CONSCIOUSNESS OF WRONGDOING: MENS REA IN ALASKA

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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.¹

It is a fundamental principle of criminal law that ordinarily a person cannot be convicted of a crime unless that person acts with a certain level of intent.² This intent requirement is frequently referred to as mens rea.³ In the recently revised Alaska Criminal


². In Morissette v. United States, 342 U.S. 246, 250 (1952), the Supreme Court explained the rule as follows:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

(footnote omitted); see also Smith v. California, 361 U.S. 147, 150 (1959) ("The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.") (quoting Dennis v. United States, 341 U.S. 494, 500 (1951)).

³. In Vick v. State, 453 P.2d 342, 344 n.15 (Alaska 1969), the Alaska Supreme Court, quoting from BLACK'S LAW DICTIONARY 1137 (4th ed. 1951), defined mens rea as "a guilty or wrongful purpose; a criminal intent."

Professor Sayre has concluded that "[n]o problem of criminal law is of more fundamental importance or has proved more baffling through the centuries than the
Code\(^4\) it is referred to as the culpable mental state requirement.\(^5\) In *Speidel v. State*,\(^6\) the Alaska Supreme Court, relying on *Morissette v. United States*,\(^7\) equated the *mens rea* requirement with the necessity of establishing that the defendant acted with a “consciousness of some wrongdoing.”\(^8\) In subsequent cases, the Alaska Supreme Court\(^9\) and the Alaska Court of Appeals\(^10\) have struggled to clarify and apply the consciousness of wrongdoing requirement.

This article will be divided into three parts. The first will trace the judicial development of *mens rea* rules in Alaska with particular emphasis on the problems that have arisen from the use of the phrase consciousness of wrongdoing as a shorthand reference to the *mens rea* requirement. The second part will survey several of the most important culpable mental state rules in the criminal code with determination of the precise mental element or *mens rea* necessary for crime. . . . But when it comes to attaching a precise meaning to *mens rea*, courts and writers are in hopeless disagreement.” Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974 (1932) (footnotes omitted).


5. ALASKA STAT. § 11.81.600(b) (1983) provides: “A person is not guilty of an offense unless the person acts with a culpable mental state . . . .” ALASKA STAT. § 11.81.900(b)(10) (1983) defines “culpable mental state” to mean “‘intentionally,’ ‘knowingly,’ ‘recklessly,’ or with ‘criminal negligence,’” as those terms are defined in ALASKA STAT. § 11.81.900(a) (1983). See *infra* notes 231, 232 for the definitions of “intentionally” and “knowingly” and *infra* text accompanying notes 256, 282 for the definitions of “recklessly” and “criminal negligence.”

Hereinafter, all references to the intent requirement of criminal statutes will be made by the term *mens rea* except when the reference is to the intent requirement of a crime included in the criminal code or when the context requires otherwise. References to the intent requirement of crimes in the criminal code will be made by referring to the culpable mental state requirement unless the context requires otherwise.


8. *Speidel*, 460 P.2d at 78; see *supra* text accompanying note 1.


Because of space limitations, *Guest* will not be examined in this article. In addition, Bell v. State, 668 P.2d 829 (Alaska Ct. App. 1983), will not be discussed. Both cases consider whether the defense of reasonable mistake as to age must be recognized when criminal liability is dependent upon the victim being under a certain age. While *Guest* and *Bell* discuss the consciousness of wrongdoing requirement, both cases involve a relatively distinct and separable application of the general principles examined in this article.

the objective of comparing the legislative and judicial approaches to *mens rea* in key areas. The concluding section will recommend abandonment of the use of the phrase consciousness of wrongdoing and propose an alternative formulation of the *mens rea* requirement.

I. JUDICIAL DEVELOPMENT OF MENS REA REQUIREMENTS

The Alaska appellate courts have been responsible for developing a comprehensive, though sometimes confusing, set of rules for determining the *mens rea* requirements of criminal statutes. Considering the lack of any statutory guidance on the subject prior to the passage of the criminal code, it was not surprising that the Alaska Supreme Court assumed the lead in this area. The first major case decided by the court was *Speidel v. State.* Because *Speidel* and subsequent cases have relied so heavily upon the United States Supreme Court's decision in *Morissette v. United States* it is first necessary to briefly review that case.

A. *Morissette*

In *Morissette,* the defendant found rusting bomb casings while he was hunting on government property. Morissette subsequently carted away nearly three tons of the casings in broad daylight and sold them for a total of eighty-four dollars. At trial Morissette claimed that he believed that the casings were abandoned. There was substantial evidence, however, that cast doubt on whether Morissette actually held that belief.

Morissette was indicted under the theory that he "did unlaw-

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12. The Alaska Court of Appeals was not established until 1980. ALASKA STAT. § 22.07.010 (1982). Hereinafter, all references to the Alaska Court of Appeals will be made by referring to the court of appeals unless the context requires otherwise. Similarly, all references to the Alaska Supreme Court will be made by referring to the court unless the context requires otherwise.
15. *Id.* at 247. As noted by Justice Jackson, the facts made the dispute "a profoundly insignificant case to all except its immediate parties had it not been so tried and submitted to the jury as to raise questions both fundamental and far-reaching in federal criminal law." *Id.*
16. *Id.* at 248-49.
17. *Id.* at 276. The court found that the jury, considering Morissette's awareness that these casings were on government property, his failure to seek any permission for their removal and his self-interest as a witness, might have disbelieved his profession of innocent intent and concluded that his assertion of a belief that the casings were abandoned was an afterthought.
fully, wilfully and knowingly steal and convert' property of the United States," in violation of a statute that applied to "whoever embezzles, steals, purloins, or knowingly converts' government property" to his own use. The trial court, however, refused to instruct on the defense that Morissette thought the casings were abandoned and therefore did not act with criminal intent. Morissette's conviction was affirmed by the Court of Appeals for the Sixth Circuit.

While the Sixth Circuit concluded that Morissette could only be convicted if he had "knowledge . . . that he [was] converting property of the United States to his own use" and that "[g]enerally speaking, the question of whether property has been abandoned is, of course, for the jury," it nevertheless upheld the trial court's refusal to instruct on the abandonment defense based on Morissette's failure to establish that the property had, in fact, been abandoned.

Since Morissette was charged under a statute requiring that he knowingly convert government property, it was hardly surprising that his conviction was reversed by the United States Supreme Court.

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18. Id. at 248.
20. 342 U.S. at 249. The trial court concluded that it did not "think [that] anybody can have a defense [that] they thought the property was abandoned on another man's piece of property," id., and essentially directed a verdict for the government with the following instruction:

"And I instruct you to this effect: That if this young man took this property (and he says he did), without any permission (he says he did), that was on the property of the United States Government (he says it was), that it was of the value of one cent or more (and evidently it was), that he is guilty of the offense charged here. If you believe the government, he is guilty. . . . The question on intent is whether or not he intended to take the property. He says he did. Therefore, if you believe either side, he is guilty."

Id. The court of appeals conceded that "greater restraint in expression should have been exercised" in the trial court's charge to the jury. Morissette v. United States, 187 F.2d 427, 431 (6th Cir. 1951), rev'd, 342 U.S. 246 (1952).

21. 187 F.2d at 431.
22. Id. at 430.
23. Id. at 431.
24. In support of its holding, the Sixth Circuit concluded that the trial court exercised a proper role in removing the abandonment defense from jury consideration.

[H]ere, as the district court held, all the testimony proves that the property had not been abandoned by the government of the United States, and the district judge so instructed. The defense throughout was based upon insistence that, in order to convict there must have been a criminal intent in the defendant's mind. The trial judge had to meet that issue, and we think correctly did so. He could not leave to the jury the interpretation of the federal statute. No proof was adduced by the defendant to the effect that the property had actually been abandoned.

Id.
based on the failure of the trial judge to allow the jury to consider the defense of abandonment.\textsuperscript{25} The Court stressed that the issue whether Morissette actually believed that the property was abandoned was a question for the jury to decide based on its assessment of the evidence presented at trial.\textsuperscript{26} Once the court of appeals acknowledged that the government was required to establish that Morissette knew he was converting government property,\textsuperscript{27} it should have concluded that it was clear error for the trial court to have removed the defense of abandonment from the jury. Morissette’s professed belief that the casings were abandoned was inconsistent with the \textit{mens rea} element required to sustain a conviction: knowledge that the property belonged to the government.\textsuperscript{28} The Court, however, added that this \textit{mens rea} element did not require the government to establish that Morissette knew that it was illegal to take the property. Morissette could be convicted if he “had knowledge of the facts, though not necessarily the law, that made the taking a conversion.”\textsuperscript{29}

In the course of reversing Morissette’s conviction, the Court embarked on a general discussion of \textit{mens rea} requirements in criminal statutes.\textsuperscript{30} While some commentators have concluded that this discussion was not required in a case that appeared to involve only a simple question of statutory construction,\textsuperscript{31} the Court nevertheless recognized three important \textit{mens rea} principles that would subsequently be applied by Alaska appellate courts: (1) that ordinarily crimes require proof of \textit{mens rea};\textsuperscript{32} (2) that in a limited category of public welfare offenses the legislature can dispense with the \textit{mens rea}
requirement; and (3) that a codification of a common law crime that does not include an intent element will be interpreted to require *mens rea* in the absence of a contrary legislative intent.

In discussing the *mens rea* requirement of criminal statutes, the Court acknowledged that "[t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion." In defining the precise level of intent required in criminal statutes, however, it referred to the myriad terms used to express the *mens rea* concept.

Courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as "felonious intent," "criminal intent," "malice aforethought," "guilty knowledge," "fraudulent intent," "wilfulness," "scienter," to denote guilty knowledge, or "*mens rea*," to signify an evil purpose or mental culpability. By use or combination of these various tokens, they

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33. See 342 U.S. at 252-60. The Court made the following general observations about public welfare offenses:

These cases do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals. Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty. Many violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize. While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. In this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation.

*Id.* at 255-56.

The Court subsequently paraphrased Professor Sayre's categorization of offenses that had previously been classified as public welfare offenses:

(1) illegal sales of intoxicating liquor, (2) sales of impure or adulterated food or drugs, (3) sales of misbranded articles, (4) violations of antinarcotic acts, (5) criminal nuisances, (6) violations of traffic regulations, (7) violations of motor-vehicle laws, and (8) violations of general police regulations, passed for the safety, health or well-being of the community.

*Id.* at 262 n.20 (citing Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 73, 84-87 (1933)).

34. See 342 U.S. at 252.

35. *Id.* at 250.
have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes.\textsuperscript{36}

While the Court noted that the many terms used to refer to the intent requirement all adhere to the "central thought that wrongdoing must be conscious,"\textsuperscript{37} it is important to note that this central thought was not viewed as being distinct from the \textit{mens rea} requirement. The Court instead concluded that the variety of terms used to define the mental element insure that only a person "blameworthy in mind" can be convicted of a crime.\textsuperscript{38} To this extent, the concept of \textit{mens rea} may more appropriately be equated with the degree of fault on the part of a defendant that justifies the imposition of a criminal sanction.\textsuperscript{39} This, of course, would differ from the implication arising from the phrase consciousness of wrongdoing in that the defendant must know that what he is doing is wrong to be convicted

\textsuperscript{36} Id. at 252.

\textsuperscript{37} Id.

\textsuperscript{38} Id.

\textsuperscript{39} Professor Sayre has noted that the historical development of \textit{mens rea} has moved away from the requirement of an evil-doing mind to a mind that endangers public interests.

[I]t seems clear that \textit{mens rea}, the mental factor necessary to prove criminality, has no fixed continuing meaning. . . . Under the dominating influence of the canon law and the penitential books the underlying objective of criminal justice gradually came to be the punishment of evil-doing; as a result the mental factors necessary for criminality were based upon a mind bent on evil-doing in the sense of moral wrong. Our modern objective tends more and more in the direction, not of awarding adequate punishment for moral wrong-doing, but of protecting social and public interests. To the extent that this objective prevails, the mental element requisite for criminality, if not altogether dispensed with, is coming to mean, not so much a mind bent on evil-doing as an intent to do that which unduly endangers social or public interests. As the underlying objective of criminal administration has almost unconsciously shifted, and is shifting, the basis of the requisite \textit{mens rea} has imperceptibly shifted, lending a change to the flavor, if not to the actual content, of the criminal state of mind which must be proved to convict.

Sayre, \textit{supra} note 3, at 1016-17 (footnotes omitted).

In their criminal law treatise, Professors LaFave and Scott initially use the phrase "state of mind" to refer to the \textit{mens rea} requirement, which they equate with "whatever element of blameworthiness, if any, a particular crime may require."

\textit{W. LaFAve \\& A. SCOTT, HANDBOOK ON CRIMINAL LAW} § 2, at 5 n.2 (1972). Later in the treatise, "state of mind" is equated with the term "fault."

[The terms "mental part" and "\textit{mens rea}" and "state of mind" are somewhat too narrow to be strictly accurate, for they include matters that are not really mental at all. Thus we shall see that, though many crimes do require some sort of mental fault (i.e., a bad mind), other crimes (which are commonly said to require \textit{mens rea}) require some sort of fault which is not mental. The unadorned word "fault" is thus a more accurate word to describe what crimes generally require in addition to their physical elements.

