

**LEVIATHAN MENACING THE GULF COAST:  
CATASTROPHIC CONSEQUENCES MAY  
IMPERIL THE RULE OF LAW**

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Leviathan, the "dragon of the sea," which, in accordance with the Egyptian tradition of Typhon (Ser) and the sea he rules over, is the devil. The devil surrounds the seas and ocean on all sides.<sup>1</sup>

## I. INTRODUCTION

The British invaded New Orleans in 1815. On January 8th of that year, they were repelled by a handful of heroes comprised of regulars, militia and a hearty band of Baratavia pirates.<sup>2</sup> Many of those militiamen came from as far away as Tennessee and the pirates came from every corner of the globe. Even today Louisiana's Baratavia Bay contains scores of men and women whose livelihoods are dependent on the sea, and while some have lived there for generations, others have emigrated from other global regions of despair and conflict such as Vietnam and Croatia. Almost 200 years after the British first came to commit mayhem upon our shores, it may be time for the Baritaria patriots to rise again in defense of our land. In defense of our fragile coastline and ecosystem, we must be prepared to utilize every legal option at our disposal, including possible criminal sanctions if applicable, though always cognizant of the rule of law.

Even as the Gulf Coast is plagued by its greatest ecological disaster, the time is ripe for a reasoned discussion on the legally sound definition of criminal negligence under the Clean Water Act (CWA). Our American system of criminal justice is inherently an adversarial arena designed to seek the truth while providing an accused every opportunity for equal justice under the law. The obligation of equal justice can be no different in the field of environmental criminal law than in other white collar or street criminal proceedings as all imperil the liberty of free men who are

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<sup>1</sup> C.J. JUNG, *THE ARCHETYPES AND THE COLLECTIVE UNCONSCIOUS* 316 (R.F.C. Hull trans., 10th prtg. 1990) citing St. Jerome, *Epistolae* pt. I, at 12. See also *Isaiah* 27:1 "In that day the LORD with his sore and great and strong sword shall punish the leviathan the piercing serpent, even leviathan that crooked serpent; and he shall slay the dragon that is in the sea."

<sup>2</sup> Battle of New Orleans Day, January 8th, was still celebrated as a legal holiday in Louisiana's capital as late as 1999. LA. REV. STAT. ANN. § 1:55 (2010).

presumed innocent. The current state of law on criminal negligence under the CWA is discussed in the Ninth Circuit case of *United States v. Hanousek*.<sup>3</sup>

The *Hanousek* decision has been followed in a single case in the Tenth Circuit,<sup>4</sup> but has not been extended to the Fifth Circuit, based on the existing precedent of *United States v. Ahmad*.<sup>5</sup> This must be corrected either through United States Supreme Court review<sup>6</sup> or Congressional intervention. A proper and rational definition of criminal negligence under the CWA is gross negligence and not merely ordinary negligence which, under *Hanousek*, puts the liberty of the common citizen at risk, even in circumstances of accident or mistake. The CWA, under a broad spectrum of tort law, never intended to overreach and impair the basic tenets of criminal law designed to protect the rights of the accused and subject citizens to potential incarceration for even nobility of purpose is never license for overzealous social engineering.

## II. THE NINTH CIRCUIT'S DEFINITION OF CRIMINAL NEGLIGENCE

The Ninth Circuit's decision in *Hanousek* was based on an incident that occurred on October 1, 1994 along the Skagway River in the state of Alaska.<sup>7</sup> Edward Hanousek, Jr., was employed by Pacific & Arctic Railway and Navigation Company as

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<sup>3</sup> *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999).

<sup>4</sup> *United States v. Ortiz*, 427 F.3d 1278 (10th Cir. 2005).

<sup>5</sup> *United States v. Ahmad*, 101 F.3d 386, 391 (5th Cir. 1996).

<sup>6</sup> See WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 269 (1987). Justice Rehnquist wrote, "Each year we find more than enough cases to meet the demanding standards for Supreme Court review, and must turn down many that several of the justices, although not a sufficient number to grant certiorari, think do meet the standard for review. We are stretched quite thin trying to do what we ought to do – in the words of Chief Justice Taft, pronouncing 'the last word on every important issue under the Constitution and the statutes of the United States' – without trying to reach out and correct errors in cases where the lower courts may have reached an incorrect result, but where that result is not apt to have any kind of influence beyond its effect on the parties to the case."

<sup>7</sup> *Hanousek*, 176 F.3d at 1119.

roadmaster of the White Pass & Yukon Railroad.<sup>8</sup> Hanousek was responsible under his contract "for every detail of the safe and efficient maintenance and construction of track, structures and marine facilities of the entire railroad...and [was to] assume similar duties with special projects."<sup>9</sup> One of the special projects he supervised was a rock-quarrying operation at a site along the railway on an embankment some 200 feet above the Skagway River.<sup>10</sup> In April 1994, prior to Hanousek taking over the project, work done along the railway was accompanied by the construction of a work platform of sand, gravel, railroad ties, and ballast material, as this was the customary practice to protect a parallel running high-pressure petroleum products pipeline.<sup>11</sup> After Hanousek took over the project in May 1994, he discontinued these preventative measures.

Five months later, on October 1<sup>st</sup>, a terrible accident occurred when the backhoe operator accidentally struck the pipeline while attempting to remove rocks which had fallen on the tracks.<sup>12</sup> The pipeline carried heating oil and an estimated 1,000 to 5,000 gallons discharged over the course of several days into the adjacent Skagway River.<sup>13</sup> After a twenty day trial, Hanousek was found guilty of the negligently discharging a harmful quantity of oil into waters of the United States, but acquitted on a second count of conspiring to provide false information. "After a twenty-day trial, the jury convicted Hanousek of negligently discharging a harmful quantity of oil into a navigable water of the United States, but acquitted him on the charge of conspiring to provide false information."<sup>14</sup>

The Ninth Circuit agreed with the district court in denying Hanousek's suggested jury instructions both taken from the Model Penal Code on "gross negligence,"<sup>15</sup> and on the issue of proximate

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<sup>8</sup> *Id.*

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

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 1120.

