of society and those of the individual are one and the same. The conventions with which we hold each other accountable have some flexibility, but our rules cannot be so ephemeral so as to disappear when a defendant is particularly unpopular. Standards in the criminal system have meaning only if we adhere to them, and that is especially true in the case of unlikable defendants.

him of his responsibility as a commanding officer as delineated in U.S. Navy Regulations.

Id.

127. See Enge, *supra* note 31, at A1 (quoting Superior Court Judge Karl Johnstone as saying "[n]o reasonably prudent person operating a tanker like the *Exxon Valdez* would have had those drinks before getting on board [or] would have left the bridge when Captain Hazelwood did . . . [a]nd I believe Captain Hazelwood knows the buck stops with him.").

128. *Hazelwood IV*, 946 P.2d 875, 883 (Alaska 1997).

V. UN-DUE PROCESS: AN AFFRONT TO LIBERTY

A. Alaska's Exceptions to the Mens Rea Requirement Were Limited

Prior to *Hazelwood*, Alaska's requirement for an adequate showing of mens rea in criminal cases had exceptions, but these were limited largely to strict liability offenses. The *Hazelwood* majority discussed Alaska's "strict liability tradition" at some length.¹²⁹ It included in its opinion a summary of the development of exceptions to the requirement "that conduct cannot be criminal unless it is shown that one . . . had an awareness or consciousness of some wrongdoing."¹³⁰ While it acknowledged the requirement for mens rea in criminal offenses, the majority then subordinated the mens rea requirement, relying on the "parallel tradition [that] has allowed imposition of penalties without formal proof of criminal intent."¹³¹

Undeniably, the *Hazelwood* majority found a lengthy history and tradition in support of strict liability, including an interesting look at the ancient law of "deodands."¹³² Although these cases established a history in support of strict liability in criminal law generally, none allowed for the criminal prosecution and incarceration of an accused without first showing that he possessed an appropriate level of mens rea.¹³³ Indeed, the court indicated one year earlier that doing so would violate the Alaska Constitution.¹³⁴

After weighing the various merits of the deodands, in rem proceedings, and several competing academic papers, the *Hazelwood* court found itself coming face to face with a requirement even more compelling: it realized that it had to limit the bounds of its holding to conform with the due process clause of Alaska's consti-

129. *Id.*

130. *Id.* at 880.

131. *Id.*

132. *Id.*

133. *Id.* at 882 (citing *Hertzner v. State*, 613 P.2d 821, 826 (Alaska 1980) (discussing the technical elements of proof and recognizing that for "mala in se" offenses such as murder and rape, proof of the conscious act is an adequate showing of mens rea)).

134. *State v. Fremgen*, 914 P.2d 1244, 1245 (Alaska 1996).

It would be a deprivation of liberty without due process of law to convict a person of a serious crime without the requirement of criminal intent. . . . [W]e adhere to the principles articulated in *Speidel, Alex, Kismoktoak*, and *Guest* that, except for public welfare type of offenses, strict criminal liability without some form of mens rea is violative of Alaska's Constitution.

Id.

tution. “While society’s interest in obtaining compliance with its regulations is strong, it can never outweigh the individual’s interest in freedom from substantial punishment for a violation he or she could not reasonably have been expected to avoid.”¹³⁵ Ordinary negligence merits criminal punishment, the court suggested, because it can be avoided.¹³⁶ This portion of the opinion is particularly dangerous, inasmuch as it directly threatens individual liberty and due process.

This language dramatically changed Alaska’s mens rea requirements. It lets the State move from having to show the defendant possessed criminal intent—a desire to do wrong—to merely showing he “could reasonably have been expected” not to break a law or regulation. The *Hazelwood* court reasoned that the civil standard for negligence was acceptable because it roughly “approximates what the due process guarantee aims at: an assurance that criminal penalties will be imposed only when the conduct at issue is something society can reasonably expect to deter.”¹³⁷ The swath thus cut is staggering.

Under the “reasonably expect to deter” standard, it is very hard to imagine a conviction that would require more than mere negligence. Consider the hypothetical that the court quoted with approval in *Guest*, that of the man who mistakenly takes a woman’s umbrella from a restaurant because he believes it is his.¹³⁸

135. *Hazelwood IV*, 946 P.2d at 883.