\textit{Id.} § 27, at 192 (footnote omitted).
of a crime. In Morissette this level of fault could be established by proof that the defendant knew he was taking government property. Whether or not Morissette also knew that this act was improper was irrelevant to a determination that he acted with the requisite mens rea.40

B. Speidel

Robert Speidel was convicted of willfully neglecting to return a rental car to the Avis Rent-A-Car Company under the terms of his rental contract. Under Alaska law at the time, this conduct was a felony punishable by a maximum term of five years imprisonment.41 While Speidel could be convicted only if he willfully neglected to return the car, the term “willfully neglects” was defined to mean “omits, fails, or forbears, 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.”42 In Speidel v. State,43 the court reversed the defendant’s conviction based on its conclusion that the statute violated due process of law since it allowed conviction without proof of consciousness of wrongdoing.44

The court began its opinion in Speidel by directly citing Morissette as authority for the “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.”45 Having established that consciousness of wrongdoing is generally required for the imposition of criminal liability, the court quickly disposed of

40. 342 U.S. at 271; see supra text accompanying note 29.
41. ALASKA STAT. § 28.35.026 (1978) provides:
   (a) A person in possession of a motor vehicle under an agreement in writing which requires him to return the vehicle to a particular place or at a particular time who refuses or wilfully neglects to return it to the place and at the time specified in the agreement in writing with the intent to deprive the owner of the vehicle or to convert it to his own use, or who secretes, converts, sells or attempts to sell the vehicle or any part of it is, upon conviction, punishable by imprisonment for not more than five years, or by a fine of not more than $1,000, or by both.
   (b) As used in this section “wilfully neglects” means omits, fails, or forbears, 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.
42. See id.
44. Id. at 80. The United States Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law . . . .” U.S. CONST. amend. XIV, § 1. The comparable provision of the Alaska Constitution appears in ALASKA CONST. art. I, § 7.
45. 460 P.2d at 78 (citing Morissette, 342 U.S. at 250 (footnote omitted)).
the argument that the challenged statute was a public welfare offense which could dispense with a mens rea requirement. The court then noted that the crime of failing to return a rental vehicle included a mens rea requirement: the defendant must willfully neglect to return the vehicle. Consequently, the court did not have to decide whether it could read an intent element into the crime; rather, the issue in Speidel was whether the mens rea element included in the crime satisfied the consciousness of wrongdoing requirement.

The court acknowledged that under the portion of the definition of "wilfully neglects" requiring the defendant to act "with a conscious purpose to injure," the "statute incorporates an element of conscious wrongdoing or criminal intent." However, under that portion of the definition making it a crime to fail to return a motor vehicle "without regard for the rights of the owner, or with indifference whether a wrong is done the owner or not," the consciousness of wrongdoing standard was not met.

Under this terminology it is possible for one to be found guilty of the offense when there was an entire lack of any conscious deprivation of property or intentional injury. If one fails to return an automobile out of neglect, without any intention to deprive the owner of his property or to convert the property to his own use, or of doing wrong to the owner, he is made guilty of a felony although he may have acted unwittingly or inadvertently or negligently.

To make such an act, without consciousness of wrongdoing or intention to inflict injury, a serious crime, and criminals of those who fall within its interdiction, is inconsistent with the general law. To convict a person of a felony for such an act, without proving criminal intent, is to deprive such person of due process of
The court was clearly correct in reversing Speidel’s felony conviction under the principles specified in *Morissette*. Since the challenged statute was not a public welfare offense, it had to specify a level of *mens rea* which would insure that only the “blameworthy in mind” could be convicted of a crime. Under the definition of “wilfully neglects,” however, liability could be imposed even if the defendant *unwittingly* failed to return the car. Consequently, while the crime appeared to require proof of *mens rea*, the definition of “wilfully neglects” allowed a conviction based on the simple failure to return the car regardless of fault: the classic form of strict liability.

The statute in *Speidel* was also interpreted to allow conviction if the defendant’s failure to return the car was “inadvertent” or “negligent.” In such a case, as opposed to the situation where the defendant acted unwittingly, the defendant has at least demonstrated some degree of fault. In holding that the crime was valid only to the extent that it applied to a person who failed to return a car “with [a] conscious purpose to injure,” the court apparently concluded that mere civil negligence does not establish a constitutionally sufficient degree of *mens rea* upon which to impose liability for a felony.

Having established that liability without fault, or liability based

53. *Id.* (emphasis added).
54. See *supra* text accompanying note 38.
55. 460 P.2d at 80; see *supra* text accompanying note 53.
56. 460 P.2d at 80.
57. *Id.* at 80-81.
58. See *infra* note 263 for the definition of negligent conduct applicable in civil litigation.
59. “Under the terms of [ALASKA STAT. §] 28.35.026 there is no escape from a felony conviction and a possible five-year prison term for simple neglectful or negligent failure to return a rented automobile . . . .” 460 P.2d at 80. Subsequent cases also emphasized that the constitutional infirmity of the statute in *Speidel* was that it allowed conviction based on mere negligence. See, e.g., State v. Campbell, 536 P.2d 105, 109 (Alaska 1975) (“Since the language of [ALASKA STAT. §] 28.35.026(b) . . . encompassed mere inadvertent or negligent conduct, we held the statute to be invalid to the extent that it made a person criminally liable for a felony without requiring criminal intent.”); Alex v. State, 484 P.2d 677, 680 (Alaska 1971) (“We emphasized that under the statute in [*Speidel*] a person might suffer a felony conviction for a simple negligent failure to act.”). But see Langesater v. State, 668 P.2d 1359, 1360 (Alaska Ct. App. 1983); Gudjonsson v. State, 667 P.2d 1254, 1256 (Alaska Ct. App. 1983) (discussed *infra* in text accompanying notes 273-74); Reynolds v. State, 655 P.2d 1313, 1315-16 (Alaska Ct. App. 1982) (per curiam) (discussed *infra* in text accompanying notes 150-51) (court of appeals applied a negligence standard in fish and game misdemeanor regulations that did not specify any *mens rea* requirement).
on civil negligence, was not a constitutionally sufficient basis for a conviction, it was unfortunate that the court summarized its holding by concluding that the challenged statute violated due process because it allowed a conviction without proof of consciousness of wrongdoing.\textsuperscript{60} As subsequent cases would indicate, that phrase carries the clear connotation that, at the very minimum, the defendant must know that what he is doing is wrong: a requirement not imposed by either \textit{Morissette}\textsuperscript{61} or \textit{Speidel}.\textsuperscript{62}

C. \textit{Alex}: \textit{Speidel} is Clarified

Less than two years after \textit{Speidel}, the court had its first opportunity to apply and clarify the rule that, ordinarily, proof of consciousness of wrongdoing is required for the imposition of criminal liability. In \textit{Alex v. State},\textsuperscript{63} the defendant was convicted of escaping from the Palmer Adult Conservation Camp where he was serving a sentence for a felony.\textsuperscript{64} At trial Alex requested and was denied a jury instruction that "'conduct cannot be criminal unless it is shown that one charged with criminal conduct had an awareness or consciousness of wrongdoing.'"\textsuperscript{65} As the supreme court acknowledged, this instruction paraphrased language in \textit{Speidel}.\textsuperscript{66} On appeal Alex argued that consciousness of wrongdoing is an essential element of a general intent crime such as escape and that the trial court committed error when it instructed that the state need not establish that he knew that his act was wrong.\textsuperscript{67}
In affirming Alex's conviction, the court found it necessary to review *Morissette* and *Speidel* and to caution that "undue emphasis should not be placed upon our use of the term 'wrongdoing' in *Speidel*."\(^{68}\) The court noted that in *Morissette* the United States Supreme Court did not emphasize "a specific awareness of wrongfulness"\(^{69}\) on the part of criminal defendants but instead cited the variety of terms used to refer to the mental element in criminal statutes.\(^{70}\) The court then concluded that the goal of *Morissette* and *Speidel* was not to require that a defendant know that his act was unlawful, but rather to insure that criminal liability could not be imposed "for innocent or inadvertent conduct."\(^{71}\)

The use of the phrase "awareness of wrongdoing" is but one means of assuring this result. The phrase does not mean a person must be aware that the conduct he is committing is specifically defined as a wrongful act. Nor does it mean that a person must know an act is proscribed by law. Rather, the requirement is that a person's intent be commensurate with the conduct proscribed.

So long as one acts intentionally, with cognizance of his behavior, he acts with the requisite awareness of wrongdoing.\(^{72}\)

The court then turned to the intent instruction given at Alex's trial. That instruction required the jury to find that Alex "'intend[ed] to do an act which, if committed, would constitute a

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\(^{68}\) 484 P.2d at 681.

\(^{69}\) Id.

\(^{70}\) The Alaska Supreme Court cited that portion of *Morissette* which summarized the wide variety of terms used to refer to the mental element in crimes. *Id.; see supra* text accompanying note 36.

\(^{71}\) 484 P.2d at 681.

\(^{72}\) Id. at 681-82.
crime,' but did not require a finding that Alex "[knew] that he [was] committing a crime or that his act [was] wrong." The court concluded that this instruction met the requirements of Speidel since it required the jury to find that Alex left the camp "intentionally and, therefore, with an awareness of his conduct." 74

Alex made two significant clarifications of the consciousness of wrongdoing requirement adopted in Speidel. First, the court noted that the phrase was but one way to insure that criminal liability could not be imposed for innocent or inadvertent conduct. 75 Second, in approving an instruction that Alex need not "‘know that he [was] committing a crime or that his act [was] wrong,’" 76 the court emphasized that the phrase consciousness of wrongdoing does not require a defendant to have acted with knowledge that his conduct was improper. 77

D. Campbell and Kimoktoak: Will the Court Read Mens Rea into a Criminal Statute?

In State v. Campbell 78 and Kimoktoak v. State, 79 the court considered whether it could read a mens rea requirement into criminal statutes that do not specifically require proof of intent and appear to impose criminal sanctions on the basis of strict liability or negligent conduct. The answer to this question was of critical importance since in Speidel the court apparently held that, ordinarily, liability for a felony may not attach unless a person acts with a level of mens rea greater than civil negligence. 80 While Speidel recognized a limited exception to this rule in the case of public welfare offenses, 81 the crimes challenged in Campbell and Kimoktoak clearly did not fall within that category. 82 Consequently, if a mens rea requirement could not be read into the criminal statutes, they apparently would

73. Id. at 680; see supra note 67.
74. 484 P.2d at 682.
75. Id. at 681; see supra text accompanying notes 71-72.
76. 484 P.2d at 680; see supra text accompanying notes 73-74.
77. 484 P.2d at 681-82; see supra text accompanying note 72.
78. 536 P.2d 105 (Alaska 1975).
80. See Speidel, 460 P.2d at 80; see supra notes 56-59 and accompanying text.
81. Speidel, 460 P.2d at 78-79; see supra note 46 and accompanying text. While the crime in Speidel did not fall within the public welfare exception, the court nevertheless recognized the existence of that exception. 460 P.2d at 78-79 (citing Morissette v. United States, 342 U.S. 246, 255-56 (1952)).
82. In Campbell the court did not even consider whether the challenged crime, which carried a maximum ten-year sentence, see infra note 85, could be classified as a public welfare offense. This was not surprising since the state argued that a mens rea requirement should be read into the crime. See infra text accompanying note 93. In Kimoktoak the state conceded that the challenged crime could not be classified as
have to be declared unconstitutional under *Speidel*. After initially adopting a rule in *Campbell* which prohibited a court from reading a *mens rea* element into a statute that did not codify a common law crime, the court repudiated that rule three years later in *Kimoktoak.*

1. *Campbell*. In *Campbell* the defendant was charged under a statute that made it a crime to find and appropriate lost property without attempting to return it to the owner by advertising the find in a local newspaper or by contacting a peace officer. Since the property that Campbell found was worth over $100, the crime was a felony punishable by a maximum term of imprisonment of ten years. On its face the statute imposed strict liability on a person for finding property that was in fact lost and failing to take affirmative steps to locate its owner, regardless of whether he knew that the property was lost or even acted with an awareness of a substantial risk of that fact. In this respect, the statute appeared to prohibit conduct similar to that conduct prohibited under the trial court's mistaken construction of the larceny statute in *Morissette*, where the defendant was prevented from arguing at trial that he believed that the property he found was abandoned.

Prior to trial, Campbell moved to dismiss the charge on the basis that the statute violated due process since it did not require proof of criminal intent and imposed criminal penalties for merely negligent behavior. The trial court, relying solely on *Speidel*, granted Campbell's motion, and the state appealed the dismissal to the

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a public welfare offense. 584 P.2d at 29 n.2. This concession was also not surprising since the crime carried a maximum ten-year sentence. See infra note 107.

83. 536 P.2d at 110.
84. 584 P.2d at 31.
85. ALASKA STAT. § 11.20.260 (repealed 1980) provided:

A person who finds lost property and appropriates it to his own use or to the use of another person not entitled to it, without (1) immediately or within a reasonable time advertising that fact in a paper of general circulation published nearest the place where found, and setting out a full and true description of the property, with marks of identification, if any, or (2) notifying the peace officer nearest to the place where found and giving a full and true description of the property, together with the time, place and circumstances under which found, is guilty of larceny and is punishable as provided in § 140 of this chapter.

ALASKA STAT. § 11.20.140 (repealed 1980) provided in pertinent part as follows:

A person who steals money, goods, or chattels . . . which [are] the property of another, is guilty of larceny. Upon conviction, if the property stolen exceeds $100 in value, a person guilty of larceny is punishable by imprisonment for not less than one nor more than 10 years.