<sup>15</sup> *Id.* at 1121.

cause.<sup>16</sup> The Court stated the issue of the jury instruction on negligence under 33 U.S.C. 1319(c)(1)(A) was a question of statutory interpretation and was to be reviewed *de novo*.<sup>17</sup> The Court ruled the plain reading of the statute, under basic tenets of statutory construction, dictated Congress intended it to only require ordinary negligence and not gross negligence to violate the CWA.<sup>18</sup>

This reading is flawed as the Ninth Circuit's statutory interpretation, which utilized sections of later drafted portions of the Oil Pollution Act (OPA) within the CWA, ignored the blunt *in pari materia textual* reading of the "criminal penalties" predicate which *must* be charged in tandem with 33 U.S.C. 1321(b)(3) in order to constitute a chargeable offense. The Ninth Circuit further erred when it concluded the criminal provisions of the CWA constitute public welfare legislation, and as a public welfare offense the district court did not violate due process by permitting criminal penalties for ordinary negligence conduct.<sup>19</sup>

### III. THE LAW OF UNINTENDED CONSEQUENCES IN CREATING A BURDEN FOUNDED IN TORT

The *Hanousek* stone has been thrown into water. How far will the ripples on the pond extend from this decision in undermining the nature of the criminal process through the interloping of tort principles onto its constitutionally protected field? Certainly, modern criminal defense advocates comment that "[a]nother complication caused by the interpolation of civil negligence into criminal environmental cases is the conundrum of precisely how much civil law to import into the case."<sup>20</sup> Although it may have been news to the rest of the criminal bar and commercial interests in our country, according to some former Department of Justice (DOJ) Environmental Crimes Section prosecutors, "the simple

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<sup>16</sup> *Id.* at 1124.

<sup>17</sup> *Id.* at 1120 (emphasis added).

<sup>18</sup> *Id.* at 1121.

<sup>19</sup> *Id.* at 1122.

<sup>20</sup> David E. Roth et al., *The Criminalization of Negligence Under the Clean Water Act*, 23 ABA CRIM. JUST., at 4, 9 (Winter 2009).

negligence standard has long been the accepted standard in both DOJ and U.S. Attorneys' offenses enforcing the CWA.<sup>21</sup>

So now will we throw our neighbors into the hellish reality of our prison system for accidents or as Holmes put it, *mere misadventure*?<sup>22</sup> What is the reason to continue any form of civil enforcement if there is no difference in the conduct? The inherent differences between civil and criminal violations of environmental statutes must be preserved. The dispositive factor on this always is three-fold and that factor is money, money and money. The motive, to save money, by either ignoring the regulations or bypassing them altogether, is and always has been, essential to criminal investigations and prosecutions. Civil enforcement, therefore, finds itself focused not on the actions or failures to act to avoid compliance, but instead on the misdeed itself which resulted in the regulatory violation.

A [civil] environmental violation or incident is an unplanned or unforeseen exceedence of a permit, or involves a discharge that occurred without the knowledge of the employees of the vessel or facility. An environmental crime is one in which employees knowingly or negligently violate the law or permit. These crimes are fundamentally not environmental crimes but instead can be classified as economic crimes that, at times, have an environmental impact. This is because people do not discharge pollutants into the river because they hate the environment... They pollute to save money. Dollars go to managers and executives who reduce the costs of environmental compliance, in the form of bonuses, and that serves to replace the much more costly alternative of proper disposal. People choose to falsify reporting requirements of air emissions and water discharges because they do not

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<sup>21</sup> Steven P. Solow & Ronald A. Sarachan, *Criminal Negligence Prosecutions Under the Federal Clean Water Act: A Statistical Analysis and an Evaluation of the Impact of Hanousek and Hong*, 32 ELR 11153, 11159-60 (Oct. 2002).

<sup>22</sup> O.W. HOLMES, *THE COMMON LAW* 56 (1909).

want to have to pay for more frequent monitoring, and they do not want to raise the ire of environmental watchdogs. People choose to transport hazardous waste while manifesting it as non-hazardous waste for disposal because, as some former managers have put it, "the costs were prohibitive to the economic viability of the plant."<sup>23</sup>

Shifting the legal protections of the accused from the constitutional rulings of Justices Holmes, Black<sup>24</sup>, and Scalia and placing them into the hands of the latest treatise on torts as written by Prosser & Keaton, has created a legal world turned upside down. This is where the trail ends on the journey across an unknown ocean *Hanousek*. Every person, both natural and corporate, whose commercial dealings may directly or indirectly fall under the auspices of the CWA is to be affected. The criminal justice system now welcomes all the diverse and fluid rules of tort into the courtroom such as intervening causes, duty-risk analysis, and contributory fault just to name a few. All three of these doctrines are defenses available to a tortfeasor in civil court and

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<sup>23</sup> Beau James Brock, *The Current State of Environmental Criminal Enforcement in Louisiana, An Insider's View*, AROUND THE BAR, Dec. 2001, at 14, available at [http://works.bepress.com/beau\\_brock/8](http://works.bepress.com/beau_brock/8).

<sup>24</sup> Justice Hugo Black, a former Alabama United States Senator from 1927 – 1937, and Supreme Court Justice (and giant) from 1937 – 1971, always stood as a vigilant paladin in the defense of the Constitutional rights of an accused. See, HUGO L. BLACK, MR. JUSTICE AND MRS. BLACK: THE MEMOIRS OF HUGO L. BLACK AND ELIZABETH BLACK 73 (Paul R. Baier ed., 1986). Elizabeth Black wrote of her husband, "[t]he majority opinion that Hugo considered his best writing was that of *Chambers v. Florida*, 309 U.S. 227 (1940), wherein Hugo, for a unanimous Supreme Court, voided the death sentences of Chambers and other blacks who had been picked up by the local police in Florida after the brutal murder of a white man. These blacks had been questioned night and day for eight days, were not allowed to see family or friends, and when questioned had each been surrounded by four to ten men. On the morning of the eighth day, the petitioners confessed. The death sentences were based on these confessions. Hugo wrote in that opinion: 'Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.'"

although any accused in a criminal court has a greater need for the potential use of these tools as his liberty is in jeopardy.