136. An alternative theory is that even if ordinary negligence does not merit punishment in its own right, society is nonetheless justified in imposing criminal penalties on the negligent actor because doing so serves to deter other actors from being negligent in the future. See Leslie Garfield, *A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature*, 65 TENN. L. REV. 875, 924 (1998). The problem with this approach is that it seeks to get around the protections inherent in the civil system at the peril of the criminal defendant. Civil plaintiffs, including the government, may not receive exemplary damages absent some culpable mental state beyond mere ordinary negligence. It makes little sense and does no small measure of violence to precedent to allow the government to make an example out of a merely negligent defendant just by switching from the civil docket to the criminal one. Indeed, it is particularly heinous in light of the liberty interests that are necessarily put at risk in criminal cases. Courts should be wary of making this leap even with the express authorization of their respective legislatures.

137. *Id.*

138. *State v. Guest*, 583 P.2d 836, 839 n.5 (Alaska 1978) (quoting LAFAVE & SCOTT, *supra* note 112, at 356–57). I expand the example by assigning genders to distinguish between the potential defendant and the victim of this most heinous umbrella thievery.

Society can reasonably expect to deter the taking of another's property, so this hapless restaurant patron is now in a pretty pickle indeed. He has inadvertently invited the full wrath of the criminal justice system upon himself because he "unreasonably" failed to verify that the umbrella in his hand was the one he left by the door.

In the same way, consider how very different *Speidel*, *Rice*, and *Guest* would have turned out had they been adjudicated beneath an inquisitor checked only by what society might reasonably expect to deter. Mr. Speidel failed to return a rental car, Mr. Rice transported illegally obtained meat, and the *Guest* defendants failed to ascertain the true age of their willing, but minor, partner. Before *Hazelwood*, these defendants were not criminals. But after *Hazelwood*, they may be criminally liable. The state must show only that their acts were something society could reasonably expect to deter. Indeed, the limitlessness of the "reasonably expect to deter" standard is overwhelming. Since it can hardly be expected that the legislature would enact a law proscribing conduct that society cannot reasonably be expected to deter, no level of mens rea beyond mere negligence need be read into a statute. Thus, the reasonably expect to deter standard reaches our entire criminal code. Under the guise of proscribing conduct society could reasonably expect to deter, the *Hazelwood* court all but eviscerated the element of mens rea in Alaska.

In light of the *Hazelwood* court's expansive reformation of criminal intent in Alaska, one might have expected the court to remark on how its new standard would impact its prior jurisprudence, but it did not. The closest it came was a string cite in a footnote to a series of cases from other jurisdictions that "allow crimes based on ordinary negligence," at least some of which rested on legislative grounds.¹³⁹ The cases cited are not persuasive inasmuch as they ignore Alaska's prior jurisprudence and legislative history. The legislature that modeled the 1978 Revised Criminal Code after the Model Penal Code certainly felt that a higher standard was needed.¹⁴⁰ Professor LaFave and others have noted that a "general feeling" has surfaced among judges, some of whom preside in those other jurisdictions, that civil negligence is close enough to ensure the correct transfer of money for damages suffered but does not

139. *Hazelwood IV*, 946 P.2d at 884 n.17.

140. See *Andrew v. State*, 653 P.2d 1063, 1066 n.5 (Alaska App. 1982) (quoting COMMENTARY ON THE ALASKA REVISED CRIMINAL CODE, S.J. SUPP. NO. 47, at 142-43 (1978)).

have the accuracy to ensure that neither life nor liberty are deprived without due process.¹⁴¹

In an attempt to unfurl and fill one last sail, the *Hazelwood* court attacked the “[p]artisans” that fear the substitution of civil negligence for mens rea. It criticized these partisans for their insistence on using an overly technical but relatively imprecise standard of criminal negligence.¹⁴² The court engaged in a bit of hyperbole here. As Chief Justice Compton correctly pointed out in his dissent, it was inaccurate to say “the only consensus and precision available in the definition of criminal negligence is that it is not civil negligence.”¹⁴³ The statutory definition of criminal negligence¹⁴⁴ distinguishes ordinary negligence by requiring a *gross* deviation from the standard of care that a reasonable person would have observed under like circumstances.¹⁴⁵ Likewise, Alaska has a Pattern Criminal Jury Instruction that defines criminal negligence in no uncertain terms: “something more than the slight degree of negligence necessary to support a civil action for damages and is negligence of a degree *so gross as to be deserving of punishment*.”¹⁴⁶ It is precisely this emphasis on punishment that a criminal defendant had been entitled to under Alaska’s prior jurisprudence.