86. See ALASKA STAT. § 11.20.140 (repealed 1980).
87. See id. § 11.20.260 (repealed 1980).
88. See supra notes 18-20 and accompanying text.
89. 536 P.2d at 106.
90. Id.
Alaska Supreme Court. In upholding the trial court’s dismissal of the charge, the court found it necessary, once again, to review Morissette and Speidel. Despite its warning in Alex that “undue emphasis should not be placed upon our use of the term ‘wrongdoing’ in [Speidel],”91 the court cited Speidel as holding that “conduct cannot be criminal unless it is shown that one charged with criminal conduct had an awareness or consciousness of some wrongdoing.”92

In arguing that the challenged statute was constitutional, the state contended that a constitutional level of intent could be read into the crime by requiring the defendant to find the lost property under circumstances that provide clues as to the ownership of the property. If the defendant appropriated the property despite the presence of such clues, the state argued that the element of wrongful intent required by Speidel could be established.93 The court, however, rejected this opportunity to construe the statute in a manner that would uphold its constitutionality. While acknowledging its duty to interpret statutes, whenever possible, in a manner that “would harmonize the statutory language with specific constitutional provisions,”94 the court concluded that an interpretation of this statute along the lines suggested by the state would violate the separation of powers doctrine.95

Central to the court’s refusal to read a mens rea element into the statute was its determination that the challenged statute did not codify a common law crime.96 The court cited Morissette for the rule that if a codification of a common law crime failed to specify a mens rea element, a court would read the common law intent requirement into the statute.97 The court, however, then went on to cite Morissette and Speidel for the rule that “intent can be found by implication only in statutes which represent codifications of a common law

91. 484 P.2d at 681; see supra text accompanying note 68.
92. Campbell, 536 P.2d at 108 (quoting Speidel, 460 P.2d at 78) (footnote omitted).
93. 536 P.2d at 110.
94. Id. (footnote omitted).
95. Id. at 111. The court observed that the separation of powers doctrine “prohibits this court from enacting legislation or redrafting defective statutes.” Id. at 111 & n.19 (citing ALASKA CONST. art. II, § 1 (vesting the legislative power of the state in a legislature consisting of a senate and house of representatives) and ALASKA CONST. art. IV, § 1 (vesting the judicial power of the state “in a supreme court, a superior court, and the courts established by the legislature”)).
96. The court noted that the common law crime of misappropriation of property required the presence of two elements that were missing from the challenged statute: (1) an intent by the defendant to convert the property absolutely to his own use, and (2) circumstances surrounding the finding which provide clues for determining the identity of the owner. Id. at 110.
97. Id. at 107-08.
Yet, as the court was to acknowledge three years later in *Kimoktoak*, neither *Morissette* nor *Speidel* established that rule.99

While the prohibition established in *Campbell* against reading a *mens rea* element into a statute that did not codify a common law crime was later overruled in *Kimoktoak*, 100 it is important to note that with the publication of *Campbell* in 1975, the court had formulated two significant rules on *mens rea* requirements.101 The first was adopted in *Speidel*, and provided that except for a limited number of public welfare offenses a person may not be convicted of a felony unless that person acted with a level of intent greater than civil negligence.102 In *Speidel* this was referred to as a consciousness of wrongdoing requirement.103 In *Alex* the court explained that the phrase consciousness of wrongdoing did not require the defendant to know that his act was wrong.104 The second *mens rea* rule was adopted in *Campbell* and prohibited a court from reading a *mens rea* element into a statute that did not codify a common law crime.105 Considered together, these two rules meant that the courts would declare a statute establishing a felony crime unconstitutional if it did not include a *mens rea* element greater than civil negligence, did not codify a common law crime, and could not be classified as a public welfare offense.

2. *Kimoktoak.* Three years after *Campbell*, in *Kimoktoak v. State*, 106 the court was faced with a constitutional challenge to a conviction under a statute that, in part, made it a felony for the driver of a car involved in an accident to fail to render assistance to a person he injured.107 At trial the jury was instructed that the defendant must be shown to have had knowledge of the incident but was told

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98. *Id.* at 110 (emphasis added).
99. See infra note 113 and accompanying text.
100. *Id.*
101. The effect of these two rules on the effort to revise the criminal laws of Alaska is discussed elsewhere in this article. See infra text accompanying notes 227-28.
102. See supra notes 56-59 and accompanying text.
103. 460 P.2d at 78.
104. 484 P.2d at 681; see supra text accompanying notes 76-77.
105. 536 P.2d at 109-10.
107. *ALASKA STAT.* § 28.35.060 (1978) provides in pertinent part:

(a) The operator of a vehicle involved in an accident resulting in injury to or death of a person or damage to a vehicle which is driven or attended by a person shall give his name, address, and vehicle license number to the person struck or injured, or the operator or occupant, or the person attending, and the vehicle collided with and shall render to any person injured reasonable assistance . . . .

(c) A person who fails to comply with a requirement of this section regarding assisting an injured person is, upon conviction, punishable by
that it could find that the defendant had the requisite knowledge "where the circumstances involving the incident were such that they would lead a reasonably prudent person to assume that an accident resulting in injury to a person must have occurred." 108

Kimoktoak's first argument on appeal was that the statute under which he was convicted did not specifically require knowledge by the driver that the accident or injury occurred. To allow conviction under such circumstances, Kimoktoak contended, would violate due process since he could have been found guilty even though he was unaware of any wrongdoing. 109 No doubt relying on Campbell, Kimoktoak argued that the court could not read a mens rea requirement into the statute since it did not codify a common law crime. 110

On its face, as the state was willing to concede, the challenged statute did not require a defendant to act with an awareness that an accident or injury had occurred. 111 Since the statute did not codify a common law crime, 112 the trial court apparently lacked authority under Campbell to read a mens rea element into the statute. If the court was to apply the Campbell rule, it was clear that Kimoktoak's conviction would have to be reversed. The court, however, rejected the Campbell rule in Kimoktoak.

The court cited four reasons why it was necessary to repudiate the Campbell rule. First, while in Campbell the court cited Speidel and Morissette for the rule that mens rea could only be read into a

imprisonment for not more than 10 years, or by a fine of not more than $10,000, or by both.

108. 584 P.2d at 31. The entire instruction provided as follows:

Knowledge by the driver of the incident is necessary before he may be found guilty under Count I. However, you need not find that the driver had actual knowledge. You may find that the driver had the required knowledge where the fact of the accident and injury was visible and obvious or where the circumstances involving the incident were such that they would lead a reasonably prudent person to assume that an accident resulting in injury to a person must have occurred.

Count I of the indictment is not a crime which requires a specific wrongful intent to commit.

Id. at 31-32.

109. Id. at 28-29. The circumstances of the case in fact raised the issue of whether Kimoktoak had knowledge of the accident or the injury. While driving a car without the owner's permission, Kimoktoak twice ran over his victim while trying to pull out of a bar parking lot. When police arrived at the scene Kimoktoak sped away and refused to stop even after a police officer fired a shot through the back window. Kimoktoak was apparently extremely intoxicated at the time. Perhaps the most remarkable aspect of the case was that the victim, who also was intoxicated, did not remember being run over even though his injuries required hospitalization for nearly a month. Id. at 27-28.

110. See id. at 28.

111. Id. at 29.

112. See id. at 30.
statute that codified a common law crime, the court on closer examination determined that neither case actually established such a rule. Second, the court cited two of its own decisions, decided before Campbell, in which a mens rea element was read into a statute that did not codify a common law crime. Third, the court cited several cases from other jurisdictions where a mens rea requirement was read into statutes similar to the Alaska provision. Finally, the court stressed its duty to construe statutes so as to avoid a finding of unconstitutionality.

Having determined that it had the authority to read a mens rea element into the statute, the court next had to decide what level of intent should be required. The court concluded that to sustain a conviction the state must establish "that the driver actually knew of the injury or that he knew that the accident was of such a nature that one would reasonably anticipate that it resulted in injury to a person." The jury instruction given at trial was deficient under this standard since it failed to require a finding that Kimoktoak knew that the accident was of a type that one would "reasonably anticipate" would result in injury. The court stressed that before the jury could determine whether a person would have reasonably believed that the accident resulted in injury, it must first find that the defendant knew the nature of the accident since "[i]t is not the reasonable person who is on trial but the defendant . . . ."

113. [W]e would note that neither Morissette nor Speidel, the two cases from which the Campbell rule was derived, establishes the principle that criminal intent may not be found by implication in statutes which do not codify a common law crime. A close reading of Morissette reveals that the court only suggested in dicta that where a legislature creates a new statutory offense but omits a criminal intent requirement, a court in some cases may not be warranted in implying the requisite intent. Similarly, the reasoning in Speidel may have suggested that criminal intent may not be found by implication where a statute creates a new offense, but that case does not establish this as a broad rule to be applied in all cases.

Id. at 30 (footnotes omitted) (emphasis in original).

114. Id. (citing Thomas v. State, 522 P.2d 528, 530 n.4 (Alaska 1974); Judd v. State, 482 P.2d 273, 280 (Alaska 1971)). Both Thomas and Judd involved prosecutions under the former Alaska Narcotic Drug Act, ALASKA STAT. §§ 17.10.010-.240 (repealed 1982). In both cases it was held that a statute prohibiting the possession of certain illegal drugs required the drugs to be "knowingly" possessed. Thomas, 522 P.2d at 530; Judd, 482 P.2d at 280. Neither case was cited in Campbell.

115. 584 P.2d at 31 & n.6.

116. Id. at 31.

117. Id.

118. Id. at 32.

119. Id.; see supra note 108.

120. 584 P.2d at 32.
E. Rice and Reynolds Mens Rea Will Be Read into a Crime
Unless a Contrary Legislative Intent Clearly Appears

In State v. Rice\(^{121}\) and Reynolds v. State,\(^{122}\) the Alaska appellate courts adopted and applied a rule of construction that criminal statutes would be "strictly construed to require some degree of mens rea absent a clear legislative intent to the contrary."\(^{123}\) Not only did this highlight the clear break from the discredited Campbell rule in Kimoktoak, but it also emphasized the judicial hostility toward strict liability crimes.

1. Rice. Rice was a big game guide who transported in his airplane moose meat that apparently had been taken by a client in violation of a regulation prohibiting killing game the same day that a hunter flew to the hunting site.\(^{124}\) Rice was convicted in district court of violating a regulation that made it a misdemeanor to "possess or transport any game . . . illegally taken."\(^{125}\) The trial court refused to give Rice's proposed jury instruction that to convict him the jury must find that he "either knew, or reasonably should have known" that the meat was taken illegally.\(^{126}\) Rice successfully appealed his conviction to the superior court based on the trial court's failure to give this instruction,\(^{127}\) and the reversal of his conviction by the superior court was subsequently upheld by the Alaska Supreme Court. However, as Justice Matthews was to note in his concurring opinion, the reasons given by the court for reading a mens rea requirement into the regulation were "somewhat unfocused."\(^{128}\)

Chief Justice Rabinowitz began the majority opinion in Rice by adopting a rule of construction that had not previously been recognized by the court.

It must be remembered that strict liability is an exception to the

\(^{121}\) 626 P.2d 104 (Alaska 1981).
\(^{122}\) 655 P.2d 1313 (Alaska Ct. App. 1982).
\(^{123}\) Rice, 626 P.2d at 108 (emphasis added); see Reynolds, 655 P.2d at 1315-16.
\(^{124}\) ALASKA ADMIN. CODE tit. 5, § 81.070(b)(6) (repealed, and reinacted in 1980 as ALASKA ADMIN. CODE tit. 5, § 81.075(4) (July 1983)) provides that it is an illegal hunting method for "a person who has been airborne . . . [to] thereafter take or assist in taking big game until after 3:00 a.m. following the day the flying occurred." See Rice, 626 P.2d at 106 & n.1. This regulation is sometimes referred to as the "same day airborne" rule. Rice was acquitted on the same day airborne charge. Id.
\(^{125}\) ALASKA ADMIN. CODE tit. 5, § 81.140(b) (July 1983); see supra note 124. Rice was sentenced to thirty days imprisonment and fined $500; his aircraft was forfeited to the state pursuant to ALASKA STAT. § 16.05.195 (1977) (amended 1983). Rice, 626 P.2d at 106.
\(^{126}\) 626 P.2d at 107.
\(^{127}\) Id. at 106.
\(^{128}\) Id. at 115 (Matthews, J., concurring). Justice Matthews proposed a test whereby a mens rea requirement would be read into any crime that authorized a term of imprisonment upon conviction. Id. at 116.
rule which requires criminal intent. Criminal statutes will be strictly construed to require some degree of *mens rea* absent a clear legislative intent to the contrary. Even when a statute, or a regulation, does not explicitly require any element of *mens rea*, we will scrutinize the statute or regulation to determine whether *mens rea* must be made part of the definition of the particular offense.\(^\text{129}\)

In adopting this rule of construction, the court effectively created a presumption that all crimes, even those traditionally classified as public welfare offenses,\(^\text{130}\) would be interpreted to require *mens rea* absent a clear legislative intent to the contrary. The court itself recognized that the status of the challenged offense as a fish and game regulation "might perhaps be considered by some to be sufficient to justify characterization . . . as a strict liability offense."\(^\text{131}\) Indeed, in the earlier case of *Nelson v. State*,\(^\text{132}\) the court appeared to recognize the need for strict liability in some game violations. In *Nelson* the court held that a regulation prohibiting the taking of a cub bear in "its first or second year of life" did not require the state to establish that the hunter knew or should have known the bear's age, since requiring proof of such knowledge "would mean that the regulation could not be enforced."\(^\text{133}\) In *Nelson* the court failed to cite any clear statement of legislative intent to impose strict liability. Application of the *Rice* rule of construction in *Nelson* might have required a reversal of the conviction.\(^\text{134}\)

In *Rice* the court announced a rule of construction that apparently would have required it to determine whether there was an expression of legislative intent to impose strict liability under the

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129. *Id.* at 108 (footnote omitted) (emphasis added).

130. See *supra* note 33 for a discussion of the common characteristics and categories of public welfare offenses.

131. 626 P.2d at 108.


133. *Id.* at 935.

134. *Rice* did not cite *Nelson*. It is, therefore, unclear whether *Nelson* would be decided differently today. In *Reynolds v. State*, 655 P.2d 1313 (Alaska Ct. App. 1982) (per curiam), the court of appeals implied that the regulation challenged in *Nelson* would be upheld even under the *Rice* rule of construction since the problems of establishing the defendant's awareness of the bear's age made the "imposition of strict liability . . . clearly justified." *Id.* at 1316. However, there was no indication in *Nelson* of a clear expression of legislative intent to impose liability regardless of the defendant's knowledge of the bear's age. Therefore, application of the *Rice* rule would not appear to warrant the imposition of strict liability. *Reynolds* may, however, be read as recognizing a limited exception to the *Rice* rule of construction in cases where imposition of a *mens rea* requirement would make a criminal regulation unenforceable. See also *Langesater v. State*, 668 P.2d 1359, 1360 (Alaska Ct. App. 1983).
challenged regulation.\textsuperscript{135} The court did not, however, next consider whether such intent had been expressed. Instead, it held that under the regulation the defendant must "'know or reasonably should know'\textsuperscript{136} that the meat was illegally taken, since without that level of intent the regulation would be unconstitutionally vague and violative of substantive due process.\textsuperscript{137}

Despite the fact that the court in \textit{Rice} never applied the rule of construction which it adopted in that opinion, the decision is significant in tracing the judicial development of \textit{mens rea} rules in Alaska for three reasons. First, it established the rule of construction that requires a court to read a \textit{mens rea} element into all crimes absent a clear legislative intent to impose strict liability.\textsuperscript{138} Second, while the court quoted approvingly from the consciousness of wrongdoing language in \textit{Speidel},\textsuperscript{139} it held that this requirement could be satisfied by showing that Rice knew or reasonably should have known that the meat was illegally taken without referring to an additional require-

\textsuperscript{135}. 616 P.2d at 108.  
136. \textit{Id.} at 110 (quoting the superior court).  
137. \textit{Id.} at 109-10. The court noted that without the specified level of intent the crime would be overbroad since it would allow forfeiture of an aircraft for shipping illegally taken meat without knowledge on the part of the owner of the aircraft that the meat was taken illegally. The regulation would therefore be void for vagueness since it did not give adequate notice of what was prohibited. \textit{Id.}

Justice Matthews, however, disagreed with this analysis.