First, let us examine how a defendant should be able to invoke the rule of contributory fault as a defense in a criminal case. Although, contributory fault has almost universally gone the way of the dodo in favor of the plaintiff friendly rule of comparative fault in civil law, should not a *criminal* defendant be entitled to the benefit of every reasonable doubt? If this black letter standard of proof is to maintain its integrity, it must be so, or there would be no line whatsoever in a criminal proceeding.

Next, the establishment of whether the accused had a duty to prevent the underlying risk charged by the government will vary from courthouse to courthouse. What will be the basis of this calculation? What will be the answer to any level of uniformity of justice when courts look to insulate the process from outrageous peculiarities and attempt to provide individual defendants their due process? Is duty always a decision for the court? If so, can a court hear a motion to quash an indictment concerning duty questions? Every question on duty and its rules in tort in American law only translate into answers which might as well be Portuguese due to confusion it will generate for both bench and bar alike.

Finally, there is the matter of intervening causes in tort, and how it might further impact a criminal trial. The jury must be instructed on this rule commonly used in tort, and it should act as another legal defense from culpability. For if another party's action or failure to act affected the misdeed even if the accused was the *prime mover*, a person should not be guilty of the crime at the bar. However, this only opens the can of confusion, as should the government be required to eliminate these possibilities? Should it have to prove the negative? Or is it an affirmative defense required of the accused to prove? If so, what is that burden? The issue of causation is a vast one and if an innocent citizen in a standard rear-end car accident, a car being an inherently dangerous instrumentality by the way, can defend himself utilizing all these legal rules. It seems unconscionable a criminal defendant, one step *figuratively* from the gallows, would not be granted at least these same protections.

#### IV. THE RATIONAL DEFINITION OF CRIMINAL NEGLIGENCE

But why discuss such societal anarchic *solutions* to this dilemma when the answer is squarely before us already. The Model Penal Code and countless states already have incorporated the rational definition of criminal negligence: it requires the defendant to act with a gross deviation below a reasonable standard of care.<sup>25</sup> This CWA statute subjects an accused to *criminal* penalties which must plainly be read with the section on negligence. A common understanding of the law, by the common man, is what our society endeavors to achieve for; as Americans, we believe the sum of our free will and moral compass saves us from the abyss of iniquity. However, without a common reading how can there be a common understanding? St. Thomas More may have best understand how a purported dogma of legal *cleverness* only causes a web of societal chaos. In his 16<sup>th</sup> century classic UTOPIA, More wrote of the mythical island of Utopia in the New World:

But in Utopia everyone's a legal expert, for the simple reason that there are, as I said, very few laws, and the crudest interpretation is always assumed to be the right one. They say the only purpose of a law is to remind people what they ought to do, so the more ingenious the interpretation, the less effective the law, since proportionately fewer people will understand it – whereas the simple and obvious meaning stares everyone in the face. From the point of view of the lower orders, who form the largest section of the community, and are in most need of such reminders, you might just as well not make a law at all, as make one and then interpret it in a sense that can be established after a lot of clever argument – for the ordinary person who's

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<sup>25</sup> See MODEL PENAL CODE §2.02(d).

busy earning his living hasn't either the time or the mental capacity for that type of research.<sup>26</sup>

In its initial enactment the CWA in 1972, the criminal penalty section "made it a misdemeanor for anyone to "willfully or negligently" violate certain provisions of the CWA."<sup>27</sup> In the 1987 amendments to the CWA, the "willful" component of the misdemeanor provision was dropped; whereas the "negligent" provision has been used sparingly by the government with little jurisprudence developed as it mainly has been used in cases involving the negotiation of guilty pleas.<sup>28</sup> The recent criminal prosecution and guilty plea in *United States v. CITGO*, stemming from the release of approximately 53,000 barrels of oil into waters of the United States from a facility in Sulpher, Louisiana, is a chief example of the aforementioned scenario. On September 17, 2008, "CITGO pled guilty in federal court to negligent violations of the CWA and was sentenced to a \$13 million fine and required to implement an environmental compliance plan."<sup>29</sup>

"[A] *malum prohibitum*<sup>30</sup> is just as much a crime as a *malum in se*."<sup>31</sup> The Due Process constitutional evaluation of

<sup>26</sup> THOMAS MORE, *UTOPIA* 106-07 (Paul Turner trans., Penguin Classics ed. 1965). Also, as to Utopia's legal system, More wrote: "They have very few laws, because, with their social system, very few laws are required. Indeed, one of their great complaints against other countries is that, although they've already got books and books of laws and interpretations of laws, they never seem to have enough." *Id.* at 106.

<sup>27</sup> See Roth et al., *supra* note 20, at 5. The author agrees with the findings in this article: "[t]o the extent that there is any liability for criminal conduct [under the CWA], it should only be for conduct that rises to the heightened standard of [criminal] negligence set forth in the Model Penal Code [which requires a gross deviation from a reasonable standard of care]." *Id.* at 9; See MODEL PENAL CODE §2.02(d).

<sup>28</sup> *Id.* See also SOLOW & SARACHAN, *supra* note 21, at 11159.

<sup>29</sup> Roth et al., *supra* note 20, at 8.

<sup>30</sup> See LANE COOPER, *THE RHETORIC OF ARISTOTLE* 74-75 (1932) for an explanation from classical thought on a *malum prohibitum*. In discussing justice, Aristotle commented, "To be wronged is to suffer injustice at the hands of a voluntary agent; for wrong-doing has already been defined as voluntary. And the person wronged must be harmed, and harmed against his will; while the nature of the various injuries is clear from what has gone before . . . and by

*malum prohibitum* crimes has even greater significance when evaluating *malum in se* crimes even though courts have been reluctant to engage in doing so in carving out the public welfare offense doctrine, and exposing citizens to potential culpability who engage in seemingly innocent conduct. However, the Supreme Court has spoken in some cases and compelled the government to prove the accused have knowledge of facts that placed them on notice of the potential criminalization of their conduct.<sup>32</sup> “And [t]o conclude that all statutes “protecting the environment” are public welfare statutes would, in one fell swoop, allow imposition of strict liability for all environmental offenses. Such a systematic transformation is not merely in absolute contravention of the Supreme Court’s nuanced analysis, but also profoundly unfair.”<sup>33</sup>

So then, where does this issue lay? I can hear the dock worker from Philly, the tug boat captain just outside Long Island Sound, the shrimper from rural Lafitte, Louisiana, crying out, who were these men?!<sup>34</sup> Who were these men who ruled a common mistake could incarcerate them and take them from their wives, from their children? They wanted to work on the river, by of the river, and for the river. We are best counseled to heed the lesson proscribed by More in the establishment of clear and obvious meanings for our citizens as it preserves confidence in our legal institutions, and thus, our republic.

