

THE AWARENESS OF WRONGDOING REQUIREMENTS IN THE WAKE OF *HAZELWOOD*

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ABSTRACT

State v. Hazelwood shook Alaska's jurisprudence and suggested the end of the due process requirement of awareness of wrongdoing for serious criminal convictions. However, prior and subsequent case law suggest a more limited principle that the awareness of wrongdoing requirement only applies to cases involving omission liability or willful violation, not to the entirety of criminal law, and *Hazelwood* would survive only as an extension of this distinction. Still, premising such a requirement on judicial classification of offenses as positive action or omission liability does not appear to have emerged by design, and the result has the potential for inconsistency, arbitrariness, and misapplication. This Note first demonstrates that the only recognizable pattern to emerge from the case law is to require an awareness of wrongdoing for omission offenses and for violations of statutes that specifically require willful violation and second argues that the requirement of awareness of wrongdoing should not hinge on omission versus affirmative action liability, because it has too great a potential for arbitrary and inconsistent application.

INTRODUCTION

The Alaska Constitution prohibits the deprivation of "life, liberty, or property without due process of law," and guarantees a right to "fair and just treatment in the course of legislative and executive investigations."¹ In *Speidel v. State*,² the Alaska Supreme Court held that a felony conviction for inadvertent or negligent action violates the defendant's right to due process.³ The court stated that an injury could

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1. ALASKA CONST. art. 1, § 7.
2. 460 P.2d 77 (Alaska 1969).
3. *Id.* at 80.

only amount to a crime when the individual charged with the crime had an “awareness or consciousness of some wrongdoing.”⁴ The Alaska Supreme Court has subsequently refused to impose convictions for negligent conduct and has required a demonstration that the defendant had an awareness of wrongdoing.⁵ In 1997, however, the Alaska Supreme Court stated in *State v. Hazelwood*⁶ that negligence could serve as the criminal intent necessary to support a conviction, and further that the requirement to demonstrate criminal intent does not require the State to demonstrate an awareness of wrongdoing.⁷

Some critics go so far as to say that *Hazelwood* is irreconcilable with the Alaska jurisprudence.⁸ Not only does the fundamental contrast in language support such an argument, but also no decision that cites *Hazelwood* additionally cites *Speidel* or forbids convictions absent a defendant’s awareness of wrongdoing.⁹ However, other decisions since

4. *Id.* at 78.

5. See *Alex v. State*, 484 P.2d 677, 681 (Alaska 1971) (holding that “[t]his court . . . will not now sanction conviction of a serious felony for mere inadvertence or simple neglect.”); *Kimoktoak v. State*, 584 P.2d 25, 29 (Alaska 1978) (“It is well-settled that an act or omission can result in serious criminal liability only when a person has the requisite criminal intent.”); *Hentzner v. State*, 613 P.2d 821, 826 (Alaska 1980) (“Where the crime involved may be said to be malum in se, that is, one which reasoning members of society regard as condemnable, awareness of the commission of the act necessarily carries with it an awareness of wrongdoing. In such a case the requirement of criminal intent is met upon proof of conscious action, and it would be entirely acceptable to define the word ‘wilfully’ to mean no more than a consciousness of the conduct in question.”).

6. 946 P.2d 875 (Alaska 1997).

7. *Id.* at 878–79.

8. See Lee Perla, Note, *Mens Rea in Alaska: From Bad Thoughts to No Thoughts?*, 23 ALASKA L. REV. 139, 162 (2006) (“The cases cited are not persuasive inasmuch as they ignore Alaska’s prior jurisprudence and legislative history.”).

9. See *Solomon v. State*, 227 P.3d 461, 468–69 (Alaska Ct. App. 2010) (“Solomon argues that imposition of criminal liability without proof that the defendant had at least some level of subjective awareness of wrongdoing violates the guarantee of due process of law. But this argument was rejected by our supreme court in *State v. Hazelwood*”); *Valentine v. State*, 155 P.3d 331, 341–42 (Alaska Ct. App. 2007) (“Valentine acknowledges that this court has repeatedly held that the offense of driving while under the influence does not require proof that the defendant was aware that he was legally impaired or that his blood alcohol level was above the legal limit – it is enough that the defendant knowingly drank and knowingly drove.”); *Latham v. State*, A-7198, 2000 WL 1124502, at *5 (Alaska Ct. App. Aug. 9, 2000) (“A person commits the crime of vehicle theft in the first degree if he had no right nor any reasonable ground to believe he had such a right and he knowingly took or drove the propelled vehicle of another.”); *Schmidt v. State*, A-8669, 2005 WL 767071, at *6 (Alaska Ct. App. Apr. 6, 2005) (“But once a person has been convicted of an offense requiring proof of a culpable mental state, including civil negligence, factors other than culpability govern the amount of the fine.”).

Hazelwood continue to require that the State demonstrate that the defendant had an “awareness of wrongdoing” or else hold that a conviction of the defendant violates his or her right to due process.¹⁰ Consequently, despite the language of the decision, *Hazelwood* did not overturn *Speidel* either explicitly or implicitly.

Given this history, what demonstration of criminal intent satisfies due process, and when must the State demonstrate that the defendant possessed an awareness of wrongdoing in order to convict him or her? The Alaska Court of Appeals managed to create a rule, compatible with the case law, that the defendant must possess an awareness of wrongdoing, and therefore cannot be convicted under a negligence theory, in two situations.¹¹

First, the defendant cannot be convicted, absent an awareness of wrongdoing, if the statute under which the defendant is charged proscribes “willful” violation.¹² Such a rule derives from a basic process of statutory interpretation in that the courts simply assign meaning to the term “willful,” and so this rule does not merit additional attention.

Second, the defendant cannot be convicted, absent an awareness of wrongdoing, if the underlying criminal action was an omission.¹³ An

10. See, e.g., *Dailey v. State*, 65 P.3d 891, 895 (Alaska Ct. App. 2003) (“In other words, to convict Dailey of failure to file sworn written quarterly verifications, the State had to prove both that Dailey was aware of the circumstances giving rise to his duty to file sworn quarterly written verifications and that he knowingly refrained from performing that duty.”); *State v. Strane*, 61 P.3d 1284, 1292 (Alaska 2003); *Moffitt v. State*, 207 P.3d 593, 595 (Alaska Ct. App. 2009); *Myers v. Municipality of Anchorage*, 132 P.3d 1176, 1185 (Alaska Ct. App. 2006); *Trigg v. State*, A-7519, 2003 WL 294363, at *1 (Alaska Ct. App. Feb. 12, 2003); *Willis v. State*, 57 P.3d 688, 694 (Alaska Ct. App. 2002); *Hutchison v. State*, 27 P.3d 774, 778 (Alaska Ct. App. 2001).

11. See *Wheeler v. State*, 659 P.2d 1241, 1252 (Alaska Ct. App. 1983) (“Accordingly, we hold that the trial court’s use of criminal recklessness as a measure of the criminal intent requirement applicable to Wheeler’s charges of selling unregistered securities fully 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.”); *McGee v. State*, 162 P.3d 1251, 1258-59 (Alaska 2007); *Kinney v. State*, 927 P.2d 1289, 1294 (Alaska Ct. App. 1996); *Steve v. State*, 875 P.2d 110, 122 (Alaska Ct. App. 1994).

12. See *Wheeler*, 659 P.2d at 1252 (“Accordingly, we hold that the trial court’s use of criminal recklessness as a measure of the criminal intent requirement applicable to Wheeler’s charges of selling unregistered securities fully 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.”); *McGee*, 162 P.3d at 1258-59.

13. See *Steve*, 875 P.2d at 122 (“The result in both cases can be explained by the rule that, when criminal liability is predicated on a person’s failure to perform an act required by law, the government must at a minimum show (1) that the defendant was aware of the circumstances that created the legal duty to act, and (2) that the defendant voluntarily refrained from performing the act.”);

omission, in contrast to a positive action, is a “failure to act . . . or [a] failure to act under circumstances giving rise to a legal duty to act.”¹⁴ Some would place more constitutional restrictions on the government when the government creates omission offenses rather than positive action offenses, because the former compels rather than forbids conduct, and therefore imposes a greater burden on free action.¹⁵ They would welcome an “awareness of wrongdoing” requirement for omission offenses. However, premising an awareness of wrongdoing requirement on whether or not an offense is a positive action or omission offense is dangerous because a statute could be written in either form and still proscribe or compel virtually identical conduct. As positive action and omission offenses function more alike than not, it does not make sense to have a different constitutional requirement for each of them. That the Alaska Court of Appeals has already misstated positive action offenses as omission offenses exemplifies how easily the distinction can be blurred.¹⁶

This Note will demonstrate how the Alaska Court of Appeals’ rule of imposing an awareness of wrongdoing requirement in cases in which the defendant was charged under a statute that requires willful violation or a statute that creates omission liability adequately encompasses the case law and provides a workable estimate for when Alaska courts will require that the State prove the defendant’s awareness of wrongdoing in order to support a conviction. However, it criticizes the emphasis on distinguishing between positive action and omission cases.