The concept of overbreadth as it is used in vagueness cases refers to a lack of fair notice as to what conduct is punishable. Stock v. State, 526 P.2d 3, 8 (Alaska 1974). Here there is fair notice in the sense that the regulation is linguistically precise in delineating the type of conduct proscribed. The problem with it is that it includes within its ambit the conduct of people who have no reason to believe that what they are doing is criminal. I suggest, therefore, that the vagueness rationale does not support the conclusion reached.

\textit{Id.} at 115 (Matthews, J., concurring).

The majority also concluded that if the regulation imposed strict liability it would violate substantive due process because "if enforced according to its literal terms, . . . [it] would bear no reasonable relationship to the legitimate regulatory purpose underlying it." \textit{Id.} at 110.

Justice Matthews also disagreed with the majority's substantive due process analysis, concluding that

this is at best a tangential expression of what is wrong with the regulation. There certainly is a legitimate government interest in preventing the unlawful killing of game, and imposing strict forfeiture or criminal fines on persons who transport unlawfully killed game bears a relationship to the accomplishment of that purpose.

\textit{Id.} at 115 (Matthews, J., concurring).

138. \textit{Id.} at 108.  
ment that Rice must have known that this conduct was wrong.\textsuperscript{140} To the extent that the court's holding in \textit{Hentzner v. State}\textsuperscript{141} can be read as requiring proof in all \textit{malum prohibitum} crimes that the defendant knew that his conduct was wrong,\textsuperscript{142} and to the extent that the regulation in \textit{Rice} was a \textit{malum prohibitum} crime,\textsuperscript{143} the court in \textit{Rice} may have implicitly rejected this broad interpretation of \textit{Hentzner}. Finally, in reading a level of intent into the regulation, the court did not require Rice to act with positive knowledge that the meat was taken illegally. Instead, merely establishing that Rice reasonably should have known that the meat was unlawfully taken would satisfy the minimum \textit{mens rea} requirement.\textsuperscript{144}

2. \textit{Reynolds}. In \textit{Reynolds v. State}\textsuperscript{145} the recently established court of appeals\textsuperscript{146} faced one of its first opportunities to tackle the \textit{mens rea} issue. Reynolds was convicted of fishing in closed waters, a crime punishable by a maximum term of imprisonment of one year.\textsuperscript{147} The regulation that served as the basis for the prosecution did not require a defendant to act with any form of \textit{mens rea} regarding the location of his boat in closed waters.\textsuperscript{148} The trial court interpreted the regulation to impose liability if Reynolds' boat entered closed waters, regardless of whether he intended the entry.\textsuperscript{149} In reversing Reynolds' conviction, however, the court of appeals concluded that by not requiring "evidence that Reynolds was at least negligent with respect to the location of his boat, the court here im-

\begin{enumerate}
\item[140.] \textit{Id.} at 110.
\item[141.] 613 P.2d 821 (Alaska 1980).
\item[142.] \textit{See infra} notes 185-86 and accompanying text.
\item[143.] A strong argument can be made that the challenged regulation in \textit{Rice} is a \textit{malum prohibitum} crime under the definition adopted in \textit{Hentzner}. \textit{See infra} text accompanying note 175 (defining \textit{malum prohibitum}). Even assuming that "reasoning members of society" are willing to conclude that taking a moose the same day that a hunter is airborne is condemnable, it is doubtful that a similar consensus would be reached regarding the actions of a pilot who knowingly transports that meat.
\item[144.] 626 P.2d at 110.
\item[145.] 655 P.2d 1313 (Alaska Ct. App. 1982).
\item[146.] \textit{See supra} note 12.
\item[147.] Pursuant to \textit{ALASKA STAT.} § 16.05.251(2) (1983), the Board of Fisheries had designated certain areas as closed waters. Reynolds had fished in one of those areas. \textit{ALASKA STAT.} § 16.05.720(a) (1983) provides that it is a misdemeanor to violate any of the board's regulations pertaining to commercial fisheries. \textit{See Reynolds}, 655 P.2d at 1314.
\item[148.] \textit{ALASKA ADMIN. CODE} tit. 5, § 06.350(b) (July 1983) "does not, on its face, require any accompanying mental state or criminal intent." \textit{Reynolds}, 655 P.2d at 1314 (footnote omitted). By contrast, the court noted that other fishing regulations do require proof that the defendant "knew or should have known" of a particular circumstance. \textit{Reynolds}, 655 P.2d at 1314 n.1.
\item[149.] 655 P.2d at 1314.
\end{enumerate}
posed a classic form of strict liability... [T]he trial judge erred in not requiring some minimal element of *mens rea*, i.e., negligence, to accompany Reynolds’ conduct.” 150 The court of appeals acknowledged that this negligence standard could be met by establishing that Reynolds “knew or reasonably should have known” the location of the boat. 151

The reversal of Reynolds’ conviction by the court of appeals was hardly remarkable considering its citation of Speidel and Rice “for the proposition that criminal statutes should be strictly construed to require some degree of *mens rea* absent a clear legislative intent to the contrary.” 152 It could have been argued that the challenged regulation in fact expressed a legislative intent to impose strict liability since similar regulations required proof that the defendant “knew or should have known” of a particular circumstance. 153 The court of appeals apparently concluded that the use of *mens rea* terms in related offenses could not be relied upon to indicate a clear legislative intent to impose strict liability under the challenged regulation. The court did, however, recognize two circumstances from which it would infer an intent to impose strict liability: (1) a specific statement in the statute defining the crime that strict liability is intended; or (2) legislative history indicating an intent to impose strict liability. 154 In subsequent cases the court of appeals would cite Reynolds as authority for reading a *mens rea* element into fish and game regulations that did not specifically require proof of intent. 155

150. *Id.* at 1315.
152. *Reynolds,* 655 P.2d at 1315.
153. See, e.g., regulations cited in *Reynolds,* 655 P.2d at 1314 n.1.
155. In Langesater v. State, the court of appeals required the state to establish under a misdemeanor fish and game regulation that the defendant knew or should have known that his boat was in excess of the maximum length allowed for a boat registered for salmon net fishing. 688 P.2d 1359, 1360 (Alaska Ct. App. 1983). Similarly, in Gudjonnson v. State, the court of appeals interpreted a regulation, making it a misdemeanor to take undersized crab, to require proof that the defendant knew or should have known that the crab was undersized. 667 P.2d 1254, 1256 (Alaska Ct. App. 1983) (citing *Reynolds,* 655 P.2d at 1316-17). In both cases, the court of appeals referred to the “knew or should have known” *mens rea* requirement as reflecting a negligence standard. See *supra* note 151 and *infra* text accompanying notes 272-76.
Reynolds is particularly significant in tracing the judicial development of mens rea requirements in Alaska because it marked the first time an Alaska appellate court cited the extensive culpable mental state provisions in the criminal code in deciding whether a crime outside Title 11 could dispense with a mens rea element. While the court of appeals noted that the culpable mental state provisions in the criminal code only apply to crimes in Title 11, it nevertheless referred to them as "persuasive in [their] logic." In fact, if the general provisions in the criminal code pertaining to culpable mental state requirements applied to the regulation challenged in Reynolds, the court of appeals would likewise have been required to read a mens rea element into the regulation, though not the same one it adopted.

F. Hentzner: Consciousness of Wrongdoing Sometimes Means What It Says

In Hentzner v. State, the defendant challenged his convictions for willfully offering and selling securities that had not been registered with the state. In 1975, Hentzner offered, through a newspaper...
per advertisement, to sell gold at eighty dollars an ounce to anyone who sent a purchase order with advance payment. Hentzner promised delivery within eight months and represented that he needed the money to buy equipment to begin mining operations at a location which had a ninety-nine percent chance of success. Several people sent money, and Hentzner in fact began to mine and continued to do so until he was ordered by the state to stop. After concluding that what Hentzner offered for sale was a security, the court turned to the argument that his convictions must be reversed because the state was not required to prove that he acted with "knowledge of wrongdoing."

The jury instructions given at Hentzner’s trial required the jury to find that he acted “wilfully, unlawfully, feloniously, and with specific intent to violate the law.” The instructions further defining this mens rea requirement were not a model of clarity. In response to a jury question, the trial judge told the jury that it could ignore the term feloniously and that Hentzner did “not have to in-
tentionally violate the law; [but that] he [did] have to intentionally do the acts which are prohibited by law.” On appeal the state argued that the only mens rea required to establish a willful violation of the statute was an intent to offer and to sell the securities even though Hentzner might not have known that his conduct was unlawful. Relying on a recent law review article discussing the culpability requirements of the federal securities laws, the court noted that there were three possibilities for defining the term willfully.

One is that the defendant must act intentionally in the sense that he is aware of what he is doing; another is that the defendant must be aware that what he is doing is illegal; and a third is that the defendant must know that what he is doing is wrong. It is in this last sense that we think “wilfully” should be interpreted.

In requiring the state to establish that Hentzner must have known that what he was doing was wrong, the court appeared to return to the interpretation of the consciousness of wrongdoing requirement that it rejected in Alex, that the defendant must act with an awareness that what he is doing is improper. The court, however, read Alex very narrowly to hold only that proof of an awareness of wrongdoing is not required if the crime is malum in se, which was defined as a crime “which reasoning members of society regard as condemnable.”

If the crime is malum in se, the court concluded the mere commission of the prohibited act establishes an awareness of wrongdoing and therefore it is appropriate to allow conviction upon a showing of “no more than a consciousness of the conduct in question.” If, on the other hand, the crime is malum prohibitum, which was defined as a crime where “there is no broad societal concurrence that [the prescribed conduct] is inherently bad,” an awareness of wrongdoing beyond the doing of the act would be required since the mere conscious doing of the act does not necessarily establish that the defendant knew that the act was wrong. The court quickly concluded that offering or selling unregistered securities is a malum prohibitum crime that could not be classified as a public welfare offense be-

168. Id. at 825.
169. Id.
170. Id. at 825 & n.9 (citing James, Culpability Predicates For Federal Securities Laws Sanctions: The Present Law And The Proposed Federal Securities Code, 12 HARV. J. ON LEGIS. 1, 5-6 (1974)).
171. 613 P.2d at 825 (footnote omitted) (emphasis added).
172. Alex, 484 P.2d at 680-82; see supra text accompanying notes 76-77.
173. Hentzner, 613 P.2d at 826.
174. Id. (citing Alex, 484 P.2d at 680-82).
175. 613 P.2d at 826.
176. Id.
cause of its substantial penalty. The court then reversed Hentzner's convictions because the jury was not required to find that he acted with knowledge that what he was doing was wrong.

There are several ways to categorize the holding in *Hentzner*. Under the narrowest interpretation, it could be argued that all the court held was that the crime of willfully offering or selling unregistered securities requires proof that the defendant knew that what he was doing was wrong. If this was the extent of the court's holding, it was based on a small number of federal and state cases interpreting similar statutes. Alternatively, it can be argued that the court held that in any prosecution involving a willful violation of the securities laws, the state must establish that the defendant knew that what he was doing was wrong. If this was what the court held, its holding was based on a more substantial body of case law interpreting similar statutes. Under the third and broader interpretation, it

177. *Id.* at 826-27. Each of the four counts against Hentzner carried a maximum sentence of five years and the court noted that Hentzner faced a maximum sentence of twenty years. See supra note 160.

178. 613 P.2d at 825-27.

179. Hentzner was only charged with selling unregistered securities and not with the fraudulent sale of securities. See supra note 160. Thus, while the court framed the issue in *Hentzner* as involving "the meaning of the word willfully, as used in [ALASKA STAT. §] 45.55.210(a)," 613 P.2d at 825, the court's interpretation of the word willfully may be viewed as applying only in the context of the sale of unregistered securities and not to other conduct covered by ALASKA STAT. § 45.55.210(a). See supra note 160 for the text of ALASKA STAT. § 45.55.210(a). This narrow interpretation of the holding in *Hentzner*, finds support in Jeffcoat v. State, 639 P.2d 308 (Alaska Ct. App. 1982), where the court of appeals noted that in *Hentzner* the court construed "the meaning of the term 'willfully' as it appeared in a statute prohibiting the sale of unregistered securities." *Id.* at 312.

180. See, e.g., United States v. Crosby, 294 F.2d 928, 942 (2d Cir. 1961) (court reversed defendants' convictions because facts did not show "guilty knowledge and purpose"); see also, e.g., Tarvestad v. United States, 418 F.2d 1043, 1047 (8th Cir. 1969), cert. denied, 397 U.S. 935 (1970) (court approved instruction requiring "guilty knowledge" without ruling on whether that knowledge was actually required); United States v. Dardi, 330 F.2d 316, 331 & n.6 (2d Cir. 1964), cert. denied, 379 U.S. 845 (1964) (same); Roe v. United States, 316 F.2d 617, 621 n.9 (5th Cir. 1963) (same). But see, e.g., State v. Hodge, 204 Kan. 98, 107-08, 460 P.2d 596, 604-05 (1969) (all that "willfully" requires "is proof that the person acted intentionally in the sense that he was aware of what he was doing"); State v. Russell, 119 N.J. Super. 344, 351, 291 A.2d 583, 587-88 (1972) (quoting LOSS & COWETT, BLUE SKY LAW 273 (1958)).

181. See 613 P.2d at 825, where the court framed the issue as involving "the meaning of the word 'willfully' as used in [ALASKA STAT. §] 45.55.210(a)."

can be argued that the court held that some crimes that are defined
to require willful conduct must be interpreted to require an actual
awareness of wrongdoing on the part of the defendant.\textsuperscript{183} If this was
the court's holding, it was also based on substantial authority.\textsuperscript{184}
The final, and broadest, interpretation of the court's holding is that it
required proof of an awareness of wrongdoing for all \textit{malum prohib-
itum} crimes, regardless of whether the crime prohibited willful con-

\textsuperscript{183} See 613 P.2d at 827 n.12, where the court noted that the Supreme Court has
ersolved times construed "willfully" in criminal statutes other than the securities laws
to require at least an awareness of wrongdoing.