The modern legal morality story of our times and the American revulsion to legal *cleverness* is found in the 1982 movie,

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voluntary acts . . . are meant such as are done knowingly. It follows that all accusations must concern either the public interest or a private one, and, again, must concern acts that are done either unconsciously and involuntarily or voluntarily and knowingly, and the latter must be done either by deliberate choice or under the influence of emotion.” *Id.*

<sup>31</sup> HOLMES, *supra* note 22, at 46.

<sup>32</sup> Paul Rosenzweig, *The Over-Criminalization of Social and Economic Conduct*, 7 THE HERITAGE FOUNDATION LEGAL MEMORANDUM 1, 13 (Apr. 17, 2003) (citing *United States v. X-Citement Video*, 513 U.S. 64, 72 (1994); *Ratzlaf v. United States*, 510 U.S. 135 (1994); *Staples v. United States*, 511 U.S. 600 (1994)).

<sup>33</sup> Roth et al., *supra* note 20, at 8.

<sup>34</sup> THE VERDICT (20th Century Fox Film Corp. 1982).

The Verdict.<sup>35</sup> In the movie, an operating nurse is compelled to forge a patient admitting form to protect a surgeon who committed malpractice.<sup>36</sup> Although the nurse testified, the defense attorney, through legal *cleverness*, convinced the trial judge to throw out her testimony and the documentary evidence confirming the truth of her statement. More, however, would have applauded the rebuttal closing argument of the plaintiff's attorney<sup>37</sup> and the attorney's attempt to untie the Gordian knot of what is justice:

You know, so much of the time we're just lost. We say please, God, tell us what is right, tell us what is true. There is no justice. The rich win, the poor are powerless. We become tired of hearing people lie, and after a time we become dead. ... We doubt ourselves, we doubt our beliefs. We doubt our institutions. And we doubt the law. But today, you are the law. You *are* the law. Not some book. Not the lawyers. Not a marble statue or the trappings of the court. See, those are just symbols of our desire to be just. They are, they are in fact, a prayer – a fervent and a frightened prayer. In my religion, they say act as if ye had faith, faith will be given to you. If? If we are to have faith in justice we need only to believe in ourselves and act with justice. See, I believe there is justice in our hearts.<sup>38</sup>

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

<sup>36</sup> See *id.*, quoted in Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J.L. & ARTS 92, 160 (2005). The nurse testified in the movie, "After the operation, when that poor girl, she went into a coma, Dr. Towler called me in. He told me that he had five difficult deliveries in a row and he was tired and he never looked at the admittance form. And he told me to change the form. He told me to change the one to a nine or else, or else he said, he said he'd fire me. He said I'd never work again. Who were these men? Who were these men?! I wanted to be a nurse." *Id.*

<sup>37</sup> I believe so, for as an honest and courageous man, Thomas More would have been appalled by this courtroom chicanery even though the defendant was the Catholic Church who owned the hospital.

<sup>38</sup> THE VERDICT, *supra* note 34, quoted in Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J.L. & ARTS 91, 160 (2005).

Though some might argue the power of this argument is a veiled attempt at jury nullification, it is indeed a reaffirmation of the common man's sense of life.<sup>39</sup> An honest appraisal of *Hanousek* must now too be undertaken. Though the case may not have been ripe for a Supreme Court review a decade ago, it is, respectfully, disingenuous to argue ordinary negligence is and always was thought to be the proper standard, but we chose not to enforce it. If this were the case, if Department of Justice *chose* not to enforce the law in this arena, why not join in the attempts to review and repeal it in Congress over the years? The jury is an accused's final redoubt that he can rely upon in the criminal process to find justice. However, as all litigators are all too aware, a jury is a tiger, and to ride the tiger is a most dangerous risk. Plainly spoken, commentators who supported this interpretation have been wrong, and we can do better by our criminal justice system and by the ordinary person by ensuring criminal negligence is defined as, gross negligence.

#### V. THE FIFTH CIRCUIT WILL NOT ABIDE

There is strong reason to believe the rule of *Hanousek*, if challenged in the Fifth Circuit, will not stand; the controlling authority in the Fifth Circuit on the CWA remains *Ahmad*. This decision held the CWA is not a public welfare offense.<sup>40</sup>

In *Ahmad*, the defendant, Attique Ahmad was alleged to have discharged approximately 4,690 gallons of gasoline he was unable to sell at his "Spin-N-Market" convenience store gas station in Conroe, Texas.<sup>41</sup> The discharge traveled from a manhole directly in front of Ahmad's store through the sewer system and all the way to the Conroe sewer plant. Gasoline began to enter the sewer plant only one day after witnesses viewed Ahmad pumping

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<sup>39</sup> See Mezey, *supra* note 35, at 153-61 (2005). For a full critique of *The Verdict* and other movies and T.V. regarding their impact on our cultural fascination and conceptualization of the law, review this well-written and researched analysis.

<sup>40</sup> *Ahmad*, 101 F.3d at 391.