Section I of this Note will review the history of the due process protection of the *mens rea* requirement in Alaska preceding *Hazelwood*. It will conclude that a rule imposing an awareness of wrongdoing requirement in cases which premise liability on either willful violation or omission adequately encapsulates the history of the requirement. Section II will analyze *State v. Hazelwood* in the context of that case law and will conclude that *Hazelwood* does not violate the rule of the Alaska Court of Appeals, as the relevant statute in *Hazelwood* neither proscribed

Kinney, 927 P.2d at 1294.

14. WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 6.2 (2d ed. 2006).

15. See George P. Fletcher, *On the Moral Irrelevance of Bodily Movements*, 142 U. PA. L. REV. 1443, 1446 (1994) (“[P]rohibiting actions represents a lesser incursion in our liberty than requiring particular actions (that is, punishing their omission). As the argument goes, it is less intrusive to prohibit flag burning than it is to require children to pledge allegiance to the flag. The former only eliminates one of many ways of expressing contempt for the state; the latter requires people to submit their bodies to motions dictated by the state.”).

16. See, e.g., *Trigg v. State*, A-7519, 2003 WL 294363, at *1 (Alaska Ct. App. Feb. 12, 2003) (finding the court of appeals misstated section 45.55.070 of the Alaska Statutes as an omission offense).

willful violation nor imposed omission liability. Section III will review the cases since *Hazelwood*. It again concludes that the rule adequately encompasses the application of the requirement on the cases following *Hazelwood*, and thus should serve as the rule for practitioners who later attempt to estimate whether courts will require that the State prove the defendant's awareness of wrongdoing. Finally, Section IV will point out the dangers of premising a condition of awareness of wrongdoing on omission liability.

I. THE HISTORY OF *MENS REA* PROTECTION IN ALASKA

This Section, divided into three Subsections, analyzes the case law preceding *State v. Hazelwood*. Subsection A examines cases providing the strongest language in support of a universal requirement of subjective awareness of wrongdoing; Subsection B examines cases premising liability on negligence instead of subjective awareness; Subsection C examines the court of appeals decisions immediately preceding *Hazelwood* that began to apply the awareness of wrongdoing requirement only to offenses premised on omission liability or offenses requiring willful violation.

A. The Development of the Awareness of Wrongdoing Requirement

In *Speidel v. State*,¹⁷ the Alaska Supreme Court declared that a felony conviction absent a criminal intent deprives the defendant of due process of the law.¹⁸ The relevant statute in this case criminalized individuals who “willfully neglect” to return a motor vehicle.¹⁹ The statute additionally provided the definition of the *mens rea* under which the defendant was ultimately convicted. The statute defined the *mens rea* of “willfully neglects” to mean “omits, fails, or forbears, with a conscious purpose to injure, or without regards for the rights of the owner, or with indifference whether a wrong is done the owner or not.”²⁰ The Alaska Supreme Court invalidated the statute because it permitted persons to receive a felony sentence despite having an

17. 460 P.2d 77, 80 (Alaska 1969).

18. *Id.* at 80.

19. ALASKA STAT. § 28.35.026(a) (1969) (“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 willfully neglects to return it . . . is, upon conviction, punishable by imprisonment for not more than five years.”) (current version at ALASKA STAT. § 28.35.320(a) (2012)).

20. ALASKA STAT. § 28.35.026(b) (1969) (current version at ALASKA STAT. § 28.35.320(b) (2012)).

innocent mind.²¹ The court accepted the “with conscious purpose to injure” part of the definition, but it rejected the criminalization of failing to return a vehicle “without regard for the rights of the owner” or “with indifference whether a wrong is done the owner or not.” The court reasoned that such a definition could lead to one being guilty under the statute even in the absence of “any conscious deprivation of property or intentional injury.”²²

Ultimately, the court held that for an injury to be considered a crime it must be “inflicted by intention,” and the defendant must have acted with an “awareness or consciousness of some wrongdoing.”²³ However, the court neither defines awareness or consciousness of wrongdoing nor outlines how future prosecutors must prove it.

The Alaska Supreme Court would not go so far as to forbid public welfare offenses, signaling to the legislature that it could criminalize conduct absent awareness of culpability if the penalty were minimal and the danger to society necessitated criminalization.²⁴ Consequently, the court highlighted that the penalty assigned to section 28.35.026 of the Alaska Statutes was a felony throughout the decision.²⁵

The statute at issue in *Speidel* involved a “failure to return,” allowing future courts to interpret *Speidel* as requiring a showing of more than mere negligence only for omission cases.²⁶ However, the *Speidel* court did not discuss omissions, but instead prefaced its discussion with, “[a]lthough an act may have been objectively wrongful . . . ,”²⁷ signaling that the court never intended to draw such a distinction.

In 1971 the Alaska Supreme Court analyzed the awareness of

21. *Speidel*, 460 P.2d at 79.

22. *Id.*

23. *Id.* at 78.

24. *Id.*

25. *Id.* at 78–80 (“Under the terms of ALASKA STAT. § 28.35.026 (2012) 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 at the time specified in the rental agreement. 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 a person of due process of law.”).

26. See *Steve v. State*, 875 P.2d 110, 122 (Alaska Ct. App. 1994) (“The result in both cases [*Speidel* and *Kimoktoak*] can be explained by the rule that, when criminal liability is predicated on a person’s failure to perform an act required by law, the government must at a minimum show (1) that the defendant was aware of the circumstances that created the legal duty to act, and (2) that the defendant voluntarily refrained from performing the act.”).

27. *Speidel*, 460 P.2d at 80 (emphasis added).

wrongdoing requirement in *Alex v. State*,²⁸ and the court held that the awareness requirement was inherently satisfied in cases where defendants were aware of their positive actions. It did so by first qualifying the *Speidel* decision by stating that the awareness of wrongdoing standard requires the defendant's intent to be "commensurate with the conduct proscribed."²⁹ Thus, the court rejected a requirement of the awareness of law, but instead only required an awareness of facts.³⁰ Given this standard, the court upheld the defendant's conviction because the judge's instruction required the jury to find that the defendant was aware of his conduct.³¹

The awareness of conduct standard leaves ambiguity in negligence statutes, specifically in whether or not one can be aware of his or her own negligence. The court clearly did not intend to permit convictions under a theory of negligence, stating that it would not sanction conviction of a serious felony for mere inadvertence or simple neglect.³² Still, the court subtly shied away from assigning constitutional protection to the awareness of wrongdoing requirement.³³

Next, in *Kimoktoak v. State*,³⁴ the Alaska Supreme Court held that omission liability offenses would require the State to demonstrate the defendant's awareness of wrongdoing. The Court found section 28.35.060 of the Alaska Statutes constitutionally defective on its face for failing to require criminal intent.³⁵ The court invalidated the statute because, while it required the operator of a vehicle in an accident to give information and provide assistance to other victims of the accident, it did not even require the vehicle operator to know that an accident or injuries had occurred.³⁶ To resolve the constitutionally impermissible

28. 484 P.2d 677 (Alaska 1971).

29. *Id.* at 681.

30. *Id.* ("What is essential is not an awareness that a given conduct is a 'wrongdoing' in the sense that it is proscribed by law, but rather, an awareness that one is committing the specific acts which are defined by law as a 'wrongdoing.'").

31. *Id.* at 682 ("The trial court's instructions required the jury to find that Alex left the Palmer camp intentionally and, therefore, with an awareness of his conduct.").

32. *Id.* at 681.

33. *Id.* ("The goal of these cases is to avoid criminal liability for innocent or inadvertent conduct. The use of the phrase 'awareness of wrongdoing' is but one means of assuring this result.").

34. 584 P.2d 25 (Alaska 1978).

35. *Id.* at 29-30.

36. *Kimoktoak*, 584 P.2d at 29 ("ALASKA STAT. § 28.35.060 does not require that a person have knowledge of the accident or of the fact that injuries have resulted to be guilty of a serious crime. Thus, the statute appears to hold a person strictly liable for failure to render assistance even if he is unaware of any wrongdoing,

lack of an intent requirement, the court assigned to the statute a requirement that the driver “knowingly fails to stop and render assistance.”³⁷

Finally, in *Hentzner v. State*,³⁸ the Alaska Supreme Court held that a “willful” violation of the Securities Act required the State to prove the defendant’s awareness of wrongdoing.³⁹ The court distinguished the case from *Alex*, as *Alex* involved a *malum in se* offense and so awareness of conduct in that case satisfied the awareness of wrongdoing requirement.⁴⁰ However, the violation of the Securities Act in *Hentzner* was a *malum prohibitum* offense.⁴¹ Therefore, awareness of the conduct alone could not satisfy the awareness of wrongdoing requirement, but instead the State must prove a separate element of the offense.⁴²

However, the discussion over willfulness would overshadow the discussion over *malum in se* versus *malum prohibitum* offenses. The Alaska Supreme Court definitively stated that it would “construe ‘wilfully’ . . . to require an awareness of wrongdoing.”⁴³ The court asserted such a definition not simply because of due process protection, but because of basic statutory interpretation as the Supreme Court and other federal courts have consistently read willfully in criminal statutes to require an awareness of wrongdoing.⁴⁴ Through this straightforward

i.e., unaware of the circumstances giving rise to the duty and thus unaware that he is in fact failing to do the required act.”).