\textsuperscript{184} See, e.g., James v. United States, 366 U.S. 213, 221 (1961) (willful failure to
account for taxes); Screws v. United States, 325 U.S. 91, 101 (1945) (willful depriva-
tion of constitutional rights); Speis v. United States, 317 U.S. 492, 497-98 (1943)
(willful evasion of taxes); United States v. Murdock, 290 U.S. 389, 394 (1933) (will-
ful violation of Revenue Act); United States v. Krosky, 418 F.2d 65, 67 (6th Cir.
1969) (willful failure to submit for induction into army); Williams v. United States,
402 F.2d 47, 49 (10th Cir. 1967) (willful violation of injunction order); United States
v. Gulf Oil Corp., 408 F. Supp. 450, 463 (W.D. Pa. 1975) (willful violation of Eco-
nomic Stabilization Act); State v. Hall, 90 Idaho 478, 489-90, 413 P.2d 685, 692
(1966) (willful wasting of water for irrigation); State v. Oyen, 78 Wash. 2d 909, 916-
17, 480 P.2d 766, 770-71 (1971) (willfully loitering about a public school), \textit{vacated on
other grounds}, 408 U.S. 933 (1971). \textit{But see, e.g.,} Dennis v. United States, 171 F.2d
986, 990-91 (D.C. Cir. 1948), \textit{aff'd}, 339 U.S. 162 (1950) (willful failure to respond to
subpoena); McBurney v. State, 280 Md. 21, 29 & n.6, 371 A.2d 129, 133-34 & n.6
(1977) (willful violation of statute prohibiting attorneys from commingling funds
entrusted to them); State v. Contreras, 105 R.I. 523, 536-38, 253 A.2d 612, 620 (1969)
(willfully striking police officer).
If this was what the court held, it failed to cite any authority in support of this holding. If this was what the court held, it failed to cite any authority in support of this holding.

185. See 613 P.2d at 826, where the court noted that the "crime of offering to sell or selling unregistered securities is malum prohibitum, not malum in se. Thus, criminal intent in the sense of consciousness of wrongdoing should be regarded as a separate element of the offense . . . ." Id. (footnote omitted). But see supra text accompanying notes 141-43 where it is argued that the court in Rice may have implicitly rejected this broad interpretation of Hentzner.

186. Indeed, the one case that arguably supports a conclusion that some malum prohibitum crimes that do not require willful conduct, nevertheless require proof that the defendant acted with an awareness of wrongdoing, Lambert v. California, 355 U.S. 225 (1957), was not even cited in Hentzner. In Lambert, the defendant was convicted under a Los Angeles municipal ordinance that made it a misdemeanor for a convicted felon to remain in Los Angeles for more than five days without registering with the police. Id. at 226. Lambert was prevented from testifying at trial that she was unaware of the registration requirement, and the Superior Court of Los Angeles County, in affirming her conviction, held that it was no defense that she did not know of the registration requirement. See Packer, Mens Rea and the Supreme Court, 1962 Sup. Ct. Rev. 107, 128 (1962).

In a 5-4 decision, authored by Justice Douglas, the Supreme Court reversed Lambert's conviction, holding that "actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand." 355 U.S. at 229. While acknowledging that "the rule that ignorance of the law will not excuse . . . is deep in our law," id. at 228 (quoting Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 68 (1910)), the Court emphasized that the challenged ordinance punished "conduct which is wholly passive — mere failure to register," 355 U.S. at 228, and noted that violation of the ordinance "is unaccompanied by any activity whatever, mere presence in the city being the test." Id. at 229. The Court was careful, however, to differentiate such passive conduct from "the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed." Id. at 228.

At first glance, it might be concluded that Lambert involved a substantial departure from the principle that ignorance of the law is ordinarily not a defense to a crime. See generally W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW §§ 27, 28, at 191-203 (1972). Justice Frankfurter, however, writing in dissent, did not appear particularly concerned, stating that he was "confident that [Lambert] will turn out to be an isolated deviation from the strong current of precedents — a derelict on the waters of the law." Id. at 232 (Frankfurter, J., dissenting).

Justice Frankfurter may have been correct in his prediction. Indeed, in the years immediately following Lambert, the decision seemed to be largely ignored by the courts, including the Supreme Court. See Packer, 1962 Sup. Ct. Rev. at 135-37. Even if the analysis and holding in Lambert continue to have validity, Lambert does not support the conclusion that all malum prohibitum crimes require that the defendant be aware of actual wrongdoing. Instead, Lambert appears only to hold that criminal liability may not be imposed based on the failure to act under circumstances where nothing places the defendant on notice regarding the duty to act. See Lambert, 355 U.S. at 229.

It is therefore not surprising that Lambert was not cited in Hentzner. Hentzner's prosecution was not based on passive conduct, as was the case in Lambert. Rather, Hentzner affirmatively engaged in a course of conduct to raise money for his gold mining scheme. His conduct did not consist of common, everyday activities; and the
G. Wheeler: Hentzner Clarified?

After *Wheeler v. State* it is questionable whether *Hentzner* can be cited for even the narrowest holding suggested by that opinion. Like *Hentzner*, Wheeler was convicted of willfully selling unregistered securities. The facts in *Wheeler*, however, supported the conclusion that the defendant also intended to defraud investors. Wheeler was convicted of three counts of securities fraud and three counts of selling unregistered securities.

Three instructions were given at Wheeler's trial to define the elements for the three counts of selling unregistered securities. The instruction for one of those counts provided as follows:

The necessary and material allegations of Count V, each of which the state must prove beyond a reasonable doubt before you can find the defendant guilty, are as follows:

1. That on or about September 19, 1978, while outside the state of Alaska, Cletus R. Wheeler did wilfully and unlawfully;
2. Sell a security to Waldo Carrasco at or near Anchorage, Third Judicial District, State of Alaska;
3. Said security having not been registered at the time of its sale as required by the Alaska Securities Act;
4. With reckless disregard for the fact that the business opportunity being offered was a security.\(^{193}\)

With regard to the word "wilfully", used in paragraph one of the instruction, the jury was told that "[a]n act is done wilfully if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say with bad purpose either to disobey or to disregard the law."\(^{194}\) To clarify the meaning of "reckless" in paragraph four of the instruction, the trial court defined the word in a context that "closely tracked" the definition of recklessly in the criminal code.\(^{195}\)

At first glance, it is difficult to understand how Wheeler could have argued on appeal that these instructions failed to require a finding that he had acted "knowingly and deliberately with bad purpose" as to each element of the offense.\(^{196}\) Even assuming that \textit{Hentzner} imposed this \textit{mens rea} requirement, the instructions seemed to satisfy Wheeler's proposed intent formulation\(^{197}\) by requiring that he act willfully\(^{198}\) and by defining that term as requiring proof of an intentional act done with a bad purpose.\(^{199}\) While it is puzzling how Wheeler could have legitimately quarreled with these instructions, it is even more interesting that the court of appeals, in affirming his conviction, used its decision to attempt to clarify the court's holding in \textit{Hentzner}.

Because of the broad definition of "willfully" used by the court at Wheeler's trial,\(^{200}\) the court of appeals was provided with an easy

\(^{193}\) \textit{Id.} at 1251 n.13.
\(^{194}\) \textit{Id.} at 1250 n.12.
\(^{195}\) \textit{Id.} at 1251. The instruction on recklessness provided as follows:

A person acts recklessly in connection with the sale of a security when he is aware of and consciously disregards a substantial and unjustifiable risk that the business venture he sells is a security. The risk must be of such a nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the same circumstances.

\textit{Id.} at 1251 n.15. See infra text accompanying note 256 for the definition of "recklessly" in the criminal code.

\(^{196}\) \textit{Id.} at 1250.

\(^{197}\) The court of appeals, however, agreed with Wheeler's interpretation of the instructions and, in a footnote, dismissed the state's argument that the term "wilfully" in paragraph one of the instructions also applied to other paragraphs in the instructions. \textit{Id.} at 1251 n.14.

\(^{198}\) \textit{See supra} text accompanying note 193.

\(^{199}\) \textit{See supra} text accompanying note 194.

\(^{200}\) \textit{Id.}
opportunity to uphold the jury instructions under the *Hentzner* requirement that the defendant must actually know that the act of selling unregistered securities was wrong.\textsuperscript{201} Indeed, at one point the court of appeals concluded that a common sense interpretation of the instructions “strongly suggests that their net effect was to inform the jury that, at the very least, it would be required to find that Wheeler’s conduct was voluntary and deliberate and that he either actually knew he was unlawfully selling unregistered securities or he recklessly disregarded that fact.”\textsuperscript{202}

The court noted that this common sense reading of the instructions was more favorable to Wheeler than *Hentzner* required\textsuperscript{203} and stressed that the use of a recklessness standard in paragraph four of the instruction “complied with the court’s duty, under *Hentzner*, to inform the jury that Wheeler could be convicted only if he acted with an awareness of wrongdoing.”\textsuperscript{204} Further, the court of appeals concluded that “a more stringent definition of the awareness of wrongdoing standard than that contained in [the criminal code’s definition of ‘recklessly’] would require subjective knowledge by the accused that his conduct was in fact illegal.”\textsuperscript{205} As the court of appeals emphasized, “[s]ubjective knowledge of illegality was . . . expressly rejected as a definition of wilfulness by the court in *Hentzner*.”\textsuperscript{206}

After reviewing *Wheeler*, it is difficult to conclude precisely what form of *mens rea* is required to establish the crime of willfully offering or selling unregistered securities. In *Hentzner*, the state argued that the crime merely requires an intent to offer and sell the security, regardless of whether the defendant knew that the conduct was unlawful.\textsuperscript{207} That contention, however, was rejected by the court in holding that the defendant must “know that what he is doing is wrong.”\textsuperscript{208} In *Wheeler* the court of appeals concluded that the *Hentzner* consciousness of wrongdoing requirement could be satisfied by establishing that Wheeler acted recklessly as to whether what he sold was a security.\textsuperscript{209} Does it necessarily follow, however, that a

\begin{itemize}
  \item \textsuperscript{201} See supra text accompanying note 171.
  \item \textsuperscript{202} 659 P.2d at 1251 (footnote omitted) (emphasis added).
  \item \textsuperscript{203} See id. at 1251 n.14.
  \item \textsuperscript{204} Id. at 1252.
  \item \textsuperscript{205} Id.
  \item \textsuperscript{206} Id.; see supra text accompanying note 171.
  \item \textsuperscript{207} See supra text accompanying note 169.
  \item \textsuperscript{208} See supra text accompanying note 171.
  \item \textsuperscript{209} The court further concluded that
    the trial court’s choice of criminal recklessness as the requisite measure of criminal intent was appropriate as a means of implementing the awareness of wrongdoing requirement expressly adopted in *Hentzner*. The subjective component of criminal recklessness seems entirely consistent with the awareness of wrongdoing standard. When the accused is subjectively
person who acts recklessly as to whether what he is selling is a security also knows or is reckless as to whether it is wrong not to register the security with the state? Despite the fact that Wheeler, for example, knew it was wrong to defraud investors, can it also be said beyond a reasonable doubt that he also knew that he was committing another wrong by not registering the security or was reckless in this regard?210

The difficulty in attempting to reconcile Wheeler with Hentzner can be traced to the court's observation in Speidel that most crimes require proof of consciousness of wrongdoing.211 As has been stressed in this article, the phrase "consciousness of wrongdoing" should be viewed simply as a shorthand reference to the mens rea requirement in criminal statutes.212 Except in the rare case where a crime includes a mens rea term that can be interpreted to require proof that the defendant knew that his act was improper,213 or in the

659 P.2d at 1252.

210. Wheeler, no doubt, acted with an actual awareness that his conduct was wrong when he offered his investment scheme. The instructions on the three counts of securities fraud specifically required the jury to find that Wheeler acted with an intent to defraud, id. at 1250 n.11, and Wheeler was convicted on those counts. See supra notes 190-91 and accompanying text. Perhaps the affirmance of Wheeler's conviction was based on the unexpressed rationale that Wheeler's consciousness of wrongdoing in committing the three counts of securities fraud also satisfied the consciousness of wrongdoing requirement for the three counts of selling unregistered securities.

This explanation for the court of appeals decision in Wheeler finds some support in the subsequent case of Bell v. State, 668 P.2d 829 (Alaska Ct. App. 1983). In Bell the court of appeals appeared to recognize that in some prosecutions the fact that the defendant's conduct also constitutes an uncharged, less serious crime may permit the elimination of the culpable mental state requirement for a particular element of the more serious crime that is the basis for the prosecution. See id. at 833. Professors LaFave and Scott, however, have referred to this doctrine as the "lesser legal wrong" theory and have concluded that it is "unsound, and has no place in a rational system of substantive criminal law." W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 47, at 361 (1972).

211. See supra note 1 and accompanying text.

212. See supra text accompanying notes 37-45 & 75-77.

213. See supra notes 179-84 and accompanying text. There are some crimes in the criminal code that require the defendant to know that his conduct is improper, but this requirement is clearly specified in the statute defining the crime. See infra note 323.
even rarer case where liability is based on the failure to act under circumstances where nothing places the defendant on notice regarding the duty to act,\textsuperscript{214} awareness by the defendant that he is committing a wrongful act is irrelevant to whether the requisite \textit{mens rea} element has been established.