<sup>41</sup> *Id.* at 387-88.

gas into the manhole.<sup>42</sup> The gasoline was diverted into an emergency lagoon in order to avoid having to shut down the entire plant.<sup>43</sup> Hazardous materials emergency responders and the fire department were called and the plant supervisor ordered all non-essential employees to be evacuated due to the threat. A "tremendous explosion hazard" was created which could have led to "hundreds, if not thousands, of deaths and injuries" and millions of dollars in property damage.<sup>44</sup> Several damning factors implicated Ahmad: (1) the witnesses; (2) his statement to a consultant, who attempted to encourage him not to empty the gas tank himself because it was illegal, in which he responded, "[w]ell, if I don't get caught, what then?" and (3) his admission to using a pump, but denial of pumping anything from his tanks.<sup>45</sup>

The jury found him guilty of knowingly discharging a pollutant without a permit and knowingly operating a source in violation of a pretreatment standard.<sup>46</sup> Critical to this discussion is the Fifth Circuit's evaluation of the *mens rea* required under the CWA in order to convict. Specifically, the court held:

The fact that violations of [33 U.S.C.] 1319(c) (2)(A) are felonies punishable by two years in federal prison confirms our view that they do not fall within the public welfare offense exception. As the *Staples* court noted, public welfare offenses have virtually always been crimes punishable by relatively light penalties such as fines or short jail sentences, rather than substantial terms of imprisonment. Serious felonies, in contrast, should not fall within the exception "absent a clear statement from Congress that *mens rea* is not required." Following *Staples*, we hold that the offenses charged in counts one and two are not public welfare offenses and that the usual presumption of a *mens rea* requirement

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<sup>42</sup> *Id.* at 388.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 388-89.

applies. With the exception of purely jurisdictional elements, the *mens rea* of knowledge applies to each element of the crimes.<sup>47</sup>

Of course, the argument remains open as to the additional question of negligence in the misdemeanor grade of the CWA rather than the felony grade directly addressed in the *Ahmed* case. Since *Ahmad* was first decided in 1997, the greatly increased quantum generated in cases over the past decade will most likely be a compelling reason to extend its reasoning to the misdemeanor grade. This is because in recent cases, at times, even when defendants pled guilty to criminal negligence they have been subjected to tens of millions of dollars in criminal fines and additional jail time.

## VI. WE ARE A NATION OF LAWS, NOT MEN

John Adams,<sup>48</sup> President, patriot, and master of the bar, is responsible for this fundamental principle in our republican form of government. As author of the Constitution of the Commonwealth of Massachusetts he inscribed in the granite of our collective legal unconsciousness:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a *government of laws and not of men*.<sup>49</sup>

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<sup>47</sup> *Id.* at 391. (citations omitted).

<sup>48</sup> In 1770, John Adams successfully represented the British soldiers in their criminal defense at trial for their conduct in the infamous "Boston Massacre." See DAVID G. McCULLOUGH, JOHN ADAMS 65-68 (2001).

<sup>49</sup> MASS. CONST. pt. I, art. XXX (emphasis added).

No matter how badly our community desires to hold a wrong-doer accountable for his actions, even, at times, to demand a pound of flesh in a medieval form of retribution from the villain, we must not lose our soul in doing so. This being the case, there is nothing more critical to our system of criminal justice than fixed rules regarding accountability for misconduct. Unfortunately, the predictability needed to create deterrence of crime was obliterated by the decision in *Hanousek*. Prior to his historic career on the bench, in 1889, Oliver Wendell Holmes, Jr. wrote "[T]here can be no case in which the law-maker makes certain conduct criminal without his thereby showing a wish and a purpose to prevent that conduct. Prevention would accordingly seem to be the chief and only universal purpose of punishment."<sup>50</sup>

How then can our community be properly served by the imposition of the nebulous world of tort upon our citizenry? There is no opportunity to build an ounce of prevention by punishing the honest man for his mistake.<sup>51</sup> And what of the *Holmesian* axiom that to understand the law, to allow it to work for community's needs we are to look at, not even as the honest man would as he would be concerned for his moral conduct, but instead as the "bad man, who cares only for the material consequences which such knowledge enables him to predict."<sup>52</sup>

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<sup>50</sup> HOLMES, *supra* note 22, at 46.

<sup>51</sup> See also *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the H. Comm. on the Judiciary Subcomm. on Crime, Terrorism, and Homeland Sec.*, 111th Cong. 83 (2009) (statement of John Wesley Hall, President, National Ass'n of Criminal Def. Lawyers) ("While a potential sentence of thirty years can serve to deter a defendant from intentionally violating the law, such a sentence can have no deterrent effect where the defendant had no intention to commit a wrong or had every reason to believe his conduct was lawful." He further posited the question, "[w]hy would anyone risk going to trial when the potential punishment is ten or twenty years in jail but the plea offer is fifteen years? A genuine lack of blameworthiness is no match for this risk.")

<sup>52</sup> O.W. HOLMES, *The Path of the Law*, 10 HARV. LAW REV. 457, 459 (1897), reprinted in *LANDMARKS OF LAW* 42 (Ray D. Henson ed., 1960).

Justice Scalia<sup>53</sup> himself framed the importance of rules and the inherent danger to our republic by judicial usurpation of the text and import of the Constitution by stating:

If the courts are free to write the Constitution anew, they will, by God, write it the way the majority wants; the appointment and confirmation process will see to that. This, of course, is the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against: the majority. By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all.<sup>54</sup>

Scalia's methodology is consistent with principles of positivist philosophy and is not centered upon considerations of policy or morality.<sup>55</sup> Further, "in [this] endeavor to adhere to a law of rules, he will invoke history to support his reasoning."<sup>56</sup> In any criminal case brought from the Fifth Circuit, this becomes of paramount importance as Scalia is the Circuit Justice for the Fifth Circuit

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<sup>53</sup> I agree with my Constitutional mentor Professor Paul Baier of the Louisiana State University Paul M. Hebert Law Center when he wrote of Justice Scalia, "[t]wenty years in retrospect show Antonin Scalia a sea crashing over the Court, condemning his colleagues for surpassing the bounds of the Constitution . . . , to what each provision meant to those who adopted and ratified the Constitution. Scalia remains a friendly knife-fighter; vociferous; argumentative; hard-boiled; Sicilian." Paul R. Baier, *The Supreme Court, Justinian and Antonin Scalia: Twenty Years in Retrospect*, 67 LA. L. REV. 489, 503-04 (2007) (internal citations omitted).

<sup>54</sup> ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 47 (1997). See also Baier, *supra* note 60 at 489. As Professor Baier thoughtfully conducts an exegesis on the Scalia, "*Il Giudice Sapiente*," and his continuing use of demonstrative language and his force of nature, incarnate, that remains after twenty years a bulwark in the struggle against constitutional infringement.