37. *Id.* at 31. “Failing to do the required act” ultimately becomes the language used to distinguish *Kimoktoak* as an omission liability case and thus justifies the decision’s application only to other omission liability cases. In *Kimoktoak*, the Alaska Supreme Court recognized that the statute’s requirement of an action rather than its the forbidding of an action was instrumental to the court’s requirement that the State prove knowledge of the circumstance in order to support a conviction. Consequently, this decision introduces the principle that omission offenses require an awareness of wrongdoing while positive action offenses do not. *Id.*

38. 613 P.2d 821 (Alaska 1980).

39. *Id.* at 826.

40. *Id.* A *malum in se* offense is “one in which reasoning members of society regard as condemnable.” *Id.*

41. *Id.* A *malum prohibitum* offense is one in which “there is no broad societal concurrence that it is inherently bad.” *Id.*

42. *Id.* The court took care to distinguish an awareness of wrongdoing from an awareness of illegality, stating that the *Speidel* court interpreted the awareness of wrongdoing as a purpose to injure, and, specific to securities law, alluding to other jurisdictions which found awareness of wrongdoing as “evil motive or purpose” and “deliberately with bad purpose.” In this sense, while an awareness of illegality would not be necessary to demonstrate an awareness of wrongdoing, it would be sufficient. *Id.* at 828.

43. *Id.* at 827.

44. *Id.* at 827, 827 n.12 (citing *United States v. Murdoch*, 290 U.S. 389 (1933)). *Murdoch* stated that in the past fifty years the United States Supreme Court has

discussion, *Hentzner* ultimately stands for the premise that a willful violation requires an awareness of wrongdoing, regardless of omission or positive action liability.

B. The Move Toward A Negligence Standard

In *State v. Guest*,⁴⁵ the Alaska Supreme Court examined a statutory rape statute that was silent on the matters of intent and the mistake of fact defense. The court followed the path set in *Kimotoak* and read a mistake of fact defense into the statute to avoid striking it as unconstitutional.⁴⁶ The court held that, “if an accused had a *reasonable* belief that the person with whom he had sexual intercourse was sixteen years of age or older, he may not be convicted of statutory rape.”⁴⁷ Although the court does not explicitly say so, requiring a reasonable belief as to the victim’s age effectively allows the State to overcome the defense by showing only the defendant was negligent.

Consequently, *Guest* becomes a foundation for *Rice* and *Hazelwood* in that it creates precedent for basing convictions on negligence as to a factual circumstance, in apparent contrast with the previously discussed case law. That the defendant may be negligent to a circumstance rather than his conduct as a whole is no issue, because the circumstance of the sexual partner’s age alone separates the conduct from otherwise legal behavior, in this case consensual sexual intercourse.

In *State v. Rice*,⁴⁸ the Alaska Supreme Court stated what it implied in *Guest*, that a conviction based upon negligence about a circumstance meets due process requirements.⁴⁹ The defendant was convicted of violating 5 Alaska Administrative Code 81.140(b), which provided: “No person may possess or transport any game or parts of game illegally taken.”⁵⁰ The court read into the statute a requirement that the defendant reasonably should have known that the game or parts of the game were illegally taken.⁵¹ Conversely, “the element of negligence must be read into 5 AAC 81.140(b).”⁵²

repeatedly construed ‘willfully’ as used in criminal statutes to include at the least an awareness of wrongdoing. *Id.* See also *Spies v. United States*, 317 U.S. 492, 498 (1943); *United States v. Peltz*, 433 F.2d 48 (2d Cir. 1970), *cert. denied* 401 U.S. 955 (1971).

45. 583 P.2d 836 (Alaska 1978).

46. *Id.* at 838–39.

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

48. 626 P.2d 104 (Alaska 1981).

49. *Id.* at 110.

50. ALASKA ADMIN. CODE tit. 5 § 81.140(b) (1981) (repealed 1985).

51. *Rice*, 626 P.2d at 110.

52. *Id.*

This stands in conflict with the language and logic of the previously mentioned cases. The circumstance of the game being illegally taken is all that separates the conduct from the otherwise legal behavior of transporting game. Still, because the statute in *Rice*, as in *Guest*, did not require willful violation and did not impose omission liability, future courts would be able to distinguish between these cases and the four discussed in Subsection A.⁵³

Additionally, the language in *Rice* leaves ample room to question how future courts should treat the case. First, the court in *Rice* left ambiguous whether or not 5 AAC 81.140(b) is a public welfare offense. On the one hand, it is a fishing and hunting regulation, which frequently qualifies as a public welfare offense.⁵⁴ On the other, the potential penalty for the offense is the seizure of a commercial aircraft.⁵⁵ Given the ambiguity in the range of possible penalties, it is unclear if the holdings of previous cases like *Speidel* and *Alex*, which specifically forbid felony convictions for negligent conduct, apply to the case.

Second, the court focuses its discussion of the constitutionality of the conviction around a vagueness issue, rather than an awareness of wrongdoing or other culpable mental state discussion.⁵⁶ The refusal to identify the implications this decision would have on *Speidel*, *Alex*, *Hentzner*, or *Kimoktoak* reveals that the court might not have thought that the principles in those cases apply, although it offers no reason for such a conclusion other than mentioning the public welfare doctrine.

Justice Matthews, noting both of the above arguments in his concurring opinion, wrote that the potential six month prison sentence upon conviction of the offense distinguished the case from public welfare offenses, and “due process requires that there be a culpable mental state in every case where a sentence of imprisonment may be imposed.”⁵⁷ However, even Justice Matthews took no issue with satisfying the culpability requirement by showing negligence.

Thus, to this point *Speidel*, *Alex*, *Hentzner*, and *Kimoktoak*, held that a conviction violated the defendant’s right to due process if the State did not demonstrate that the defendant had an awareness of wrongdoing.⁵⁸

53. See *McGee v. State*, 162 P.3d 1251, 1258–59 (Alaska 2007); *Kinney v. State*, 927 P.2d 1289, 1294 (Alaska Ct. App. 1996); *Steve v. State*, 875 P.2d 110, 122 (Alaska Ct. App. 1994); *Wheeler v. State*, 659 P.2d 1241, 1252 (Alaska Ct. App. 1983).

54. *Rice*, 626 P.2d at 108.

55. *Id.* at 109.

56. *Id.*

57. *Id.* at 115.

58. See *Hentzner v. State*, 613 P.2d 821, 825 (Alaska 1980); *Kimoktoak v. State*, 584 P.2d 25, 29 (Alaska 1978); *Alex v. State*, 484 P.2d 677, 680–81 (Alaska

However, the court in *Guest* and *Rice* sanctioned statutes that would allow for the defendant to be unaware of one of the circumstances of the offense, so long as the defendant should have been aware.⁵⁹ This is equivalent to a negligence standard, which the court expressly rejected in *Speidel*⁶⁰ and *Alex*.⁶¹

C. The Court of Appeals Deals with the Conflicting Case Law

In *Wheeler v. State*,⁶² the Alaska Court of Appeals revisited section 45.55.210(a) of the Alaska Statutes, the statute at issue in *Hentzner*, and held that the recklessness standard was an “appropriate means of implementing the awareness of wrongdoing expressly adopted in *Hentzner*.”⁶³ The court reasoned:

The subjective component of criminal recklessness seems entirely consistent with the awareness of wrongdoing standard. When 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.⁶⁴

The court of appeals took care to state that negligence would not meet the awareness of wrongdoing requirement, saying, “[t]he definitions contained in the Revised Criminal Code for both recklessness—[section of 11.81.900(a)(3) of the Alaska Statutes]—and negligence—[11.81.900(a)(4) of the Alaska Statutes]—were expressly formulated to preclude mere civil negligence from forming the basis for a criminal conviction.”⁶⁵ The court rejected civil negligence as a substitute for awareness of wrongdoing because it did not to contain a subjective aspect and it did not have its criminal counterpart’s requirement of “gross deviation”.⁶⁶

The total rejection of a negligence standard as to the circumstances of the offense undeniably conflicts with *Rice* and *Guest*, and neither case was cited in the decision. The complete lack of reference to those cases,

1971); *Speidel v. State*, 460 P.2d 77, 80 (Alaska 1969).