The crime of willfully offering or selling an unregistered security may, in fact, be one of the few exceptions to the general rule that proof of an actual awareness of wrongdoing is irrelevant to the \textit{mens rea} inquiry. Indeed, as previously noted,\textsuperscript{215} there is some authority that the crime requires the prosecution to establish that the defendant knew that he was committing an improper act. If this narrowest interpretation of \textit{Hentzner}\textsuperscript{216} continues to remain good law, \textit{Wheeler} must be viewed as being premised on the unexpressed rationale that when a person acts recklessly as to whether what he is selling is a security, he is put on notice of the duty to inquire whether there is government regulation in the area. If the person then offers to sell the security without complying with the registration requirement, it may then be concluded that he acted with an awareness of wrongdoing.\textsuperscript{217}

Alternatively, the court of appeals may have concluded that the \textit{Hentzner} requirement that the defendant must know that his conduct was wrong\textsuperscript{218} was merely another way to refer to the consciousness of wrongdoing requirement,\textsuperscript{219} which could be satisfied by showing that the defendant acted with a level of \textit{mens rea} greater than civil negligence.\textsuperscript{220} If this was the basis for the holding in \textit{Wheeler}, the application of a recklessness standard in paragraph four of the instruction\textsuperscript{221} would have insured that Wheeler could not have been convicted based on strict liability. Despite the court’s reasoning to the contrary, however, the recklessness standard did not also insure that Wheeler could be convicted only if he knew he was acting improperly unless it is presumed that all persons who act recklessly as to whether what they are selling is a security also act

\begin{footnotes}
\footnotetext{214}{See supra note 186.}
\footnotetext{215}{See cases cited supra note 180.}
\footnotetext{216}{See supra text accompanying note 179.}
\footnotetext{217}{Cf. federal cases cited supra in next to the last paragraph of note 186.}
\footnotetext{218}{See supra text accompanying note 171.}
\footnotetext{219}{While the court of appeals quoted from the passage in \textit{Hentzner} where the court required proof that the defendant “must know that what he was doing [was] wrong,” \textit{Wheeler}, 659 P.2d at 1250 (quoting \textit{Hentzner}, 613 P.2d at 825), it also referred to the “awareness of wrongdoing” standard throughout the opinion.}
\footnotetext{220}{The court of appeals characterized the chief concern of \textit{Hentzner} as insuring that a person could not be convicted of selling unregistered securities “based upon application of strict liability or upon a mere finding of civil negligence.” 659 P.2d at 1252.}
\footnotetext{221}{See supra notes 193 & 195 and accompanying text.}
\end{footnotes}
recklessly as to whether they are acting improperly in not registering the security with the state.222

It is apparent that legislative clarification or further judicial interpretation will be required before it can be said with reasonable certainty what form of mens rea must be established to sustain a prosecution for willfully offering or selling an unregistered security. Resolution of this issue, however, is unlikely to have much significance outside of its effect on securities prosecutions since no crime in the criminal code is defined to require proof of willful conduct. The ambiguities raised by Hentzner and Wheeler, however, emphasize the continuing difficulties that the Alaska appellate courts are experiencing in applying the consciousness of wrongdoing requirement.

II. CULPABLE MENTAL STATES IN THE CRIMINAL CODE: A COMPARISON WITH THE JUDICIAL APPROACH TO MENS REA

In 1978, the Alaska legislature adopted a new criminal code.223 One of the major incentives for the revision was the haphazard approach to mens rea in the existing statutes.224 This concern was summarized in the legislative commentary that accompanied passage of the criminal code.

[The important area of culpable mental states is one of great confusion and uncertainty in existing law. The proliferation of culpable mental state terms coupled with their haphazard use hampers the interpretation of individual sections and frustrates one of the principal purposes of the mens rea concept: providing a structure for the classification of offenses according to their degree of blameworthiness. Additionally, some statutes are exposed to constitutional attack by their failure to specify a culpable mental state, or by their specification of an unconstitutional form of culpability.225]

222. The court of appeals concluded that "[w]hen the accused is subjectively 'aware of and consciously disregards a substantial and unjustifiable risk' that his conduct may be unlawful or that it may lead to unlawful results, it is difficult to imagine how he could realistically be said to have acted without an awareness of wrongdoing." Wheeler, 659 P.2d at 1252 (emphasis added).

The instruction in paragraph four (see supra text accompanying note 193) did not, however, require the defendant to disregard a risk that it was unlawful to fail to register the security with the state; it merely required that he disregard the risk that his investment scheme constituted a security. The court of appeals' qualifying language, "it is difficult to imagine," may have highlighted its own uncertainty regarding its conclusion.


224. See ALASKA SENATE J. SUPP. NO. 47, at 139 (June 12, 1978).

225. Id.
Prior to the adoption of the criminal code, at least twenty different and undefined terms were used in Title 11 to denote \textit{mens rea}.\textsuperscript{226} As the commentary to the criminal code indicated, the legislature was well aware of the constitutional problems caused by the failure to include a \textit{mens rea} term in a crime or by the specification of an unconstitutional form of culpability. In summarizing the criminal code rules on culpable mental states, the Criminal Code Revision Subcommission specifically cited \textit{Speidel} and \textit{Campbell} to illustrate the substantial problems that arise from the lack of a coherent approach to \textit{mens rea}.\textsuperscript{227} In this respect, there was a clear relationship between the holdings in \textit{Speidel} and \textit{Campbell} and the effort to revise Alaska's outdated criminal laws. \textit{Campbell}, in particular, highlighted the urgent need for revision. The legislature recognized that the courts would declare a criminal statute unconstitutional if it did not include a constitutionally sufficient form of \textit{mens rea}, did not codify a common law crime, and could not be classified as a public welfare offense.\textsuperscript{228}

The culpable mental state provisions that were adopted in the criminal code were patterned after similar sections in the Model Penal Code\textsuperscript{229} and recent state criminal code revisions that were also based on the Model Penal Code.\textsuperscript{230} The criminal code uses only four culpable mental states — intentionally,\textsuperscript{231} knowingly,\textsuperscript{232} recklessly,\textsuperscript{233} and purposely.\textsuperscript{234}

\textsuperscript{226} See \textit{Alaska Criminal Code Rev.}, pt. 2, at 13 (Tent. Draft 1977); Stern, supra note 223 at 9 n.47. Title 11 of the Alaska Statutes contains the substantive provisions of the criminal code.
\textsuperscript{228} See supra text accompanying notes 100-05. The \textit{Campbell} rule against reading a \textit{mens rea} element into a statute that did not codify a common law crime was still good law at the time the legislature considered adoption of the criminal code. It was not until September 1, 1978, over two months after the code was passed, that the court in \textit{Kimoktoak} reversed its rule in \textit{Campbell}. See supra text accompanying notes 111-16. The criminal code received final legislative approval on June 16, 1978. \textit{Alaska House J. 1715} (June 16, 1978). Thus, despite the fact that the court's shortlived rule in \textit{Campbell} was incorrect, it can, nevertheless, be concluded that it had a positive effect on law reform in Alaska by adding to the list of reasons for comprehensively revising the criminal law.
\textsuperscript{229} Compare \textit{Alaska Stat.} § 11.81.900(a)(1)-(4) (1983) and \textit{id.} §§ 11.81.600-.610 with \textit{Model Penal Code} § 2.02 (Proposed Official Draft 1962).
\textsuperscript{230} A list of the state criminal code revisions that were relied upon in revising Alaska's criminal laws appears in Stern, supra note 223 at 3 n.9. The Alaska Court of Appeals recently concluded that the New York Penal Code, N.Y. \textit{Penal Law} (McKinney 1975), is the primary state criminal code to be consulted in determining the meaning of ambiguous sections in the Alaska criminal code. See Neitzel v. State, 655 P.2d 325, 327 (Alaska Ct. App. 1982).
\textsuperscript{231} \textit{Alaska Stat.} § 11.81.900(a)(1) (1983) provides as follows:

\begin{quote}
A person acts "intentionally" with respect to a result described by a provision of law defining an offense when the person's conscious objective is to
\end{quote}
Consciousness of Wrongdoing

and criminal negligence — and includes rules that govern their application to crimes in Title 11. For purposes of comparing the legislative approach to culpable mental state requirements with the judicial treatment of mens rea surveyed in Part I of this article, three highlights of the culpable mental state sections in the criminal code will now be examined.

A. The Presumption Against Strict Liability Crimes

The criminal code contains a codification of the rule adopted in Rice, that the failure of the legislature to include a mens rea element in a crime is insufficient evidence to warrant a conclusion that it intended to create a strict liability offense. In section 11.81.600(b) of the Alaska Statutes, the criminal code states the general rule that a culpable mental state is required for all Title 11 offenses.

cause that result; when intentionally causing a particular result is an element of an offense, that intent need not be the person's only objective; . . .

32. Id. § 11.81.900(a)(2) provides as follows:

a person acts "knowingly" with respect to conduct or to a circumstance described by a provision of law defining an offense when the person is aware that the conduct is of that nature or that the circumstance exists; when knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is aware of a substantial probability of its existence, unless the person actually believes it does not exist; a person who is unaware of conduct or a circumstance of which the person would have been aware had that person not been intoxicated acts knowingly with respect to that conduct or circumstance . . . .

33. See infra text accompanying note 256 for the definition of "recklessly" appearing in ALASKA STAT. § 11.81.900(a)(3) (1983).

34. See infra text accompanying note 282 for the definition of "criminal negligence" appearing in ALASKA STAT. § 11.81.900(a)(4) (1983).

35. ALASKA STAT. §§ 11.81.600-.640 (1983).

36. See supra text accompanying note 129.

37. ALASKA STAT. § 11.81.600(b) (1983) provides as follows:

A person is not guilty of an offense unless the person acts with a culpable mental state, except that no culpable mental state must be proved (1) if the description of the offense does not specify a culpable mental state and the offense is

(A) a violation; or

(B) designated as one of "strict liability"; or

(2) if a legislative intent to dispense with the culpable mental state requirement is present.

(Citations omitted).

38. An "offense" means conduct for which a sentence of imprisonment or fine is authorized; an offense is either a crime or a violation." ALASKA STAT. § 11.81.900(b)(33) (1983). A "crime" means an offense for which a sentence of imprisonment is authorized; a crime is either a felony or a misdemeanor." ALASKA STAT. § 11.81.900(b)(9) (1983). See infra text accompanying notes 240-42 for a discussion of the term "violation."
are, however, three limited exceptions to the culpable mental state requirement.

The first exception is when the offense is a violation which does not specifically require proof of a culpable mental state. A "violation" is defined as "a noncriminal offense punishable only by a fine, but not by imprisonment or other penalty." A maximum fine of $300 is authorized upon conviction of a violation. There are only a handful of violations in the criminal code, and since they do not describe criminal conduct they are appropriately not subject to any implied culpable mental state requirement.

The second circumstance in which a culpable mental state is not required is when an offense is "designated as one of 'strict liability.'" This would be the clearest way for the legislature to express its intent to dispense with a culpable mental state requirement. Currently, however, no crime in the criminal code is specifically designated as a strict liability offense.

The final situation in which a culpable mental state is not required is when "a legislative intent to dispense with the culpable mental state requirement is present." This exception is consistent

239. ALASKA STAT. § 11.81.600(b)(1)(A) (1983); see supra note 237.
240. Id. § 11.81.900(b)(56).
241. Id. § 12.55.035(b)(5) (Supp. 1982).
242. See, e.g., id. § 11.51.125 (1983) (failure to permit visitation with a minor); id. § 11.76.100 (selling or giving tobacco to a minor).
243. Id. § 11.81.600(b)(1)(B); see supra note 237.
244. In Reynolds v. State, 655 P.2d 1313, 1316 (Alaska Ct. App. 1982) (per curiam), the court noted:
Especially in the context of regulatory provisions, which can be modified or re-enacted more expeditiously and with less complexity than can formal statutory provisions, we do not think it unrealistic to expect that, if a provision is intended to create a strict liability offense, an express statement to that effect will be included.

245. ALASKA STAT. § 11.81.600(b)(2) (1983); see supra note 237. In Bell v. State, 668 P.2d 829, 835 (Alaska Ct. App. 1983), the court applied this exception to the crime of promoting prostitution in the first degree, ALASKA STAT. § 11.66.110 (1983), and held that a legislative intent to impose strict liability as to one element of the offense (knowledge that the victim was under 16) was clearly present.

The language of ALASKA STAT. § 11.81.600(b)(2) (1983), supra note 237, is not the original formulation adopted by the legislature when it passed the criminal code. The original version of section 11.81.600(b)(2) provided that a culpable mental state need not be proved if an intent to dispense with the element "clearly appears." ALASKA STAT. § 11.81.600(b)(2) (1978) (amended 1980) (emphasis added). The 1980 change does not, however, appear to have significantly altered the scope of this exception. The commentary adopted by the legislature which accompanied the 1980 change merely notes that "the courts should be specifically authorized to consider the legislature's intent (and most importantly, the commentary accompanying passage of the code) in determining whether the legislature intended to dispense with the culpability requirement in a particular statute." ALASKA SENATE J. SUPP.
with the court's observation in Reynolds that an intent to dispense with a mens rea element may be found in the legislative history of a statute. Of course, as the legislature itself recognized in its commentary accompanying the 1980 amendment to this provision, "the decision to eliminate the culpable mental state requirement must comport with constitutional due process guarantees." Thus, while the legislature may intend to create a strict liability crime, ultimately it is the court's responsibility to determine whether the crime meets the requirements of a public welfare offense as specified in Morrisette and Speidel.

Considered together, the provisions of section 11.81.600(b) of the Alaska Statutes effectively establish a presumption against a judicial finding that the legislature intended to create a strict liability crime in the criminal code. Except where an offense is a violation, the failure to include a culpable mental state in a crime does not warrant a finding that strict liability was intended. Either a clear statement of legislative intent to impose strict liability appearing in the statute or an equally clear statement of intent appearing in the legislative history will be required. In this regard, section 11.81.600(b) is consistent with the decisions in Kimoktoak, Rice, and Reynolds, in which a mens rea element was judicially implied in crimes defined outside the criminal code. In these cases the legislature did not include a mens rea element in the definition of the challenged crime, nor did it specify an intent to impose strict liability. In each case, however, the appellate courts read a mens rea element into the crime.

B. Recklessly as the Minimum Culpable Mental State that Will Be Judicially Implied

Having established that the mere absence of a culpable mental state in the definition of a crime does not warrant a judicial determin-
nation that strict liability was intended by the legislature,\textsuperscript{250} the criminal code specifies the culpable mental state which must be read into the crime.