The distinction between what is mere negligence and what is *gross* negligence is unambiguous even in the oft-murky arena of tort. One standard allows for the injured plaintiff to receive punitive damages at trial and the other does not. For the *Hazelwood* court to seriously contend that the partisan’s “fear of torts is unfounded,” it would have had to read Alaska’s jury instruction for gross negligence as superfluous. The court, while doing no small measure of violence to its own precedent, did not go so far as to rewrite Alaska’s jury instructions.

Instead, the court noted that similar language was used in both criminal and civil proceedings. Referring to a 1930 Michigan Supreme Court case,¹⁴⁷ the court noted that either the wrongful taking of property or of liberty violated due process. The court wrongly assumed that due process had the same meaning in the criminal

141. *Hazelwood IV*, 946 P.2d at 889 (Compton, C.J., dissenting) (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, *SUBSTANTIVE CRIMINAL LAW* 326 (1986)).

142. *Hazelwood IV*, 946 P.2d at 885.

143. *Id.*

144. ALASKA STAT. § 11.81.900(a)(4) (2004).

145. *Hazelwood III*, 912 P.2d 1266, 1278 (Alaska Ct. App. 1996).

146. *Hazelwood IV*, 946 P.2d at 889 (Compton, C.J., dissenting) (emphasis added).

147. *People v. McMurchy*, 228 N.W. 723 (Mich. 1930).

and civil arenas. It rationalized that, first, since “the same constitutional clause which governs the criminal prosecution would also govern a civil proceeding, and [second,] because it is undisputed that due process is satisfied by the negligence standard” in civil matters, it must be that due process in criminal cases can also be satisfied by the same negligence standard.¹⁴⁸

This argument is deeply troubling. It is as if the court accepted the use of ordinary negligence in criminal trials because it allowed that standard to govern in civil ones. That argument cannot be widely applied. We relax a host of protections for civil matters when we would not do so in a criminal court. For example, we allow civil juries to reach a decision with a mere preponderance of the evidence standard. Civil defendants have no right against self-incrimination, have less privacy to resist searches, and operate under an entirely different discovery regime.¹⁴⁹ The burden of proof in criminal matters, in contrast, is far more rigidly defined as a function of due process.¹⁵⁰ Even in *Hazelwood*, the supreme court recognized the difference between civil and criminal proceedings.

The court reaffirmed the principle that some sanctions that “normally would run afoul of due process” might nonetheless be “allowed because the penalties are light.”¹⁵¹ By its own admission then, we cannot look to the civil notions of due process to govern our criminal system without compromising the latter. Our expectation of what constitutes due process in the civil forum is lower than in the criminal forum precisely because civil penalties are “light” in comparison to criminal punishments.

148. *Hazelwood IV*, 946 P.2d at 885.

149. See, e.g., U.S. CONST. amend. V (“nor shall be compelled in *any criminal case* to be a witness against himself”) (emphasis added); *United States v. Hubbell*, 530 U.S. 27 (2000); *Brady v. Maryland*, 373 U.S. 83 (1963). Compare Fed. R. Civ. P. 32 with Fed. R. Crim. P. 16.

150. See, e.g., *Sandstrom v. Montana*, 442 U.S. 510, 514 (1979) (reversing the conviction since “[the] jury may have interpreted the judge’s instruction as constituting either a burden-shifting presumption like that in *Mullaney*, or a conclusive presumption like those in *Morisette* and *United States Gypsum Co.*, and because either interpretation would have deprived defendant of his right to the due process of law”); *Taylor v. Kentucky*, 436 U.S. 478, 483 (1978) (reversing a criminal conviction on due process grounds when the defendant’s request that the jury be reminded of the presumption of innocence in favor of the accused was rejected).