59. *State v. Guest*, 583 P.2d 836, 839 (Alaska 1978); *Rice*, 626 P.2d at 110.

60. *Speidel*, 460 P.2d at 80.

61. *Alex*, 484 P.2d at 681.

62. *Wheeler v. State*, 659 P.2d 1241 (Alaska Ct. App. 1983).

63. *Id.* at 1252.

64. *Id.*

65. *Id.* (citing *Andrew v. State*, 653 P.2d 1063, 1066 (Alaska Ct. App. 1982)).

66. *Id.*

which stood as controlling law, implies that the Alaska Court of Appeals determined that such cases did not apply to the case at hand. The only explanation for such reasoning is that the willful violation of the statute in *Wheeler* implicated the awareness of wrongdoing requirement, whereas *Guest* and *Rice* do not because those violations did not have to be violated willfully.

In *Steve v. State*,⁶⁷ the Alaska Court of Appeals revisited the awareness of age issue in *Guest*, holding that placing the burden on the defendant to prove the mistake of age did not violate due process because the defendant's awareness of the age of the victim was not an element of the crime.⁶⁸ The court took issue with strict adherence to *Speidel* to the extent that "due process was violated whenever a criminal offense did not require proof 'that [the] one charged with criminal conduct had an awareness of consciousness of some wrongdoing'" because to do so would forbid crimes such as criminally negligent homicide and many "general intent" crimes, additionally arguing that such crimes needed to exist in a functioning criminal code.⁶⁹

So, in order to allow for such crimes, the court cited *Alex* to conclude that for "general intent" crimes, the defendant need only act with an awareness of his positive act.⁷⁰ It distinguished *Speidel*, *Kimoktoak*, and *Hentzner* in that the defendants in those cases all were charged with failure to act as required by law, and that the nature of the offense as an omission rather than a positive action triggered the awareness of wrongdoing requirement.⁷¹ It conceded that the case law required an awareness of wrongdoing in certain situations other than omission offenses,⁷² and such an argument leaves room to explain that convictions for willful violation would also require the same awareness of wrongdoing. By distinguishing between omission and positive action offenses, the Alaska Court of Appeals found a rule that could reconcile the previous case law.

In *Kinney v. State*,⁷³ the Alaska Court of Appeals affirmed the conviction of a defendant who asserted that his due process rights had been violated when he did not receive a jury instruction requiring the

67. 875 P.2d 110 (Alaska Ct. App. 1994).

68. *Id.* at 123-24.

69. *Id.* at 120-21 (quoting *Alex v. State*, 460 P.2d 77, 80 (Alaska 1969)).

70. *Id.* at 123.

71. *Id.* *Speidel v. State* imposed a duty to return the car. 460 P.2d 77, 80 (Alaska 1969). *Kimoktoak v. State* imposed a duty to aid. 584 P.2d 25, 31 (Alaska 1978). *Hentzner v. State* imposed a duty to register the securities. 613 P.2d 821, 826 (Alaska 1980).

72. See *Steve*, 875 P.2d at 123.

73. 927 P.2d 1289 (Alaska Ct. App. 1996).

prosecution to prove his awareness of the illegality of his conduct.⁷⁴ The court followed *Steve* in finding that because the crime, the selling of alcohol, was a positive action (as opposed to a failure to register the sale of alcohol), the government did not have to prove an additional *mens rea*.⁷⁵ There was no duty to register because the sale of liquor was banned by a local vote in a local-option community.⁷⁶ The court also relied on *Wheeler* to state that the requirement of awareness of wrongdoing differed from the requirement of awareness of illegality.⁷⁷ Finally, the decision acknowledged the *malum in se* and *malum prohibitum* distinction outlined by the supreme court in *Hentzner*, but did not rest its decision on such a distinction even though the “‘broad societal concurrence’ that the act of selling alcohol is condemnable” in a local-option community could qualify the offense as *malum in se*.⁷⁸ Deciding the case on such grounds was unnecessary because the positive act of selling alcohol required no additional awareness of wrongdoing.

Ultimately, these three Alaska Court of Appeals decisions created a rule consistent with all of the above Alaska Supreme Court cases: a defendant could not be convicted of a willful violation or a failure to act unless the State proved that the defendant was aware of some wrongdoing. In *Speidel* and *Kimoktoak* the defendants were liable for their failure to act, and so the State had to prove their awareness of wrongdoing.⁷⁹ In *Hentzner* and *Wheeler* the defendants were charged with willfully violating a statute, and therefore the State had to prove their awareness of wrongdoing.⁸⁰ In *Alex*, *Guest*, *Rice*, *Steve*, and *Kinney*, the defendants were liable because of their positive actions and the relevant statutes did not proscribe willful violation or otherwise impose an additional mental state requirement for the government to demonstrate. Consequently, the State did not have to prove the defendants’ awareness of wrongdoing, and accordingly the defendants were liable for their own negligence as to the consequences of their conduct.⁸¹ The next Section discusses how *Hazelwood* did not

74. *Id.* at 1294-95.

75. *Id.*

76. *Id.* at 1290. See ALASKA STAT. § 4.16.200(b) (1996).

77. *Kinney*, 927 P.2d at 1294.

78. *Id.* at 1292.

79. *Speidel v. State*, 460 P.2d 77, 80 (Alaska 1969); *Kimoktoak v. State*, 584 P.2d 25, 29 (Alaska 1978).

80. *Hentzner v. State*, 613 P.2d 821, 825 (Alaska 1980); *Wheeler v. State*, 659 P.2d 1241, 1252 (Alaska Ct. App. 1983).

81. See *State v. Rice*, 626 P.2d 104, 110 (Alaska 1981) (finding the defendant was guilty of games violations while using an airplane); *State v. Guest*, 583 P.2d 836, 839 (Alaska 1978) (finding the defendant guilty of statutory rape); *Alex v.*

acknowledge this rule. However, because the court held that the defendant did not need to have an awareness of wrongdoing to be convicted of a positive action offense, *Hazelwood* did not defeat the rule either.

II. STATE V. HAZELWOOD

This Section will discuss *State v. Hazelwood*, the decision that definitively states that a defendant can be convicted for negligent conduct without violating his or her due process rights, as there is no requirement that the State demonstrate the defendant's awareness of wrongdoing.⁸² Subsection A explains how *Hazelwood* properly invoked *Rice* and *Guest* as important precedents for the claim that a defendant could be properly convicted for negligent conduct. Subsection B criticizes the decision for not adequately recognizing and addressing the Alaska Supreme Court decisions that predated *Rice* and *Guest*, as *Hazelwood* blatantly conflicts with much of the language from those cases. Finally, Subsection C concludes that despite the contrast in language and reasoning, *Hazelwood* does not fundamentally conflict with the requirement of awareness of wrongdoing in cases involving willful violation and omission liability.

A. Reliance on *Rice* and *Guest*

In *State v. Hazelwood*, the Alaska Supreme Court held that the defendant could be convicted under a theory of negligent conduct, and that civil negligence was an acceptable standard under due process.⁸³ In support of its argument that negligence meets the *mens rea* requirement, the court offered *Guest* and *Rice*.⁸⁴ It briefly addressed the two opinions, stating that in each case negligence was the basis of the offense.⁸⁵ In doing so, the court brushed over the fact that in those cases the negligence only pertained to a circumstance surrounding the offense and not the conduct itself.⁸⁶ However, as the circumstance alone

State, 484 P.2d 677, 681 (Alaska 1971) (affirming the defendant's conviction for felony escape); *Kinney*, 927 P.2d at 1294 (affirming defendant's conviction for sale of liquor in a "local-option" community); *Steve v. State*, 875 P.2d 110, 123 (Alaska Ct. App. 1994) (affirming defendant's sexual abuse of a minor).

82. *State v. Hazelwood*, 946 P.2d 875, 885 (Alaska 1997).

83. *Id.*

84. *Id.* at 879.

85. *Id.*

86. *See id.* (finding the defendant in *Guest* was negligent to the victim's age, and the defendant in *Rice* was negligent as to the fact that the game was illegally taken).

separated innocent conduct from criminal conduct, it is correct to state that the negligence became the determinative issue.

Still, the short treatment these cases receive hides that the cases did not fully support basing a criminal conviction on negligent conduct. Particularly, as mentioned above, *Guest* did not explicitly state that the defendant's negligence would satisfy the *mens rea* requirement, and the court in *Rice* did not analyze the *mens rea* requirement too closely because the underlying statute mirrored a public welfare statute and because the reasoning ultimately turned on a notice issue.