<sup>55</sup> Beau James Brock, *Mr. Justice Antonin Scalia: A Renaissance of Positivism and Predictability in Constitutional Adjudication*, 51 LA. L. REV. 623, 650 (1991).

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

Court of Appeals and his influence and procedural authority cannot be understated.<sup>57</sup>

“Our federal courts must continue, as they currently are, to be perceived by the legal community and the public at large as a beacon of hope against the darkness of ever encroaching attacks against civil liberties and an objective arbiter of our Nation’s foremost legal challenges.”<sup>58</sup> This is even of greater need as “Congress has exercised precious little self-restraint in expanding the reach of federal criminal laws to new regulatory areas.”<sup>59</sup> “This beacon will dim if those protections are to be governed by rules of sand – sand subject to the tipping of an hourglass – when competing social engineering objectives demand a new outcome, and thus a new rule to rationalize it.”<sup>60</sup>

The “[a]dministration of justice *according to law* means administration according to standards, more or less fixed, which individuals may ascertain in advance of controversy and by which all are reasonably assured of receiving like treatment.<sup>61</sup> It means an impersonal, equal, certain administration of justice, so far as these may be secured by principles of decision of general application.”<sup>62</sup>

Throughout history, there have been Supreme Court Justices who do not care particularly much for clear and precise . . . rules but who rather appear to search for the most “fair result” case by case, applying broad legal “standards” rather than crisp and definitive rules. In modern times, for example, Justices Lewis Powell and Sandra Day O’Connor have tended to eschew application of “clean rules,”

<sup>57</sup> *Id.* at 624.

<sup>58</sup> Beau James Brock, *Hanousek v. United States: Social Engineering Encroaching on Individual Liberty*, 245 AROUND THE BAR 18 (May 2010).

<sup>59</sup> Rosenzweig, *supra* note 32, at 2.

<sup>60</sup> Brock, *supra* note 58, at 18.

<sup>61</sup> Roscoe Pound, *Justice According to Law*, 13 COLUM. L. REV. 696, 705 (1913) (emphasis added).

<sup>62</sup> *Id.* See also HOLMES, *supra* note 22, at 44 (“It may be the destiny of man that the social instincts shall grow to control his actions absolutely, even in anti-social situations. But they have not yet done so, and as the rules of law are or should be upon a morality which is generally accepted . . .”)

instead seeking the fairest result in each case. Scalia is adamantly against this approach and has sought to set and follow clear rules of law, regardless of their impact in a particular case.<sup>63</sup>

There are many examples of Scalia's proclivity for rules over standards<sup>64</sup> and balancing tests, even those grounded in precedent.

Preeminent American legal jurist, Roscoe Pound studied how the notion of predictability in law allowed capitalism to persevere in twentieth century America, mostly due to the simultaneous commercial revolution. Pound wrote: "[i]n a commercial and industrial society, where the economic existence is extremely complex, and delimitation of individual interests is demanded by the social interest in security of transactions and security of acquisitions, justice without law is pushed to the wall by the demand for a maximum of certainty."<sup>65</sup>

The danger to the very fabric of public confidence in our government is heightened by personal rule from the bench according to societal norms in any area of law.<sup>66</sup> Former Alabama Chief Justice Roy Moore wrote "[w]hen judges put on their social engineering hats and go beyond the law to correct perceived inequities, they assume the role of the state legislature and violate the basic doctrine of separation of powers."<sup>67</sup>

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<sup>63</sup> PAUL BARRETT ET AL., *A YEAR IN THE LIFE OF THE SUPREME COURT* 193 (Rodney A. Smolla ed., Duke University Press 1995).

<sup>64</sup> *Id.* at 9.

<sup>65</sup> Pound, *supra* note 61, at 696.

<sup>66</sup> *But see* Alexander Hamilton's apologetic defense of such possibilities upon the creation of the Supreme Court in our Constitution in *THE FEDERALIST PAPERS*, "It may in the last place be observed that the supposed danger of judiciary encroachments on the legislative authority which has been . . . reiterated is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system." ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, *THE FEDERALIST PAPERS* 484-85 (Clinton Rossiter ed., Penguin Books USA 1961).

<sup>67</sup> ROY MOORE, *SO HELP ME GOD: THE TEN COMMANDMENTS, JUDICIAL TYRANNY, AND THE BATTLE FOR RELIGIOUS FREEDOM* 158 (Broadman & Holman 2005).

Many attractive reasons exist to usurp . . . the powers of another branch of government, especially when you wear a black robe, but it is always improper to do so. The judicial branch has no authority to assume the lawmaking mantle that belongs to the legislature even when it seems convenient to allow judges to do so because it will make things better. Such a misuse of power will always result in a permanent 'evil,' by leading to further usurpations.<sup>68</sup>

The public welfare doctrine has become a tool of socialization, disrupting the historic character of criminal law as a system for addressing wrongful conduct.<sup>69</sup>

As a Nation of laws, not men, a reliance on the goodwill of prosecutors is hollow and misplaced and I dare say unpatriotic in a republic of ordered liberty. Equal justice is not satisfied by the caprice of the prosecutor, ever.<sup>70</sup> For human endeavor is always short of perfection and, at times, subject to personal or political intrigue. I am reminded of tragic Edmund Dantes, the tile character from the novel *The Count of Monte Cristo*, who is politely told by prosecutor Villefort, "I cannot set you at liberty at once as I had hoped... You see how I have tried to help you, but I must detain you a prisoner for some time longer. I will make that time as short as possible."<sup>71</sup> Dantes, of course, became the mythically wronged man in modern literature, and our legal system must not devolve into a host of wronged Counts of Monte Cristo which are evocative

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<sup>68</sup> *Id.* at 159.

<sup>69</sup> Rosenzweig, *supra* note 32, at 14-15. *See also id.* at 3 ("Where once the criminal law was an exclusively moral undertaking, it now has expanded to the point that it is principally utilitarian in nature.").