151. *Hazelwood IV*, 946 P.2d at 884.

B. Civil Standards are Inadequate for Assigning Criminal Punishments

Civil negligence, while blameworthy, is not the same as criminal negligence. The civil standard of negligence has no proper place within the elements of a criminal offense. The civil standard of negligence is not robust enough to guarantee that accidental and benign offenders are not criminally punished.¹⁵² It is no trivial matter that the legislature “requires negligence of a degree so gross as to be deserving of punishment” in its jury instructions. Irrespective of what society may reasonably expect to deter, the jury instructions provide “a persuasive argument that societal notions of fundamental fairness do not permit imprisonment for the simple neglectfulness embodied in the civil negligence standard. Such notions, in turn, shape the right of due process.”¹⁵³

Criminal punishments, and incarceration in particular, are intended to punish. Defendants are not sent to jail to “make whole” the victim for their crimes inasmuch as they are put there to atone for their criminal conduct. The same principles underlie punitive damages in tort.¹⁵⁴ Just two years prior to *Hazelwood*, the supreme court “established that ‘mere negligence is insufficient to justify an award of punitive damages.’”¹⁵⁵ It therefore makes little sense that the civil standard of negligence could be sufficient for a jury to impose a *prison sentence* when that same showing would be insufficient for a jury to award punitive damages. Nonetheless, the *Hazelwood* court upheld Captain Hazelwood’s conviction and prison sentence under the mere negligence standard, even though it would not have allowed punitive damages for the same conduct. Hopefully this is little more than an aberration.

There have been few subsequent cases that directly cite the *Hazelwood* decision. In *Latham v. State*,¹⁵⁶ the Alaska Court of Appeals noted in a memorandum opinion that the state justified its

152. *Andrew v. State*, 653 P.2d 1063, 1066 n.5 (Alaska Ct. App. 1982) (quoting COMMENTARY ON THE ALASKA REVISED CRIMINAL CODE, S.J. SUPP. NO. 47, at 142–43 (1978)).

153. *Hazelwood IV*, 946 P.2d at 889 (Compton, C.J., dissenting).

154. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 908 cmt. b (“Punitive damages are not awarded for mere inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence (but are restricted to) conduct involving some element of outrage similar to that usually found in crime.”)).

155. *Id.* (quoting *Johnson & Higgins of Alaska Inc. v. Blomfield*, 907 P.2d 1371, 1376 (Alaska 1995) (allowing punitive damages only for “acts done with malice or bad motives or a reckless indifference to the interests of others”)).

156. No. A-7198, 2000 Alas. App. LEXIS 111, *16–19 (Alaska Ct. App. Aug. 9, 2000) (mem.).

jury instruction at trial partly on the *Hazelwood* decision.¹⁵⁷ The court, however, did not discuss the state's argument and decided the issue on other grounds.¹⁵⁸ In his concurring opinion, Judge Mannheimer briefly acknowledged the uncertainty of the mental state required by the statute without further discussing the *Hazelwood* decisions.¹⁵⁹ In *State v. Simpson*, the court of appeals cited to *Hazelwood* as the most recent affirmation of a very limited proposition not directly relating to the use of the civil negligence standard in criminal convictions.¹⁶⁰

Lastly, in *Schmidt v. State*,¹⁶¹ the Alaska Court of Appeals in another memorandum opinion cited to *Hazelwood* to justify the imposition of large fines on the basis of the deterrent effect those fines necessarily have.¹⁶² The opinion did make one casual reference that seemed to acknowledge the arguments made here and in the dissent in *Hazelwood*. The defendant argued that the fines he received were excessive in light of the smaller fines imposed on an even more egregious offender in a separate case.¹⁶³ The court justified the defendant's seemingly disparate treatment by pointing out the more egregious offender's smaller fine was accompanied by a lengthy jail sentence.¹⁶⁴ Thus, fortunately, the harm inflicted by Captain Hazelwood on Alaska's mens rea jurisprudence appears to have been contained.