B. Misstatement of Case Law

The *Hazelwood* court also downplayed the prevalence of the awareness of wrongdoing requirement of due process in the preceding case law, and instead argued that the due process requirement stands for a principal of deterrence.⁸⁷ To do so, it cited *Alex*, misquoting the case so as to replace the Alaskan model with the federal standard.⁸⁸ In its discussion of *Alex*, the court made no mention of the language that specifically states, "This court would not then and will not now sanction conviction of a serious felony for mere inadvertence or simple neglect."⁸⁹

The *Hazelwood* court conceded that *Speidel* stands for the principal that some cases require more than negligence, and some require less, but it did little to offer a guideline for determining which circumstances have which requirement, instead only offering public welfare offense as an example that requires less.⁹⁰ It alluded to a distinction between *mens rea* requirements based upon serious penalties,⁹¹ but it did not rest its decision on the fact that the statute at issue only provided for misdemeanor rather than felony punishment.

The court also waived on whether a statutory requirement of *mens rea*, or explicit lack of requirement, trumped the due process guarantee against a conviction without an awareness of wrongdoing. It cited *Rice* and stated, "[N]o mental element will be required when a statute provides 'clear legislative intent to the contrary.'"⁹² Additionally,

87. *Id.* at 884.

88. *See id.* at 879 (quoting *Alex v. State*, 484 P.2d 677, 681 (Alaska 1971) ("The requirement of criminal intent does 'not emphasize a specific awareness of wrongfulness.")). The full language from *Alex* refers to the federal standard as opposed to the Alaska standard, and reads, "[T]he [United States] Supreme Court did not emphasize a specific awareness of wrongfulness." 484 P.2d at 681.

89. *Alex*, 484 P.2d at 681.

90. *Hazelwood*, 946 P.2d at 879–80.

91. *See id.* at 880 ("As a corollary, a *mens rea* requirement is imputed only when a serious penalty attaches.").

92. *Id.* (quoting *State v. Rice*, 626 P.2d 104, 108 (Alaska 1981)).

the court stated, “[e]ven *Morissette* concedes that the concerns raised by the exclusion of mens rea ‘would not justify judicial disregard of a clear command to that effect from Congress.’”⁹³ On the other hand, the court limited the power of the legislature, stating, “[a]n exception to the mens rea requirement for ‘clear legislative intent to the contrary’ has the potential to swallow the rule. As we said in *Speidel*, even where a statute is explicit, due process will on occasion require a higher degree of culpability.”⁹⁴

The court in *Hazelwood* then explained what it believed to be the reasoning behind the due process requirement of *mens rea*. In doing so it cited neither case law nor legal theory, stating:

Society’s interest in obtaining compliance with its regulations . . . can never outweigh the individual’s interest in freedom from substantial punishment for a violation he or she could not reasonably have been expected to avoid. The threshold question, then, is whether the defendant’s conduct is something which society could reasonably expect to deter.⁹⁵

The court simply stated that negligence met this goal.⁹⁶ Other than its brief recognition of *Guest* and *Rice*, it did not explain why, but merely battled with the argument that a civil standard is inappropriate for criminal sanctions.⁹⁷

The court outlined three circumstances in which due process would not require not require a “separate mental element.”⁹⁸ First, the court noted, “Persons operating in rule-laden environments, and whose actions have a substantial impact on public health, safety, or welfare, can reasonably be assumed aware of their governing codes.”⁹⁹ The court said this in support of strict liability for highly regulated areas, a proposition offered in *Cole v. State*.¹⁰⁰ Second, the court returned to the *Hentzner* distinction that *malum in se* offenses inherently contain an awareness of wrongdoing.¹⁰¹ Finally, the court stated that an awareness of wrongdoing might not be required when the penalty is only a small fine under the public welfare offense theory that has been permitted

93. *Id.* at 882 (quoting *Morissette v. United States*, 342 U.S. 246, 254 n.14 (1952)).

94. *Id.* (quoting *Speidel v. State*, 46 P.2d 77, 80 (1969)).

95. *Id.* at 883.

96. *See id.* at 883–85.

97. *See id.* at 883–84.

98. *Id.* at 883.

99. *Id.*

100. *Id.* (citing *Cole v. State*, 828 P.2d 175, 178 (Alaska Ct. App. 1992)).

101. *Id.* at 883–84 (citing *Hentzner v. State*, 613 P.2d 821, 826 (Alaska 1980)).

since *Speidel*.¹⁰² However, after giving these circumstances, the court did not state that any of them apply to the facts at hand. This questions the relevancy of the discussion, leaving only the possibility that the court listed these circumstances in order to suggest that the due process protection can be limited when circumstances require it. Ultimately, such a discussion exemplifies the shortcomings in this decision: it inadequately summarizes and relies upon case law and engages in lofty discussion without applying the conclusion to the facts at hand.¹⁰³

C. *Hazelwood* Overall

Despite the apparent contrast between *Hazelwood* and the preceding case law, the facts of *Hazelwood* do not disturb the formulated rule that emerged from the decisions of the court of appeals: the State must prove the defendant's awareness of wrongdoing when the relevant statute involves either willful violation or omission liability. In *Hazelwood*, the defendant committed a positive action and the statute required no willful violation.¹⁰⁴

Unfortunately, *Hazelwood* neither mentioned nor relied upon the rule that the awareness of wrongdoing requirement would only apply in such cases. Instead, the *Hazelwood* court proposed a new test, asking "whether the defendant's conduct is something which society could reasonably expect to deter."¹⁰⁵ Despite the Alaska Supreme Court offering this new test, the subsequent due process cases continued to follow the rule outlined above as it existed before *Hazelwood*.

III. RECENT CASES

In the supreme and appellate court cases following *Hazelwood*, the inconsistencies between that case and *Speidel*, *Alex*, *Kimoktoak*, and *Hentzner* were clear. All were still good law, as each continued to be cited, but no case that cited *Hazelwood* cited any of the other four.¹⁰⁶ For the most part, the distinction previously made by the court of appeals between omission and positive action liability held. Subsection A will show that cases that required an awareness of wrongdoing either involved omission liability or willful violation. Likewise, Subsection B will show that courts upheld negligence liability in the case of positive

102. *Id.* at 883–84.

103. For an additional critique of *Hazelwood*, see Perla, *supra* note 8, at 153–57.

104. *See Hazelwood*, 946 P.2d at 878.

105. *Id.* at 883.

106. And, intuitively, vice versa.

actions. However, Subsection C will discuss how possession liability proved difficult to classify as a positive action or omission case. Finally, Subsection D will analyze how the court of appeals incorrectly characterized flight as a failure to stop in *Melson v. Municipality of Anchorage*.¹⁰⁷

A. Awareness of Wrongdoing Cases

After *Hazelwood*, the court of appeals first returned to due process analysis without employing the “reasonably expect to deter” standard in *Dailey v. State*.¹⁰⁸ In *Dailey*, the court considered the requirement of awareness of wrongdoing for a conviction for the defendant’s failure to file quarterly written verification of sex offender registration.¹⁰⁹ The court cited *Speidel, Alex*, and *Hentzner* to show that the State had a duty to prove the defendant “was aware that he had a duty to act.”¹¹⁰ The court of appeals explicitly found that requirement necessary, “because Dailey was prosecuted for a failure to act.”¹¹¹ Consequently, omission liability triggered the requirement of awareness of circumstances, without which the State could not adequately prove the defendant’s culpable mental state.

Later, in *Doe v. State*,¹¹² the Alaska Supreme Court cited *Hentzner* in order to demonstrate that for mala in se offenses, awareness of the conduct suffices for an awareness of wrongdoing.¹¹³ The *Doe v. State* court acknowledged the continued existence of the awareness of wrongdoing requirement, but did not analyze the issue further because the case ultimately turned on an ex post facto issue.¹¹⁴

In contrast, in *McGee v. State*,¹¹⁵ the Alaska Supreme Court discussed the effect of removing “willfulness” from a criminal statute.¹¹⁶ *McGee* cited *Hentzner* to state that “willfully” had a recognized understanding as “requiring the state to prove either a conscious ‘awareness of wrongdoing’ or the intentional commission of ‘an unlawful act without justification or other legal excuse.’”¹¹⁷ So, while the old version of a statute—proscribing willful violation—permitted a

107. 60 P.3d 199 (Alaska Ct. App. 2002).

108. 65 P.3d 891 (Alaska Ct. App. 2003).

109. *Id.* at 894.

110. *Id.*

111. *Id.* at 895.

112. 189 P.3d 999 (Alaska 2008).

113. *Id.* at 1012–13.

114. *See id.* at 1019.

115. 162 P.3d 1251 (Alaska 2007).

116. *Id.* at 1258–59.