<sup>70</sup> "Where once the law had strict limits on the capacity of the government to criminalize conduct, those limits have now evaporated. Society has come, instead to rely on the conscience and circumspection in prosecuting officers." *Id.* at 15 (citing *Nash v. United States*, 229 U.S. 373, 378 (1913)).

<sup>71</sup> Alexandre DUMAS, *THE COUNT OF MONTE CRISTO* 51 (Barnes & Noble 2004) (1844).

of the overreaching results that may portend if any prosecutions are based on *Hanousek*.<sup>72</sup>

## VII. THE END OF THE BEGINNING

And so the calamity in the gulf now will potentially place this issue squarely before both bench and bar. It has been but prologue to this point and our prosecutors and courts must determine how they will drive this issue. To quote Churchill, “[n]ow this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning.”<sup>73</sup> As we enter this maelstrom, a complex investigation will attempt to determine potential civil and criminal wrong-doing.<sup>74</sup> This investigation has as its impetus the deaths of eleven human beings from the BP oil spill incident which occurred on April 20, 2010.

The environmental and economic devastation also affects our entire energy sector, and thus our national security, and continues unabated along the gulf coast as this article is drafted. Already, the President has declared a moratorium on offshore drilling and this event appears to be the Three Mile Island disaster for the offshore oil and gas sector. The long term impacts of this *foreign* company’s alleged misconduct upon our native corporate

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<sup>72</sup> Lest we also join the French government in their dismissal of the *French* lesson of Dantes, to their unending shame in the Dreyfus Affair.

<sup>73</sup> NEVER GIVE IN! THE BEST OF WINSTON CHURCHILL’S SPEECHES 342 (Winston S. Churchill ed., Hyperion 2003). (This was part of the famous speech Churchill gave on November 10, 1942, after the British victory at El Alamein which finally turned the tide of battle in the desert war.) About this critical period of the war, Churchill later wrote, “It marked the turning of the ‘Hinge of Fate.’ It may almost be said, ‘before Alamein we never had a victory. After Alamein we never had a defeat.” WINSTON S. CHURCHILL, THE SECOND WORLD WAR, VOLUME IV: THE HINGE OF FATE 541 (Houghton Mifflin 1985).

<sup>74</sup> Any possible investigation in this case will most certainly be a political tug-of-war between federal agencies, of which many have criminal investigators. Also, EPA-CID needs more agents in order to meet both ordinary and crisis-based criminal investigations of environmental crimes, and unfortunately, the agency has only found support before Congress and within EPA itself, in times of ecological catastrophe. See also Raymond W. Mushal, *Up From the Sewers: A Perspective on the Evolution of the Federal Environmental Crimes Program*, 2009 UTAH L. REV. 1103, 1115-27.

oil and gas sector will have untold ramifications upon our future ability to free ourselves from even greater dependence on foreign imports. We must never forget the world's first offshore production started in Louisiana. "Drilling from barges and platforms over water began in the decades of 1910-1930," with the first platform drilled "past the sight of land" in 1947.<sup>75</sup> This platform stood ten miles off the Louisiana coast.<sup>76</sup>

Any environmental criminal investigation, such as the one presented here, may develop numerous Federal and state criminal charges; charges may include: possible violations of the CWA, other traditional crimes such as false statements, aggravated damage to property, and possibly manslaughter or some other degree of homicide. If proven, these charges should be aggressively pursued and be made to set the standard so long sought in this arena, to ensure a firm message to the regulated community – *it does not pay to pollute* – and so to deter future criminal misdeeds. But, in spite of this passion for deterrence, our lesson today is *not* to charge crimes for which a perpetrator may legally find an escape, and *not* to charge criminal negligence based on the tenuous holding of *Hanousek* effectually compromising the full measure of justice.<sup>77</sup>

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<sup>75</sup> R.W. Peterson, *GIANTS ON THE RIVER: A STORY OF CHEMISTRY AND THE INDUSTRIAL DEVELOPMENT ON THE LOWER MISSISSIPPI RIVER CORRIDOR 15* (Homesite Company 1999).

<sup>76</sup> *Id.* According to the Louisiana Oil & Gas Association (LOGA) web site on June 5, 2010, there are currently 191 active offshore rigs off the Louisiana coast. *See also* In 2000, Shell Oil Company was leading the way in offshore operations with more than seventy platforms in the Gulf of Mexico. *Id.*

<sup>77</sup> *See* Memorandum from Earl E. Devaney, Dir., Office of Criminal Enforcement, U.S. Env'tl. Prot. Agency, to All EPA Employees Working in or in Support of the Criminal Enforcement Program (Jan. 12, 1994), *available at* <http://www.epa.gov/compliance/resources/policies/criminal/exercise.pdf>. EPA Office of Criminal Enforcement Director Earl Devaney issued his famous criminal investigative discretion memo in 1994 and it remains the cornerstone of EPA-CID's *raison d'etre*. A critical portion of it states, "OCE . . . must maximize its presence and impact through discerning case-selection, and then proceed with investigations that advance EPA's overall goal of regulatory compliance and punishing criminal wrongdoing." *Id.* at 3. Interestingly, Devaney, always a foremost a dedicated public servant above political hi-jinks, recently served as the Director of the Office of the Interior's Office of Inspector

Even when considering traditional aspects of prosecutorial discretion, commentators have noted, “[t]he extremely limited use of the CWA’s negligence provisions by federal prosecutors also reflects the deep-seated norm in Anglo-American jurisprudence that criminal penalties should generally be limited to injuries caused by intentional misconduct rather than by accidents.<sup>78</sup> As the U.S. Supreme Court has stated: ‘[t]he contention that an injury can amount to a crime only when inflicted by intention . . . 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 good and evil.’”<sup>79</sup>

In this twenty-first century corporate monolithic controlled economy, an apt description of the parties potentially responsible might be they are [a] government of themselves, with revenue greater than Britain itself, one that controls the lives of more people than the United States, a government owned by businessman who bought and sold its shares every day jockeying for potential control.<sup>80</sup> Strangely enough, this familiar corporate description is not of BP or others of today’s headlines, but of the first multi-national British corporation, the East India Company which dominated international commerce across our globe from the 17<sup>th</sup> to the 19<sup>th</sup> centuries. Our American form of torch and pitchfork justice was occasioned upon the East India Company famously in 1773 by the Sons of Liberty’s “Boston Tea Party.” This response by patriotic citizens to corporate misdeeds who attempted to obtain a government controlled monopoly was another example of justice *without* law, but in the dire circumstances now facing our gulf community, we must conform to legal means.