Captain Hazelwood's conviction may have served the short-term interests of the people of Alaska to have ended this matter without a second trial. But the long-term health of the judiciary in Alaska depends on the consistent application of the legislature's laws and the court's precedents. Popular approval can be a fickle thing, difficult to attract and easy to lose. Expedient departures from precedent, while seemingly appealing in light of the individual circumstances of a particular case, nevertheless should be avoided. Such departures run the risk of exposing the court to uninvited peril. Future courts, operating in similar seas, are well advised to steer clear of such hazards.

157. *Id.*

158. *Id.*

159. See *Latham*, 2000 Alas. App. LEXIS at *18–20 (Mannheimer, J., concurring).

160. 53 P.3d 165, 167 n.5 (Alaska Ct. App. 2002).

161. No. A-8669, 2005 Alas. App. LEXIS 35, *21–22 n.23 (Apr. 6, 2005) (mem.).

162. *Id.*

163. *Id.* at *25–26.

164. *Id.*

VI. SUGGESTED COURSE: STEER CLEAR OF THE STORM

A. Criminal Negligence for Ship Captains

The law uses industry standards to help establish what a reasonable person would do in like circumstances. Ship captains, as with other professionals, set the standard of care within the industry collectively. These standards depend to some degree on the civil system. But civil negligence alone hardly justifies criminal punishment.

Consider the medical community, which is made up of professionals who routinely act under pressures that are analogous to, if not greater than, those of ship captains. Physicians are under an affirmative duty to use the degree of care and skill that is expected of a reasonably competent practitioner of the same class to which he or she belongs, and acting under the same circumstances.¹⁶⁵ A physician's mere negligence will not ordinarily expose that physician to criminal punishment unless his or her want of care, relative to other doctors, is so extreme that it can be categorized as criminal.¹⁶⁶ If the standard were otherwise, then every successful malpractice lawsuit would be the precursor for criminal sanctions. That is, of course, not the case. Criminal prosecutions of medical professionals are rare even in cases that warrant punitive damages. Comparing a criminal defendant's conduct to the industry standard, however, provides a bright and clear navigation aid to determine whether ship captains who are negligent merit criminal punishment.

Indeed, Alaska Statute section 11.81.900 defines criminal negligence by referring to the "standard of care."¹⁶⁷ A ship captain would be criminally negligent only if he "fails to perceive a substantial and unjustifiable risk" and if "the risk [is] of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."¹⁶⁸ The burden for taking the industry standard precautions—remaining sober, using the barest minimum of navigation aids, and ensuring that only qualified personnel pilot the

165. See, e.g., ALASKA STAT. § 09.55.540 (2004).

166. See George J. Annas, *Medicine, Death and the Criminal Law*, 333 NEW ENG. J. MED. 527, 527–30 (1995), available at http://content.nejm.org/cgi/content/full/333/8/527?ijkey=2a3d49850c425014edf712b2be3303a765710b30&keytype=tf_ipsecsha.

167. ALASKA STAT § 11.81.900(4) (2004).

168. See *id.*

ship in and around shallow waters—is minimal.¹⁶⁹ The task of merchants and sailors alike is to move their ship from one place to another. They are expected to do so safely. This level of care is especially important when costs associated with not doing so can be disastrous to crew, cargo, and as in this case, to the coastline.

It is of little import what an average individual, albeit a reasonable one, would have done had he been thrust onto the bridge of the *Exxon Valdez*. The hypothetical reasonable person does not face criminal punishment.¹⁷⁰ For precisely this reason, Alaska's courts have required the state to show that the defendant on trial possessed *criminal intent*, i.e., that he acted with “something more than mere ‘neglectfulness.’”¹⁷¹ This intent is crucial. People have accidents even when they exercise care; not every accident merits criminal sanctions. The defendant's conduct must constitute a gross deviation from the standard of care, and just as a physician's want of care is measured relative to other doctors, the conduct of a merchant captain can fairly be measured against that of a reasonable captain subject to the rules that govern the transport of toxic materials in environmentally sensitive waters.

Industry standards would have likely demonstrated that Captain Hazelwood acted with something more than neglectfulness. Hazelwood's errors were more than foreseeable and he knew the risks he was creating by drinking on the job. Captains know the extent of risk they face and accept responsibility for the safe conduct of their vessel. Given the hazards involved, safe navigation precautions were more than feasible. Navigation in open and restricted waters exists precisely because navigation in and around narrow channels is extremely dangerous.¹⁷² Hazelwood surely knew of this danger.