117. *Id.* at 1258.

mistake of fact defense, the new version of the statute – without the term “willful” – would only permit a mistake of fact defense if the defendant’s mistake was reasonable.¹¹⁸

In so doing, the Alaska Supreme Court solidified one half of the court of appeals’ rule that the State would have to demonstrate the defendant’s awareness of wrongdoing if the defendant were charged with a willful violation. Removing “willful” from a positive action statute removed the requirement of showing a subjective awareness of wrongdoing.

The court further cemented the subjective awareness and willfulness standard in *State v. Strane*.¹¹⁹ In that case, the court analyzed the liability of a defendant who violated a protective order but believed the order would not apply if the protected party consented.¹²⁰ The defendant sought to invoke *Hentzner* but the court responded that in *Hentzner*, “while recognizing the ‘awareness of wrongdoing’ standard as one that would certainly pass constitutional muster, [the court] stopped short of holding that this particular culpable mental state was constitutionally necessary.”¹²¹ Under this reasoning, *Hentzner* required an awareness of wrongdoing element not because of the constitution, but because of the statute under which the defendant was convicted, thus confirming that “willful” triggered the subjective awareness of wrongdoing requirement. As the violation of the protection order was a positive action, and the violation did not require willfulness, a conviction did not need an additional showing of subjective awareness of wrongdoing. The State demonstrated that the defendant was aware of his conduct and aware of the order, in violation of the statute. Since the State had no burden to prove anything else, the defendant’s mistake of law was irrelevant.¹²²

Next, in *Hutchison v. State*,¹²³ the court of appeals considered the defendant’s willful failure to appear at his scheduled court date.¹²⁴ The court cited *Hentzner* for the following proposition:

118. *Id.* at 1258–59.

119. 61 P.3d 1284 (Alaska 2003).

120. *Id.* at 1285.

121. *Id.* at 1291.

122. *Id.* at 1292 (“We know of no decision from the domestic violence arena supporting Strane’s position. And as the court of appeals observed in *Strane*, courts ruling in the analogous area of criminal contempt routinely apply a culpable mental state of reckless disregard, a standard less demanding on the prosecution than consciousness of wrongdoing, and one that does not permit defenses based on either a pure mistake of law or a good faith but unreasonable mistake of fact.”).

123. 27 P.3d 774 (Alaska Ct. App. 2001).

124. *Id.* at 775.

[T]he crime of failure to appear involves an omission to perform a duty—for, in such situations, the definition of ‘willfulness’ must encompass not only the need to prove the voluntariness or purposefulness of the defendant’s conduct, but also the need to prove the defendant’s awareness of the duty in the first place.¹²⁵

Such a statement implies that the awareness of wrongdoing did not apply to all cases, but instead applied specifically to omission liability and willful violation cases. Ultimately, the court acquitted the defendant because the defendant did not act with the conscious purpose of avoiding his obligation to appear.¹²⁶

In *Trigg v. State*,¹²⁷ the court of appeals considered the defendant’s failure to register as a sex offender.¹²⁸ The court cited *Kimoktoak, Wheeler*,¹²⁹ and *Steve*, in support of “the principle that a person can be punished for failing to engage in specific conduct only if the person was aware of the circumstances that triggered the duty to engage in that conduct.”¹³⁰ Again, in taking such care to make this distinction, the court implied that punishment for engaging in conduct, in contrast to failing to act, does not have an equally stringent requirement of awareness of circumstances. The court refused to resolve whether recklessness or knowledge satisfied the awareness of circumstances requirement.¹³¹

Finally, in *Willis v. State*,¹³² the court of appeals considered the awareness of two parents convicted of “recklessly caus[ing] serious physical injury to [their child].”¹³³ Because the prosecutors could not determine which parent assaulted the child, the State advanced a theory that one defendant assaulted the child and the other failed to protect the child.¹³⁴ Because the State pursued a failure to act theory, the court relied on *Kimoktoak*, stating, “[m]ore specifically, when a defendant is prosecuted for failing to act, the State must show that the defendant was

125. *Id.* at 778.

126. *Id.* at 782.

127. A-7519, 2003 WL 294363 (Alaska Ct. App. Feb. 12, 2003).

128. *Id.* at *1.

129. The Alaska Court of Appeals summarized *Wheeler* as a case about the defendant’s failure to register, rather than the defendant’s sale of unregistered securities. *Id.*

130. *Id.*

131. *Id.* at *3.

132. 57 P.3d 688 (Alaska Ct. App. 2002).

133. *Id.* at 690.

134. *Id.* at 693 (“Judge Weeks gave the jurors an instruction that combined both theories of criminal responsibility—i.e., responsibility based on personal commission of an assault, and responsibility for failing to act to prevent the assault.”).

aware of the circumstance that triggered the duty to act and that, being aware of this circumstance, the defendant chose to do nothing—*i.e.*, ‘knowingly’ refrained from acting.”¹³⁵ Again the court of appeals held that the omission liability triggered the requirement of awareness of circumstances.

B. Cases Citing *Hazelwood*

Four cases have cited *Hazelwood* regarding the criminal requirement of awareness of wrongdoing. The relevant statutes consistently proscribe positive conduct and do not require willful violation; therefore negligence satisfies any constitutional requirement of a criminal mental state.

The court of appeals cited *Hazelwood* approvingly in *Solomon v. State*,¹³⁶ upholding a DUI conviction under a negligence theory.¹³⁷ The defendant asserted that he had no knowledge of his intoxication, and therefore should not be subject to criminal punishment.¹³⁸ However, the court held that the defendant was at least negligent as to his intoxication, and therefore could face criminal punishment.¹³⁹ It made no mention of a requirement mandating awareness of wrongdoing, but it specifically stated that *Hazelwood* allowed for a conviction without a showing of what the defendant subjectively realized, and instead allows for convictions on only a negligence theory.¹⁴⁰

Another DUI case, *Valentine v. State*,¹⁴¹ mirrors *Solomon* in that the defendant attempted to use *Hazelwood* to require that the State demonstrate that he was at least negligent as to his intoxication.¹⁴² The court of appeals acknowledged that *Hazelwood* stood for the premise that the State must prove the defendant’s negligence as to an attendant circumstance, but, like *Solomon*, the court of appeals found that his negligence was assumed because the defendant knowingly consumed

135. *Id.* at 694.

136. 227 P.3d 461 (Alaska Ct. App. 2010).

137. *Id.* at 468 (“[T]here must be some level of mental culpability on the part of the defendant. However, this principle does not preclude a civil negligence standard.”).

138. *Id.* at 464.

139. *Id.* at 469.

140. *Id.* at 468.

141. 155 P.3d 331 (Alaska Ct. App. 2007), *rev’d* 215 P.3d 319 (Alaska 2009).

142. *Id.* at 342–43 (For instance, the court in *Morgan v. Anchorage* explained “[i]t certainly does not make sense to allow a defendant to claim that his intentional consumption of alcohol impaired his ability to know that he was intoxicated.”).

enough alcohol to become legally intoxicated.¹⁴³

The court of appeals also considered the defendant's negligence in the context of vehicular theft in *Latham v. State*.¹⁴⁴ The relevant statute criminalized the taking of a vehicle if the defendant "ha[d] no right to do so or any reasonable ground to believe the person ha[d] such a right."¹⁴⁵ The defendant argued that the State must prove at least recklessness as to the circumstance of his right to take the vehicle, as mandated by section 11.81.610(b) of the Alaska Statutes.¹⁴⁶ However, the court of appeals reasoned that section 11.81.610(b) did not apply because *Hazelwood* stood for the principle that "ordinary negligence is the included mental state where a defendant is permitted to assert a reasonable but mistaken belief as a defense to criminal charges."¹⁴⁷ Because the statute implicitly provided for a negligence standard, section 11.81.601(b) did not apply, and because the statute criminalized a positive act, there was no constitutional requirement of a greater awareness than negligence.

In *Schmidt v. State*,¹⁴⁸ the court of appeals considered the liability of a defendant "convicted of seven fish and game violations related to taking two moose and one brown bear [Six of the violations] required proof that he was not an Alaska resident, and that he was at least negligent in claiming that he was an Alaska resident."¹⁴⁹ The court cited *Hazelwood* to demonstrate that the negligence theory is sufficient to deter Schmidt and others from similar offenses.¹⁵⁰ Again, as this statute forbade positive acts under a negligence theory, it did not implicate any awareness of wrongdoing or circumstances requirements.

The four above cases all upheld negligence convictions based on a positive action, and did not involve a statutory requirement of willful violation.¹⁵¹ In contrast, the cases in the previous subsection that involved willful violation or omission liability did still require that the State prove an awareness of wrongdoing.¹⁵² Therefore, the court of

143. *Id.*

144. A-7198, 2000 WL 1124502 (Alaska Ct. App. Aug. 9, 2000).

145. ALASKA STAT. § 11.46.360(a) (2000).

146. *Latham*, 2000 WL 1124502, at *5.