(b) Except as provided in \[Alaska Stat. \S\] 11.81.600(b), if a provision of law defining an offense does not prescribe a culpable mental state, the culpable mental state that must be proved with respect to

(1) conduct is "knowingly"; and
(2) a circumstance or a result is "recklessly."\textsuperscript{251}

The distinction between the conduct, circumstance, and result elements of a crime is not always an easy determination to make.\textsuperscript{252} It is apparent, however, that as to the circumstance and result elements of a crime, the minimum culpable mental state requirement that can be read into a crime is "recklessly."\textsuperscript{253} In the case of conduct elements, the prosecution must establish that the conduct was done "knowingly."\textsuperscript{254} Under no circumstances can the culpable mental state of "criminal negligence" be judicially implied into a crime.\textsuperscript{255} The criminal code defines "recklessly" in the following manner:

\begin{itemize}
  \item \textsuperscript{250} See supra text accompanying notes 236-49.
  \item \textsuperscript{251} \textsc{Alaska Stat.} \S\ 11.81.610(b) (1983).
  \item \textsuperscript{252} In making the distinction, however, it is useful to consider the following discussion appearing in the commentary to the criminal code:
    The Code distinguishes between three elements of offenses to which the culpable mental states apply . . . .
    
    The first element, conduct, involves the nature of the proscribed act or the manner in which the defendant acts. Kidnapping, for example, requires that one person restrain another. The conduct might be the locking of the only door to a windowless room. Knowingly is the culpable mental state applicable to conduct. The second element, circumstances surrounding the conduct, refers to a situation having a bearing on the actor's culpability. Kidnapping requires that the person inside the room not consent to being restrained. Lack of consent is an example of a circumstance surrounding the actor's conduct, and is an element of the crime. Knowingly, recklessly, and criminal negligence are the culpable mental states associated with the existence of circumstances. The result of the actor's conduct constitutes the final element. Kidnapping can occur if the victim is exposed to a substantial risk of serious physical injury. Intentionally, recklessly, and criminal negligence are the culpable mental states associated with results.
  \item \textsuperscript{253} \textsc{Alaska Senate J. Supp.} No. 47, at 140 (June 12, 1978). See generally Neitzel v. State, 655 P.2d 325, 328-30 (Alaska Ct. App. 1982).
  \item \textsuperscript{254} \textsc{Alaska Stat.} \S\ 11.81.610(b)(1) (1983); see supra text accompanying note 251.
  \item \textsuperscript{255} \textsuperscript{255} "Criminal negligence" will not apply unless the term is expressly included in the statute defining the offense." \textsc{Alaska Senate J. Supp.} No. 47, at 144 (June 12, 1978).
[A] person acts "recklessly" with respect to a result or to a circumstance described by a provision of law defining an offense when the person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation . . . 256

In Andrew v. State, 257 the court of appeals held that the definition of "recklessly" as it applies to the crime of theft by receiving, 258 is not impermissibly vague and satisfies "the due process requirement of criminal intent." 259 The court emphasized that the definition of "recklessly" in the criminal code (as well as the definition of "criminal negligence") was "expressly formulated to preclude mere civil negligence from forming the basis for a criminal conviction. Thus, . . . [the definition] require[s] a 'gross deviation' from the standard of care that 'a reasonable person would observe in the situation.' " 260 Additionally, the court of appeals quoted the commentary accompanying the passage of the criminal code that contrasted the definition of "recklessly" with the definition of "criminal negligence." 261

The test for recklessness is a subjective one—the defendant must actually be aware of the risk. On the other hand, if criminal negligence is the applicable culpable mental state, the defendant will be criminally liable if he "fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists." The test for criminal negligence is an objective one—the defendant’s culpability stems from his failure to perceive the risk. 262

A review of the cases surveyed in Part I of this article in which Alaska appellate courts have read a mens rea term into crimes defined outside the criminal code reveals an apparent lack of consistency in the intent element which has been applied. In some cases the implied level of mens rea has been similar or identical to the definition of "recklessly" in the criminal code. In other cases, the courts have applied a civil negligence standard 263 which appears to

258. ALASKA STAT. § 11.46.190(a) (1983) provides that "[a] person commits theft by receiving if the person buys, receives, retains, conceals, or disposes of stolen property with reckless disregard that the property was stolen."
259. 653 P.2d at 1066.
261. 653 P.2d at 1066 n.5.
262. Id. (quoting ALASKA SENATE J. SUPP. No. 47, at 142 (June 12, 1978)).
263. In Swenson Trucking & Excavating, Inc. v. Truckweld Equip. Co., 604 P.2d 1113 (Alaska 1980), the court defined "negligent" conduct as "that which breaches
allow the prosecution to establish less than would be required under the definition of criminal negligence in the criminal code.

In *Kimoktoak*, for example, the level of *mens rea* read into the challenged statute pertained to the circumstance that the defendant had been involved in an accident where injury resulted. While the court did not require *Kimoktoak* to have had positive knowledge of the injury, it did require that "he knew that the accident was of such a nature that one would reasonably anticipate that it resulted in injury to a person." Under this standard, the court appears to have applied a *mens rea* requirement that was very similar to that required by the definition of "recklessly" in the criminal code. Similarly, in *Wheeler*, the court of appeals specifically required proof that the defendant satisfied the criminal code's definition of "recklessly" as to the circumstance that his investment scheme constituted a security.

In contrast to the approach in *Kimoktoak* and *Wheeler*, the court held in *Rice* that before a person could be convicted of transporting illegally taken meat he must know or reasonably should have known that the meat was taken illegally. The "reasonably should have known" standard was inherently ambiguous for two reasons. First, it did not specify whether the defendant must have been subjectively aware of the risk that the meat was taken illegally, or alternatively, whether liability could attach if he objectively should have been aware of that risk. Second, regardless of whether subjective awareness of the risk was required, the court did not clarify whether the standard would be governed by the reason-

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264. 584 P.2d 25, 31 (Alaska 1978); see supra text accompanying note 108.

265. 584 P.2d at 32; see supra text accompanying note 118.

266. Applying the definition of "recklessly" in the criminal code, see supra text accompanying note 256, to the circumstance of *Kimoktoak*'s awareness that an accident involving injury resulted, the pertinent question would have been: Was *Kimoktoak* aware of and did he consciously disregard a substantial and unjustifiable risk that an accident involving injury had occurred? *Kimoktoak*'s disregard of that risk must also have involved a gross deviation from the standard of conduct that a reasonable person would have observed in the situation.

267. 659 P.2d 1241, 1252 (Alaska Ct. App. 1983); see supra text accompanying notes 204-05.

268. 626 P.2d 104, 108 (Alaska 1981); see supra text accompanying notes 136-37.

269. Contrast this ambiguity with the definitions of "recklessly," see supra text accompanying note 256, and "criminal negligence," see infra text accompanying note 282, in the criminal code. See also supra text accompanying note 262.
able person test of civil negligence,\textsuperscript{270} or by a more serious deviation from that standard as required by the definitions of "recklessly" and "criminal negligence" in the criminal code.\textsuperscript{271}

In Reynolds the court of appeals appeared to answer both questions when it equated the "reasonably should have known" test with a civil negligence standard.\textsuperscript{272} Under this standard, a defendant apparently "should have known" that a particular circumstance existed if a reasonable person in the defendant's situation would have been aware of the risk that the circumstance existed, regardless of whether the defendant was subjectively aware of that risk. Any doubt that this was how the court of appeals intended to apply the "reasonably should have known" standard was removed in Gudjonsson v. State.\textsuperscript{273} In Gudjonsson the court of appeals upheld the convictions of two fishing skippers for taking undersized crabs based on evidence presented at trial "that the skipper of a crab vessel knows or reasonably should know when undersized crab are taken."\textsuperscript{274} The court of appeals did not consider, however, whether the defendants were actually aware of the risk that the crabs were undersized. Similarly, in Langesater v. State,\textsuperscript{275} the court of appeals held that before a person can be convicted of fishing in an undersized boat the jury must be instructed that he was "at the very least . . . negligent in failing to recognize that his boat" was underlength.\textsuperscript{276}

At first glance, it might be concluded that the recognition of a civil negligence standard in Reynolds, Gudjonsson, and Langesater by the court of appeals is inconsistent with the supreme court's condemnation of a negligence standard as a constitutionally sufficient degree of mens rea in Speidel.\textsuperscript{277} It should be recalled, however, that in Speidel the court merely condemned the use of a negligence standard to impose liability for a felony offense.\textsuperscript{278} In Kimoktoak and Wheeler, the mens rea standard which was implied paralleled the definition of "recklessly" in the criminal code and differed signifi-

\textsuperscript{270} See supra note 263 for the definition of "negligent" conduct applicable in civil litigation.

\textsuperscript{271} Both the definitions of "recklessness" and "criminal negligence" require a "gross deviation" from the standard of care or conduct that a reasonable person would observe in the situation and were "expressly formulated to preclude mere civil negligence from forming the basis for a criminal conviction." \textit{Andrew}, 653 P.2d at 1066; see supra text accompanying note 260.

\textsuperscript{272} 655 P.2d 1313, 1315-17 (Alaska Ct. App. 1982); see supra text accompanying notes 150-51.


\textsuperscript{274} \textit{Id}. at 1256.

\textsuperscript{275} 668 P.2d 1359 (Alaska Ct. App. 1983).

\textsuperscript{276} \textit{Id}. at 1360 (emphasis added).

\textsuperscript{277} See supra text accompanying notes 56-59.

\textsuperscript{278} See Langesater, 668 P.2d at 1360.
cantly from a civil negligence standard. Both *Kimoktoak* and *Wheeler*, however, also involved felony prosecutions. In contrast, *Reynolds, Gudjonnson,* and *Langesater* involved prosecutions for misdemeanor fish and game regulations that may have been thought of as strict liability offenses before *Rice.* Consequently, while the criminal code provides that recklessly is the minimum culpable mental state requirement that can be judicially implied in a crime in Title 11, the court of appeals has apparently recognized that a civil negligence standard can be implied in misdemeanor fish and game regulations that are silent as to mens rea.

**C. Criminal Negligence as the Minimum Culpable Mental State Requirement**

Of the four culpable mental states used in the criminal code, criminal negligence is the easiest for the prosecution to establish. Unlike the definitions of the culpable mental states of “intentionally,” “knowingly,” and “recklessly,” the definition of “criminal negligence” does not require any subjective intent or awareness on the part of the defendant. The test for criminal negligence is purely an objective standard and is based on the failure of the defendant to perceive a substantial and unjustifiable risk. A person acts with criminal negligence

ded). On the other hand, a person acts intentionally when “the person’s conscious objective is to cause” a particular result, *id.* § 11.81.900(a)(1), knowingly when he “is aware that the conduct is of [a particular] nature or that [a certain] circumstance exists,” *id.* § 11.81.900(a)(2), and recklessly when he is “aware of and consciously disregards a substantial and unjustifiable risk.” *Id.* § 11.81.900(a)(3).

The circumstances in which criminal negligence will serve as an adequate basis upon which to impose liability in the criminal code are extremely limited. Only three crimes allow a conviction based

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279. *See supra* text accompanying note 131; *see also supra* note 33.

280. *See supra* notes 231-32 for the definitions of “intentionally” and “knowingly,” text accompanying note 256 for the definition of “recklessly,” and *infra* text accompanying note 282 for the definition of “criminal negligence.”

281. A person acts with criminal negligence when he “fails to perceive a substantial and unjustifiable risk.” *Alaska Stat.* § 11.81.900(a)(4) (1983) (emphasis added). On the other hand, a person acts intentionally when “the person’s conscious objective is to cause” a particular result, *id.* § 11.81.900(a)(1), knowingly when he “is aware that the conduct is of [a particular] nature or that [a certain] circumstance exists,” *id.* § 11.81.900(a)(2), and recklessly when he is “aware of and consciously disregards a substantial and unjustifiable risk.” *Id.* § 11.81.900(a)(3).

on criminal negligence: criminally negligent homicide,\(^{283}\) criminally negligent burning,\(^{284}\) and permitting an escape.\(^{285}\) Further, the culpable mental state of criminal negligence can never be read into a crime that fails to specify a culpable mental state.\(^{286}\) Nevertheless, in the three crimes where criminal negligence is a sufficient culpable mental state to sustain a conviction, a person will be held criminally liable based on inadvertence.\(^{287}\) Whether the degree of inadvertence required by the definition of criminal negligence distinguishes it

283. **Alaska Stat.** § 11.41.130(a) (1983) provides that "[a] person commits the crime of criminally negligent homicide if, with criminal negligence, the person causes the death of another person." The crime is a class C felony punishable by a maximum term of imprisonment of five years. *Id.* § 11.41.130(b); *id.* § 12.55.125(e) (Supp. 1983).

284. **Alaska Stat.** § 11.46.430(a) (1983) provides that “[a] person commits the crime of criminally negligent burning if with criminal negligence the person damages property of another by fire or explosion." The crime is a class A misdemeanor punishable by a maximum term of imprisonment of one year. *Id.* § 11.46.430(b) (1983); *id.* § 12.55.135(a) (Supp. 1983).

285. **Alaska Stat.** § 11.56.370(a) (1983) provides that a public servant commits the crime of permitting an escape "if with criminal negligence the public servant permits a person under official detention to escape." The crime is a class C felony punishable by a maximum term of imprisonment of five years. *Id.* § 11.56.370(b); *id.* § 12.55.125(e) (Supp. 1983).

286. See supra note 255.

287. The commentary to the Model Penal Code sections on culpability summarizes the debate over whether inadvertence should ever be the basis upon which to impose criminal liability:

Of the four kinds of culpability defined, there is, of course, least to be said for treating negligence as a sufficient basis for imposing criminal liability. Since the actor is inadvertent by hypothesis, it has been argued that the "threat of punishment for negligence must pass him by, because he does not realize that it is addressed to him." So too it has been urged that education or corrective treatment not punishment is the proper social method of dealing with persons with inadequate awareness, since what is implied is not a moral defect. We think, however, that this is to oversimplify the issue. Knowledge that conviction and sentence, not to speak of punishment, may follow conduct that inadvertently creates improper risk supplies men with an additional motive to take care before acting, to use their faculties and draw on their experience in gauging the potentialities of contemplated conduct. To some extent, at least, this motive may promote awareness and thus be effective as a measure of control. Certainly legislators act on this assumption in a host of situations and it seems to us dogmatic to assert that they are wholly wrong. Accordingly, we think that negligence, as here defined, cannot be wholly rejected as a ground of culpability which may suffice for purposes of penal law, though we agree that it should not be generally deemed sufficient in the definition of specific crimes, and that it often will be right to differentiate such conduct for the purposes of sentence.

from the court's condemnation in Speidel of imposing criminal liability for a felony on the basis of negligent conduct\textsuperscript{288} must now be considered.