As such, Captain Hazelwood would almost certainly have been convicted under Alaska's criminal standard of negligence. The court could have preserved its precedent without fear of letting Captain Hazelwood go unpunished. The problem with sustaining his conviction under the civil standard of negligence, however, is that doing so removed an important procedural right. Future criminal defendants can no longer look at their peers and ask whether their inadvertence was so egregious as to merit criminal punishment. This change is deceptively minimal in the instant

169. See U.S. COAST GUARD, NAVIGATION RULES 6–17 (2005).

170. Stern, *supra* note 1 at 18 (quoting *Kimoktoak v. State*, 584 P.2d 25, 32 (Alaska 1978)).

171. *Hazelwood IV*, 946 P.2d 875, 887 (Alaska 1997) (Compton, C.J., dissenting).

172. See 46 C.F.R. § 15.812 (2006).

case. How it might impact the outcome of a closer case, i.e., one involving the prior example of umbrella thievery, is impossible to know. It is hard to predict what future juries will do.

B. The Legislature's Response

The statute under which Captain Hazelwood was convicted was amended in 1990 to set the unlawful discharge "barrel" limits for either a class C felony or a class A misdemeanor.¹⁷³ The legislation was enacted during an intense period of legislative reform immediately following the spill and in a run-up to the 1990 elections.¹⁷⁴ As part of this revision, the statute expressly set out that criminal penalties for an oil discharge attach only if the accused acts with *criminal* negligence.¹⁷⁵ The legislature, acting immediately after Captain Hazelwood's trial, reacted to the widespread public perception that existing laws were an inadequate deterrent and relatively ineffective. It expressly linked the applicable criminal negligence standard for oil discharges to Alaska's other criminal code provisions.¹⁷⁶ Reiterating the intent it evidenced in 1978 when it revised the Criminal Code, the legislature again returned to the structure of the Model Penal Code.¹⁷⁷ The legislature showed fidelity to *criminal* negligence rather than a mere civil negligence standard.

VII. CONCLUSION

The Alaska Supreme Court lessened the level of protection afforded criminal defendants by affirming the criminal conviction of the captain of the *Exxon Valdez* without a showing of criminal negligence. Although Captain Hazelwood might nonetheless have been convicted under the criminal negligence standard, the court did no small measure of violence to precedent with its holding. It ignored both *stare decisis* and traditional norms of statutory construction. It found the evidence adduced at trial sufficient for im-

173. See *Hazelwood III*, 912 P.2d 1266, 1278 n.14 (Alaska Ct. App. 1996). The statute provides that "an unlawful discharge of 10,000 barrels or more of oil" constitutes a class C felony and "a lesser discharge amounts to a class A misdemeanor." *Id.* (citing 1990 Alaska Sess. Laws ch. 141, §§ 2-5).

174. David Postman, *Fast Track No Longer Greased for New Oil Regulations*, ANCHORAGE DAILY NEWS, Mar. 26, 1990, at A1.

175. ALASKA STAT. § 46.03.790 (a), (d), & (g)(2) (2004) (declaring that "a person who with criminal negligence discharges oil in violation of" the statute is subject to criminal punishment).

176. ALASKA STAT. § 11.81.900 (2004).

177. See Stern, *supra* note 1, at 36-37.

prisoning the defendant even though that same evidence would not support awarding punitive damages.

While the court had discretion to interpret an ambiguous statute, the legislature also remained free to act. It wasted little time in doing so, amending the statute explicitly to require criminal intent. That it restored the mens rea requirement demonstrated no small measure of legislative intent. The statute serves as a reminder to the court that “it would be a deprivation of liberty without due process of law to convict a person of a serious crime without the requirement of criminal intent”¹⁷⁸ and to “adhere to the principles articulated in *Speidel*, *Alex*, *Kimoktoak*, and *Guest* that, except for public welfare type of offenses, strict criminal liability without some form of mens rea “equates to a violation of due process under Alaska’s Constitution.”¹⁷⁹

178. *State v. Fremgen*, 914 P.2d 1244, 1245 (Alaska 1996).

179. *Id.* at 1246.