147. *Id.*

148. A-8669, 2005 WL 767071 (Alaska Ct. App. Apr. 6, 2005).

149. *Id.* at *1.

150. *Id.* at *6.

151. See *Solomon v. State*, 227 P.3d 461, 468 (Alaska Ct. App. 2010); *Valentine v. State*, 155 P.3d 331, 342-43 (Alaska Ct. App. 2007); *Schmidt*, 2005 WL 767071, at *6; *Latham*, 2000 WL 1124502, at *5.

152. See *Dailey v. State*, 65 P.3d 891, 895 (Alaska Ct. App. 2003); *Trigg v. State*, A-7519, 2003 WL 294363, at *1 (Alaska Ct. App. Feb. 12, 2003); *Willis v. State*, 57 P.3d 688, 695 (Alaska Ct. App. 2002); *Hutchison v. State*, 27 P.3d 774,

appeals' rule on when to apply the awareness of wrongdoing requirement discussed in Section II survived *Hazelwood* and continues to be in effect in Alaska. Following this rule provides the best guidance for when the courts will require the State to prove the defendant's awareness of wrongdoing.

C. The Third Track – Possession Liability

However, *Myers v. Municipality of Anchorage* does not fit the above mold. In a case decided ten years after *Hazelwood*, the Alaska Court of Appeals overturned the defendant's conviction for possession of drug paraphernalia, finding that it violated the defendant's due process right because the relevant statute did not require a culpable mental state.¹⁵³ Section 08.35.010 of the Alaska Statutes defines drug paraphernalia as:

[A]ny items [sic] whose objective characteristics or objective manufacturer's design indicate that it is intended for use in the consumption, ingestion, inhalation, injection or other method of introduction of a controlled substance into the human body or to facilitate a violation of AS 11.71. [A]ny item where circumstances reasonably indicate that the subjective intent of [its] possessor is to use it or sell it for the consumption, ingestion, inhalation, injection or other method of introduction of a controlled substance into the human body or to facilitate a violation of AS 11.71.¹⁵⁴

The court recognized that it could follow the United States Supreme Court and construe such a definition narrowly so as to limit the statute as much as possible in order to only prosecute for possession of items which, "by virtue of [their] objective features, *i.e.* features designed by [their] manufacturer [are] principally used with illegal drugs"¹⁵⁵ or to require proof that the defendant intentionally displayed the item "in a manner that appeal[ed] to or encourage[ed] illegal drug use."¹⁵⁶ However, the court of appeals reasoned that while such a solution may survive the national standard, it still did not survive the Alaska due process requirement of awareness of wrongdoing.¹⁵⁷ Specifically, the

782 (Alaska Ct. App. 2001).

153. *Myers v. Municipality of Anchorage*, 132 P.3d 1176, 1185 (Alaska Ct. App. 2006).

154. ANCHORAGE, ALASKA, MUN. CODE § 08.35.010 (2006).

155. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 501 (1982).

156. *Id.* at 502.

157. *See Myers*, 132 P.3d at 1186. The court further stated that it falls outside of its scope to rewrite the provision to meet due process requirements. *Id.*

court took issue with the language involving “the subjective intent of [the] possessor” because it:

[A]llows a defendant to be convicted of the sale or possession of drug paraphernalia when, given the circumstances, a reasonable person would believe, or think it likely, that the defendant intended to use or sell the item to accomplish or further the unlawful introduction of a controlled substance into the human body—regardless of whether the defendant actually intended this.¹⁵⁸

The court emphasized the part of the statute describing a circumstance which would identify an item as drug paraphernalia as “[d]irect or circumstantial evidence of [the possessor’s] intent . . . to deliver [the item] to persons who [the possessor] . . . should reasonably [know] intend to use the object to facilitate a violation of [the state drug laws].”¹⁵⁹ *Myers* held that this language essentially created a negligence standard.¹⁶⁰ The court made the following distinction between negligent and reckless *mens rea* that proved instrumental in its rejection of the former: “‘reasonable indication’ is not being used as circumstantial evidence of the defendant’s true intention. Rather, ‘reasonable indication’ is all that must be proved.”¹⁶¹

The court reiterated the due process guarantee that the State must show that the defendant acted with some awareness of wrongdoing, and then cited *Hentzner*, *Kimoktoak*, *Alex*, and *Speidel* in support of this principle, noticeably ignoring *Rice*, *Guest*, and *Hazelwood*.¹⁶²

If *Hazelwood*, *Rice*, and *Guest* (followed by *Valentine*, *Solomon*, *Schmidt*, and *Latham*) apply to positive action cases, while *Speidel*, *Hentzner*, and *Kimoktoak* (followed by *Dailey*, *Hutchison*, *Trigg*, and *Willis*) apply to omission liability, then perhaps *Myers* creates precedent that possession liability, like omission liability and unlike positive action liability, would require an awareness of wrongdoing in order to support a conviction.¹⁶³

158. *Id.* at 1184.

159. *Id.* (quoting ANCHORAGE, ALASKA, MUN. CODE § 08.35.010 (2006)).

160. *Id.*

161. *Id.* at 1185.

162. *Id.* at 1185 n.17.

163. The comments to the Model Penal Code contain some language analogizing possession to omission liability. MODEL PENAL CODE § 2.01(4) cmt. 4 (1985) (“An actor who is aware of his control of the thing possessed for a period that would enable him to terminate control has failed to act in the face of a legal duty imposed by the law that makes his possession criminal.”). See also JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 97 (5th ed. 2009) (“‘possession’ is equivalent to an omission, in which the defendant has a statutory duty to

As the Alaska Court of Appeals applied the same awareness of wrongdoing requirement to possession liability offenses that it had reserved for omission liability offenses, it appears that it also considered possession liability a form of omission liability. Taking such an approach, *Myers* provides yet another example of how to remedy the apparent contradictions in the case law through separating omission and positive action liability.

D. *Melson v. Municipality of Anchorage*

Finally, in *Melson v. Municipality of Anchorage*,¹⁶⁴ the court of appeals considered the defendant's awareness in his conviction for his "resisting or interfering with a police investigation by fleeing after having been told to stop."¹⁶⁵ The court cited *Kimoktoak* in its holding that the municipality must have shown that defendant was aware of the command to stop.¹⁶⁶ Here, however, the defendant's flight was a positive act, and therefore should not have required an awareness of circumstances. Thus, this case stands in stark contrast to the developed rule.

However, in reaching its decision, the court of appeals cited *Kimoktoak* as a case where the defendant was "convicted of leaving the scene of an accident."¹⁶⁷ While that is perhaps a common summary of the offense, the defendant in *Kimoktoak* violated section 28.35.060 of the Alaska Statutes, "Duty of operator to give information and render assistance,"¹⁶⁸ and to classify that statute as leaving the scene of an accident is to disregard the nature of the offense as a crime by omission.

Thus, *Melson* suffers from one of two defects: either the court mischaracterized *Kimoktoak* as a positive action offense and consequently decided this case using a misunderstanding of the precedent, or it found the distinction between positive action liability and omission liability inconsequential to the awareness of wrongdoing requirement. Either way, the decision, if followed in future cases, would destroy the rule used in the previous decisions. The result would leave practitioners with no way to reconcile cases like *Strane* and *Trigg*, much less *Speidel* and *Hazelwood*.

Perhaps for this reason, *Melson* has not been widely followed, as

dispossess herself of the property").

164. 60 P.3d 199 (Alaska Ct. App. 2002).

165. *Id.* at 201.

166. *Id.* at 203.

167. *Id.*

168. *Kimoktoak v. State*, 584 P.2d 25, 29 (Alaska 1978).

Dailey, Doe, McGee, Strane, Trigg, Solomon, Valentine, and Schmidt were all decided after the case. Even within *Melson*, the awareness of the command to stop received minimal attention, and could have easily been resolved through statutory interpretation¹⁶⁹ rather than the due process argument that underlies the other cases. Instead of shattering the rule that the State must prove the defendant's awareness of wrongdoing in willful violation and omission liability cases but not in others, this case better serves as an example of how easy it is to blur the distinction between omission liability and positive action liability. The court of appeals in this case misclassified the underlying offense in *Hentzner* as fleeing the scene rather than failing to stop and render aid, while the offense in this case, resisting arrest, operated much more as a failure to stop than a positive action. The ease with which positive action and omission liability can be blurred demonstrates the fundamental flaw with the functioning distinction.

IV. THE *ACTUS REUS* SHOULD NOT DETERMINE THE MINIMAL LEVEL OF *MENS REA*

The case law divisions of positive action, omission liability, and possession liability do not seem to come from an intent to place additional requirements on omission and possession liability, but rather from the courts simply trying to make a rule to reconcile the conflicting results in the jurisprudence. While the distinction between omission and positive action liability satisfies *stare decisis*, it should not continue to serve as the functioning rule, if for no other reason than the potential for confusion as demonstrated in *Melson*. To premise a constitutional requirement on such an easily blurred distinction can create unmanageable ambiguity and lead to otherwise insignificant changes in phrasing that alter the rights of defendants.