For in this case, let any potential criminal prosecution, based on the rule of law, exact punishment which will restore the public confidence of a wounded American public who have

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General, and according to the popular press, reportedly found several concerns with the regulatory workings of the Federal Office of Minerals Management under the Department of the Interior.

<sup>78</sup> Solow & Sarachan, *supra* note 21, at 11160.

<sup>79</sup> *Id.* (citing *Morrissette v. United States*, 342 U.S. 246, 250 (1950)).

<sup>80</sup> See BRIAN GARDNER, *THE EAST INDIA COMPANY: A HISTORY* 11 (1971).

become more and more cynical of the government's perceived cozy relationship with industry. For isn't the mere acceptance of criminal fines in exchange for wrongful acts without further deprivation of a perpetrator's position of corporate hegemony, or individual criminal responsibility, a *de facto* form of governmental simony?<sup>81</sup> Dante's *Inferno* described in grisly detail how simoniacs were consigned to the eighth circle of hell for their fraudulent sins of impiously bribing their way into influence or position in the Church.<sup>82</sup> The result of the continuing use of criminal negligence under *Hanousek* compromises not only the honest man's ability to operate in a commercial trade without fear in the face of a common mistake, not only compromises an accused's right to a fair trial, but compromises our legal system's moral obligation to exact proportional justice from those whose actions are truly reprehensible. This compromise cannot be allowed to perpetuate itself further without the public rising up and welcoming the legal system itself to the eighth circle.<sup>83</sup>

Our own western lore is also replete with frontier justice, or justice without rules, and although anecdotally amusing, are antithetical to a modern commercial society. Tradition in southwestern Texas revolves around Judge Roy Bean, who was the self-styled "Law west of the Pecos" back in frontier days when horse stealing was worse than murder.<sup>84</sup> Judge Bean held court on the porch of

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<sup>81</sup> Simony is the crime of paying for sacraments and consequently for holy offices or positions in the hierarchy of a Church, named after Simon Magus, who appears in *Acts of the Apostles*, 8:18-24.

<sup>82</sup> See JOSEPH GALLAGHER, *TO HELL & BACK WITH DANTE* 41 (1996). ("[A]s described in the eighth chapter of the Acts of the Apostles, Simon Magus (magician) sought to buy spiritual power from the apostles. Simoniacs likewise prostitute the sacred for cash. Seeing how simoniacs who perversely stuffed their purses with sacrilegious gain are here stuffed upside down into the holes that pock this ditch . . . [t]he feet of the sinners are afire and twitch like the wicks votive lights at a shrine.")

<sup>83</sup> See Mushal, *supra* note 74, at 1127, wherein the "Godfather" of the DOJ Environmental Crimes Section, AUSA Mushal, writes, "[t]he real gauge of a government's commitment to environmental protection is the vigor with which it enforces its laws and regulations. Without vigorous enforcement, those laws and regulations are just so many piles of paper."

<sup>84</sup> ERNIE PYLE, *HOME COUNTRY* 82-83 (1947).

his saloon in Langtry.<sup>85</sup> He always had two things on the bench in front of him – a law book, which he didn't know how to use, and a six-shooter, which he did.<sup>86</sup>

Judge Roy Bean was his own law without rules among the wilderness of the Pecos. Any potential criminal case developed from an investigation on the current gulf oil spill will weave its convoluted journey along a rocky path, through the darkened woodlands, and eventually will meet the mighty quill of Justice Scalia. Instead of being a voice crying in the wilderness, any case will find a Scalia who will act, as a fisher of Justices, on the issue of criminal negligence. Authors have been consistent in their evaluation of Scalia's apparent inability to work collegially in the quiet corridors of decision. They have noted, "[i]n the end, his color and candor may at once define Justice Scalia's strengths and limitations."<sup>87</sup> In fact, "[t]he building of coalitions, however, would not appear to be Justice Scalia's agenda, and indeed, seems to be inimical to his temperament . . . Scalia's role on the Court is rather of provocateur, gadfly, agitator, [and] conscience."<sup>88</sup> But not here, and the opportunity to defend the rule of law which so invigorates the imagination of Scalia will be joined by other Supreme Court pragmatists intent on also establishing predictable and salient rights of any accused in the ever expanding environmental legal arena.

The scenario unfolding in the gulf is a nightmare of Biblical proportions. But, the Fifth Circuit will not be moved by the circumstances to reverse its previous long held position—the violation of the CWA is not a public welfare offense and will resoundingly reject any such efforts to challenge it. Further, any potential prosecution of the circumstances of this tragedy would

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 83. Pyle went around the country discovering America and Americans for the average reader. When he talked with a local rancher who remembered Bean, Ike Billings, who told the following story: "I remember once a cowboy fell or jumped off the railroad bridge up here a piece and was killed. They found forty dollars and a six-shooter on him. The judge convened court over the body, and took the six-shooter and fined the fellow forty dollars for committing suicide, and then had the county bury him because he was a pauper." *Id.*

<sup>87</sup> BARRETT ET AL., *supra* note 63, at 11.

<sup>88</sup> *Id.* at 11-12.

best serve our Nation and the victims by structuring the charges in a responsible and professional manner, zealously without compromise. This may include any charges of knowing conduct and all other instances of negligence *only* if they are gross deviations below a reasonable standard of care. The memories of the victims and their families are owed the same predictability of process as the accused, and the path of the law *does* appear clear, but unlike the recent 2009 Supreme Court result of *Wyeth v. Levine*,<sup>89</sup> this case will not “illustrate[ ] that tragic facts make bad law.”<sup>90</sup>

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<sup>89</sup> 129 S. Ct. 1187 (2009).

<sup>90</sup> *Id.* at 1217 (Alito, J., dissenting). Justice Alito was joined in his dissent by the Chief Justice and Justice Scalia.