With respect to the crime of criminally negligent homicide, the culpable mental state of criminal negligence likely defines a constitutionally sufficient level of intent. In \textit{O'Leary v. State},\textsuperscript{289} a case decided before the effective date of the criminal code, the court sustained a conviction under the former crime of negligent homicide based on the culpable negligence of the defendant in operating a motor vehicle while intoxicated.\textsuperscript{290} The term culpable negligence was not defined in the statute and the jury instruction given at trial did not require a finding that the defendant was aware that his conduct created the risk of death.\textsuperscript{291} The instruction did, however, require the jury to find that the defendant's inadvertence exceeded the level required by a civil negligence standard.\textsuperscript{292}

In allowing a conviction to be based on inadvertence, but requiring the degree of inadvertence to be greater than that required for civil negligence, the court in \textit{O'Leary} approved a jury instruction that is consistent with the definition of "criminal negligence" in the criminal code.\textsuperscript{293} Further, while \textit{Speidel} was not cited in \textit{O'Leary}, it

\textsuperscript{288} \textit{See supra} text accompanying notes 56-59; \textit{see also} State v. Campbell, 536 P.2d 103, 109 (Alaska 1975) (emphasizing that the statute in \textit{Speidel} encompassed "mere inadvertent or negligent conduct"); Alex v. State, 484 P.2d 677, 680 (Alaska 1971) (emphasizing that the challenged statute in \textit{Speidel} allowed conviction based on a "simple negligent failure to act").

\textsuperscript{289} 604 P.2d 1099 (Alaska 1979).

\textsuperscript{290} \textit{Alaska Stat.} § 11.15.080 (repealed 1980) provided that "[e]very killing of a human being by the culpable negligence of another, when the killing is not murder in the first or second degree, or is not justifiable or excusable, is manslaughter, and is punishable accordingly."

\textsuperscript{291} The instruction defined culpable negligence in the following manner:

\textit{Culpable negligence is something more than that slight degree of negligence necessary to support a civil action for damages} and is negligence of such a degree, so gross and wanton, as to be deserving of punishment. Culpable negligence implies a reckless disregard of the consequences which might ensue from the doing of an act and constitutes conduct of such a reckless, gross and wanton character so as to indicate an utter, heedless indifference to the rights, properties, safety and even the lives of others . . . .

\textit{In order to constitute culpable negligence it is not necessary that the actor actually recognize that his conduct is extremely dangerous.} It is enough that he knows or has reason to know of circumstances which would bring home to the realization of the ordinary, reasonable man the extremely dangerous character of his conduct.

\textsuperscript{292} \textit{Id} at 1105.

\textsuperscript{293} The definition of "criminal negligence" requires a "gross deviation from the standard of care that a reasonable person would observe in the situation." \textit{Alaska Stat.} § 11.81.900(a)(4) (1983); \textit{see supra} text accompanying note 282.
can be concluded that by requiring a level of inadvertence greater than that required by a civil negligence standard, the repealed crime of negligent homicide,294 as well as the current crime of criminally negligent homicide,295 satisfy the consciousness of wrongdoing requirement of *Speidel*.296 Similarly, the use of the culpable mental state of criminal negligence in the crimes of criminally negligent burning and permitting an escape would also appear to satisfy the primary concern of *Speidel* by preventing the imposition of criminal liability for a felony based on a civil negligence standard.297

### III. Conclusion

A comparison of the judicial and legislative approaches to *mens rea* in Alaska reveals more significant similarities than differences. The three important *mens rea* principles recognized by the United States Supreme Court in *Morissette*,298 having been initially followed by the Alaska Supreme Court, now find explicit recognition in the criminal code. The judicial reluctance expressed in *Campbell* to read a *mens rea* element into a statute which does not codify a common law crime299 has been replaced by the *Rice* rule of construction which requires a court to read a *mens rea* element into a crime unless a contrary legislative intent clearly appears.300 A similar rule appears in the criminal code.301 While strict liability or public welfare offenses continue to exist in theory,302 there effectively is a legislative and judicial presumption against their creation and recognition.303

The court's condemnation in *Speidel* of imposing criminal liability for a felony based on a civil negligence standard304 finds confirmation in the criminal code rules on culpable mental state requirements. The minimum culpable mental state of criminal negligence is defined to insure that criminal liability cannot be imposed based on a civil negligence standard.305 In practice the legislature

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294. *See supra* note 290.
295. *See supra* note 283.
297. *Id*. Of course, the crime of criminally negligent burning is only a misdemeanor. It is therefore likely that it does not even fall within the court's condemnation in *Speidel* of imposing criminal liability for a felony based on inadvertence.
298. *See supra* notes 32-34 and accompanying text.
299. *See supra* text accompanying notes 96-98.
300. *See supra* text accompanying note 129.
301. *ALASKA STAT.* § 11.81.600(b) (1983); *see supra* note 237.
302. *ALASKA STAT.* § 11.81.600(b)(1)(B) (1983); *see supra* note 237; *see also* notes 33 & 46 and accompanying text.
303. *See supra* text accompanying notes 129-31 & 236-49. *But see supra* note 154; *see also* Nelson, discussed *supra* at notes 132-34 and accompanying text.
304. *See supra* notes 56-59 and accompanying text.
305. *See supra* note 271.
has been extremely reluctant to impose liability for criminal negligence, no matter how seriously the degree of inadvertence has been defined.\(^{306}\)

Given the judicial and legislative consensus that civil negligence should not provide the basis for the imposition of criminal sanctions, it may seem somewhat surprising that in recent cases the court of appeals has implied a civil negligence standard in misdemeanor fish and game regulations that failed to specify any \textit{mens rea} requirement.\(^{307}\) This level of \textit{mens rea} would clearly be an inadequate form of culpability for any offense in the criminal code and, under \textit{Speidel}, for any felony outside the criminal code. Nevertheless, it is submitted that in \textit{Reynolds, Gudjonnson, and Langesater}, the court of appeals read an appropriate level of \textit{mens rea} into the challenged regulations. In each of the three cases the status of the offense as a fish and game regulation may have justified its interpretation as a strict liability offense prior to the adoption of the \textit{Rice} rule of construction.\(^{308}\) Today, the legislature could presumably eliminate any \textit{mens rea} requirement in these regulations by adopting a clear statement of intent to impose strict liability.\(^{309}\) The court of appeals has therefore taken a novel, but nevertheless justifiable, approach in applying a "half-way" standard of \textit{mens rea} for these offenses, which requires the prosecution to establish more than would be required if the offense imposed strict liability, but less than would be required under a criminal negligence standard.\(^{310}\)

The one significant difference between the judicial and legislative approaches to \textit{mens rea} which cannot be reconciled, however, pertains to the continued judicial use of the phrase "consciousness of wrongdoing" as a shorthand reference to the general \textit{mens rea} requirement. First used in \textit{Speidel},\(^{311}\) the phrase ordinarily has noth-
ing to do with the issue of whether the defendant knew that his conduct was wrong; nevertheless, it conveys precisely that requirement. It should not have been surprising, therefore, that less than two years after Speidel, the defendant in Alex requested a jury instruction that “conduct cannot be criminal unless it is shown that the one charged with criminal conduct had an awareness or consciousness of wrongdoing.”312 In Alex the court upheld the trial court’s denial of this instruction.313 cautioned that “undue emphasis should not be placed upon our use of the term ‘wrongdoing’ in [Speidel.]”314 and observed that consciousness of wrongdoing does not require the defendant to act with “a specific awareness of wrongfulness” but only that the defendant’s “intent be commensurate with the conduct proscribed.”315 Having said that, it might have been expected that the court would have abandoned use of the phrase consciousness of wrongdoing. Unfortunately, that did not occur. Instead, in every major case decided since Alex that has discussed mens rea requirements, the appellate courts have continued to use the phrase as a shorthand reference to the general mens rea requirement.316

Only in Hentzner was proof that the defendant knew that his conduct was wrong even arguably relevant to the issue whether he acted with the requisite mens rea. The holding in Hentzner, however, appears to have been based on the use of the mens rea term willfully in the challenged statute and some sparse authority recognizing that a willful violation of the securities law requires proof of an actual awareness of wrongdoing on the part of the defendant.317 Thus, for two reasons Hentzner is of limited authority. First, even the narrowest holding suggested by the opinion, that the crime of willfully selling or offering to sell an unregistered security requires proof that the defendant knew that his conduct was wrong,318 is of questionable authority after Wheeler.319 Second, no crime in the criminal code is defined to require proof of willful conduct.

312. Alex v. State, 484 P.2d 677, 680 (Alaska 1971); see supra text accompanying note 65.
313. 484 P.2d at 682; see supra text accompanying note 74.
314. 484 P.2d at 681; see supra text accompanying note 68.
315. 484 P.2d at 681; see supra text accompanying notes 69-72.
317. See supra notes 179-82 and accompanying text.
318. See supra text accompanying notes 179-80.
319. See supra text accompanying notes 207-22.
Hentzner, therefore, will be of no assistance in applying the four culpable mental states used in the criminal code.

The consciousness of wrongdoing formulation is simply irrelevant to the issue whether the defendant acts with the necessary culpable mental state to establish a crime in the criminal code. For example, a person commits criminally negligent homicide if he causes death through criminal negligence. There is no requirement that the defendant know that what he is doing is wrong. Indeed, even the defendant's awareness that his conduct creates a risk of death is irrelevant to whether he acts with criminal negligence.

Supporters of the consciousness of wrongdoing formulation might reply that in Hentzner the court clarified the phrase by stating that it does not require proof of an actual awareness of wrongdoing for malum in se crimes. It might therefore be argued that the legislative and judicial approaches are in agreement that an actual awareness of wrongdoing is irrelevant for most crimes. This argument, however, only serves to emphasize the misleading nature of the phrase consciousness of wrongdoing. Virtually every crime in the criminal code falls within the malum in se category. Since the court has emphasized that the phrase consciousness of wrongdoing does not mean what it appears to say when it is applied to malum in se crimes, the preferable approach is to abandon the use of that phrase when its plain meaning is inapplicable to the overwhelming majority of crimes in the criminal code.

Abandonment of the consciousness of wrongdoing formulation would not leave the legislature or judiciary powerless to add or to imply a specific mens rea element in a crime which requires proof that the defendant knew that his conduct was wrong. Indeed, several crimes in the criminal code specifically require proof that the defendant knew that his conduct was improper. Moreover, crimes

320. ALASKA STAT. § 11.41.130 (1983); see supra note 283.
321. ALASKA STAT. § 11.81.900(a)(4) (1983); see supra text accompanying note 262.
322. See supra text accompanying note 174.
323. The court of appeals recently recognized the possibility that the crime of prostitution, ALASKA STAT. § 11.66.100 (1983), may be a malum prohibitum crime. Bell v. State, 668 P.2d 829, 834 (Alaska Ct. App. 1983) (however, promoting prostitution is a malum in se offense). It is difficult to select another crime in the criminal code that falls within the court's definition of malum prohibitum crimes although it is possible that some of the gambling offenses might fall within that definition. See ALASKA STAT. §§ 11.66.200-260 (1983).
324. ALASKA STAT. § 11.41.330 (1983) provides that "[a] person commits the crime of custodial interference in the second degree if, . . . knowing that the person has no legal right to do so," he takes a child from its lawful custodian. (emphasis added). See also id. § 11.41.320 (custodial interference in the first degree); id. §§ 11.41.480-.486 (providing that the crime of criminal mischief occurs if the de-
defined outside the criminal code could continue to be interpreted to require an actual awareness of wrongdoing based on the particular *mens rea* term used or the presence of a legislative intent to impose that requirement.

Fifty years ago, Professor Sayre, in discussing the ambiguity inherent in the phrase *mens rea*, concluded that "[t]here is only one way out. Either the term must be discarded altogether, or its scope must be carefully defined." 325 In the fifteen years that have passed since *Speidel*, Alaska appellate courts have struggled to clarify the consciousness of wrongdoing requirement. Judged by the continuing volume of litigation in the area and the ambiguities inherent in the recent *Hentzer* and *Wheeler* decisions, those attempts have largely been unsuccessful. Rather than continue in an effort to clarify this inherently misleading and ambiguous phrase, the Alaska appellate courts should abandon the consciousness of wrongdoing formulation and replace it with the following suggested formulation of the *mens rea* requirement:

Ordinarily, a person may not be convicted of a crime unless that person acts with a degree of fault which is greater than that required by a civil negligence standard.326 There are two exceptions to this rule. First, the fault requirement can be eliminated if the crime is a public welfare offense and there is a clear expression of legislative intent to impose liability regardless of fault.327 Second, an exception applies to misdemeanors outside the criminal code that have traditionally been classified as public welfare offenses. In the absence of a clear expression of legislative intent to impose liability regardless of fault, the minimum fault requirement for these crimes is civil negligence.328

Proof that the person knew that his conduct was wrong is irrelevant in determining whether the fault requirement has been satisfied329 with two exceptions. Under the first, proof that the person knew that his conduct was wrong is

326. *Speidel*, 460 P.2d at 80-81; see supra notes 56-59 and accompanying text.
328. See supra notes 307-10 and accompanying text. If the imposition of a negligence standard would make the criminal statute unenforceable, liability without fault may be imposed. See supra note 134.
329. *Alex*, 484 P.2d at 681-82; see supra text accompanying notes 69-72 & 76-77.
required if the crime imposes liability for the failure to act under circumstances where nothing places the person on notice regarding the duty to act.\textsuperscript{330} Under the second, the legislature may define a crime to specifically require proof that the person knew that his conduct was wrong.\textsuperscript{331}

While this proposed rule lacks the conciseness inherent in the consciousness of wrongdoing formulation, it substitutes accuracy for brevity. The adoption of this rule by the Alaska appellate courts and the abandonment of the consciousness of wrongdoing formulation will clarify prior judicial rules on \emph{mens rea} requirements, insure consistency between the legislative and judicial approaches to \emph{mens rea}, and perhaps reduce the inordinate amount of litigation that has arisen concerning the meaning of the phrase consciousness of wrongdoing.

\textsuperscript{330} See supra note 186.

\textsuperscript{331} See, e.g., statutes cited supra note 324.