First, difficulty can arise even in the simple step of attempting to identify omission liability. The definition of the term ranges from "omissions are the willed absence of bodily movements, or willed nonmotion"¹⁷⁰ to "[i]llegal omissions are simply the failure to do what is required by law."¹⁷¹ Using the former definition, a violation of section 28.35.060 of the Alaska Statutes, as seen in *Kimoktoak*, might not qualify as an omission: a defendant who drives away from the scene of the

169. Either through reading the term "recklessly," which is already in the statute, or through applying section 11.81.610(b) of the Alaska Statutes.

170. Fletcher, *supra* note 15, at 1444.

171. Patricia Smith, *Legal Liability and Criminal Omissions*, 5 BUFF. CRIM. L. REV. 69, 69 (2001).

accident would be committing a positive act in that they would be willing their motion. However, the second definition is clearly more applicable, because the conduct that the legislature intended to incriminate through such a statute is the failure to give information and to render assistance. Overall, the range in definitions demonstrates the dangers of premising an awareness requirement on a term with varying meaning because of the potential for inconsistent results.

Second, the traditional arguments for distinguishing between omission and positive action liability do not apply in a number of these cases. Some proponents of clearly distinguishing omission liability from positive action liability argue:

[T]hat prohibiting actions represents a lesser incursion in our liberty than requiring particular actions (that is, punishing their omission). As the argument goes, it is less intrusive to prohibit flag burning than it is to require children to pledge allegiance to the flag. The former only eliminates one of many ways of expressing contempt for the state; the latter requires people to submit their bodies to motions dictated by the state.¹⁷²

However, the cases of *Wheeler* and *Hentzner* provide examples of how a slight change of wording would switch the offense from a positive action offense to an omission offense, without changing the quantity of conduct proscribed. As written, the statute invoked in those cases, section 45.55.070 of the Alaska Statutes, proscribed the sale of a security unless it was registered.¹⁷³ However, the statute could easily have been written as, “a person shall register all securities that the person offers for sale. Failure to do so . . .” The language would proscribe and compel virtually the same conduct, but would face different awareness requirements under the current jurisprudence. That the Alaska Court of Appeals in *Trigg* misstated section 45.55.070 of the Alaska Statutes as an omission offense further exemplifies how the distinction has been blurred, and how the fundamental reasoning for making such a distinction has lost its meaning.¹⁷⁴

Third, as the awareness of circumstances and awareness of conduct argument was championed as an effort “to avoid criminal liability for innocent or inadvertent conduct,”¹⁷⁵ distinguishing between positive action and omission liability often does not accomplish that goal. An

172. Fletcher, *supra* note 15, at 1446.

173. ALASKA STAT. § 45.55.070 (1983).

174. See *Trigg v. State*, A-7519, 2003 WL 294363, at *1 (Alaska Ct. App. Feb. 12, 2003) (stating that the issue is whether knowingly describes the conduct of failing to register or the awareness of the duty to register).

175. *Alex v. State*, 484 P.2d 677, 681 (Alaska 1971).

individual can cause harm, and therefore not be innocent, through non-action just as easily as through action.¹⁷⁶ Critics have offered numerous hypotheticals in which inaction greatly mirrors action and in which the culpability of a non-actor appears as great as a positive actor. For example, “[a] mother’s failure to feed her child is readily treated as the affirmative act of neglect or starvation, and thus virtually every Western legal system would include this case within the ambit of criminal homicide. Whether the mother remains motionless as the baby dies is totally irrelevant.”¹⁷⁷ In such an example, the harm caused is the focus and is what qualifies the mother as a guilty individual, rather than any specific action or non-action, and it is pointless to create a rule that if the mother caused the death through inaction she has more due process rights for the prosecution to overcome than if the mother caused the death through some action. *Willis* demonstrates this point because the relevant statute focused on the result, not the means in which it was achieved. Because the prosecution pursued a theory of omission liability it faced an additional hurdle of demonstrating the awareness of the circumstances of the defendants’ inaction.¹⁷⁸ When the harm caused rather than the manner in which the defendant caused it determines the culpability of the defendant, premising a due process protection on whether the defendant committed an action or failed to act does not further the goal of protecting innocent behavior.

Two sets of comparisons between cases already introduced highlight these arguments. First, the defendant in *Rice* was convicted despite only being negligent to what he was transporting.¹⁷⁹ In contrast, the defendant in *Myers* could not be convicted because of his negligence

176. See Smith, *supra* note 171, at 83–84. “At the same time, however, it must also be acknowledged that ‘allowing’ (like ‘causing’) is a success verb, that is, you cannot let something happen unless it happens. In other words, it is necessarily the case that if you let something happen, it happened. This point creates some tension with the idea that allowing something to happen is nothing more than the absence of a potential causal factor, but it must be included in a full account because it is a conceptually necessary feature of what it means to let something happen.” *Id.*

177. Fletcher, *supra* note 15, at 1448.

178. See *Willis v. State*, 57 P.3d 688, 690 (Alaska Ct. App. 2002) (“[T]he indictment was based on the theory that one of them had personally assaulted the infant while the other had knowingly stood by and allowed the assault to happen—thus violating their parental duty to protect the child and rendering them criminally liable for the resulting injuries.”).

179. *State v. Rice*, 626 P.2d 104, 110 (Alaska 1981). The court argued that such reasoning was necessary in order to promote the legitimate, regulatory purpose of the statute. Any other interpretation would be inapposite to the statute’s aims. *Id.*

as to the items he was possessing.¹⁸⁰ Does the fact that the defendant in *Rice* was moving transform the action so much that the two statutes invoke two different liability regimes? An advocate of the distinction would answer affirmatively, pointing to the nature of moving the illicit cargo as an act that, whether the defendant knows it or not, furthers a criminal enterprise in some trafficking sense. However, drawing the line at basic, unwitting motion between these two crimes seems too arbitrary to create such a distinction between such similar offenses.

Second, comparing *Melson* to *Kimoktoak*, the court of appeals required the same level of awareness of both offenses; in one case the defendant failed to stop at the order of a police officer, while in the other the defendant failed to stop at a scene of an accident.¹⁸¹ In both cases penalizing a defendant who did not know of the circumstances, the order to stop or the occurrence of an accident, seemed patently unfair, and so the court of appeals in *Melson* applied the same requirement as did the supreme court in *Kimoktoak*. However, if this distinction between omission and positive action were to be more firmly cemented in case law, the defendant in *Melson* might have faced different awareness requirements because he was not convicted of the omission of failing to stop, but rather the positive action of fleeing. This change, though small, alters the liability of the defendant and the minimal awareness that the State must prove.

Classifying an act as fleeing rather than failing to stop, or leaving the scene rather than failing to give aid, is too arbitrary a distinction. That the court of appeals in *Melson* misstated the underlying conduct in *Kimoktoak* as a positive action offense demonstrates the potential for misapplication. The potential for inconsistency exemplifies why Alaska's jurisprudence should not premise an awareness of wrongdoing requirement on a term as difficult to define and as morally irrelevant as omission liability. However, without such a reliance on omission liability, the courts would face the difficult task of explaining the rivaling case law.

CONCLUSION

The rule that the prosecution must prove the defendant's awareness of wrongdoing in cases involving willful violation or omission liability effectively distinguishes conflicting cases such as

180. *Myers v. Municipality of Anchorage*, 132 P.3d 1176, 1185 (Alaska Ct. App. 2006).

181. *See Melson v. Municipality of Anchorage*, 60 P.3d 199, 203 (Alaska Ct. App. 2002) (“[T]he actus reus of this offense is the defendant's act of flight”).

Speidel and *Hazelwood*. This rule has largely been followed since *Hazelwood*, has expanded to include possession liability within omission liability, and provides the best guideline for practitioners to follow to determine when the courts will require the State to prove the defendant's awareness of wrongdoing.

However, the part of the rule that premises the requirement to demonstrate the defendant's awareness of wrongdoing on omission liability should be abandoned: distinguishing between positive action and omission often fails to make meaningful distinctions between conduct committed by the defendant, freedoms restricted by the government, or innocence of the defendant. Consequently, following this rule already has and will continue to give due process protection to defendants in some cases but not in other substantially similar ones. Therefore, the courts must decide if requiring the prosecution to demonstrate the defendant's awareness of wrongdoing is worthy of universal application, total abandonment, or a new rule that would provide for a more reasoned selection of when to apply the requirement. Until that time, the existing rule, even if partially based upon an arbitrary distinction, allows lawyers to distinguish between fundamentally conflicting cases and provides an estimate of when future courts will require the State to prove the defendant's awareness of wrongdoing.