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CASENOTE

TAKING CRIMINAL LIABILITY OF NEGLIGENT ACTORS ONE STEP TOO FAR

*United States v. Hanousek*¹

I. INTRODUCTION

The Ninth Circuit's recent holding in *United States v. Hanousek* continues a trend by courts of holding criminally liable those individuals who act negligently in violation of public welfare statutes like the Clean Water Act ("CWA"), regardless of whether they possess any mental culpability.² Courts historically have disfavored holding individuals who act with ordinary negligence liable for criminal penalties because criminal punishment has been reserved for only the worst offenses in which the defendant possesses a requisite level of mental culpability.³ Since the Industrial Revolution, however, courts have become increasingly willing to allow criminal penalties for certain acts of ordinary negligence which can be considered public welfare offenses like the CWA. This Note will discuss the court's holding and reasoning in *Hanousek* which involves a violation of the CWA, the history of the United States' courts unwillingness to hold negligent actors criminally liable, how this case's holding takes the courts' historic use of criminal penalties for negligent actors one step too far, and the possible implications of *Hanousek*'s overly broad use of criminal penalties for other negligent actors.

II. FACTS AND HOLDING

As an employee of Pacific & Arctic Railway and Navigation Company ("Pacific & Arctic"), Edward Hanousek, Jr., worked as roadmaster of White Pass & Yukon Railroad.⁴ He was contractually responsible "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 similar projects" for a stretch of track between Skagway, Alaska and Whitehorse, Yukon Territory, Canada.⁵

One of Hanousek's duties was to supervise a rock-quarrying project at a 1000-foot long work site called "6-mile" near the Skagway River, a navigable waterway of the United States.⁶ The project involved realigning a sharp curve in the railroad track and gathering rock for a ship dock in Skagway.⁷ To accomplish the project, Pacific and Arctic employed a contracting company, Hunz & Hunz, to perform the labor and provide the work supplies.⁸

A high-pressure petroleum pipeline, owned by Pacific & Arctic's sister company Pacific & Arctic Pipeline, Inc., ran partially above and partially below ground only a few feet from the track.⁹ To protect the pipeline, workers followed industry customs and covered about 300 feet of the pipeline with railroad ties, ballast material and sand.¹⁰ After Hanousek assumed project responsibility in May 1994, workers also constructed a moveable platform that covered the pipeline so workers could travel and carry rock over it to the railroad cars.¹¹

On the evening of October 1, 1994, Shane Thoe, a backhoe operator for Hunz & Hunz, was loading rocks into railroad cars.¹² The area where the backhoe operator had been assigned to load the train with the rocks was covered by the moveable platform.¹³ After the train pulled away, Thoe noticed that some rocks that had been

¹ *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), cert. denied, 120 S.Ct. 860 (2000).

² *Id.*

³ Leslie Yalof Garfield, *A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature*, 65 TENN. L. REV. 875, 890-91 (1998).

⁴ *Hanousek*, 176 F.3d at 1119.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

caught in the train's plow were lying off the tracks beyond the protected area of the pipeline.¹⁴ On his own, Thoe decided to move them with his backhoe.¹⁵ Because that area of the site had been graded to finish grade, the pipeline was covered by dirt.¹⁶ As Thoe operated the backhoe next to the track to sweep away the rocks, he struck and ruptured the pipeline causing the discharge of between 1000 to 5000 gallons of heating oil over the course of several days into the Skagway River.¹⁷ Appellant Hanousek was not present when the oil pipeline ruptured, which caused the lawsuit which is the topic of this Note.¹⁸

After an investigation, the United States charged Hanousek with two counts.¹⁹ Hanousek was charged with one count of negligently placing a harmful quantity of oil into United States' navigable water, thus violating the Clean Water Act provisions 33 U.S.C. §§ 1319(c)(1)(A)²⁰ and 1321 (b)(3),²¹ and with one count of conspiracy to provide U.S. Coast Guard officials investigating the accident with false information, in violation of 18 U.S.C. §§ 371 and 1001.²² Hanousek's appeal, which is the subject of this casenote, followed a district court jury verdict convicting Hanousek of negligently discharging a harmful quantity of oil into United States water and acquitting him of the charge of conspiracy to provide false information.²³ The district court sentenced him to six months in prison, six months in a halfway house, six months of supervised release and fined him \$5,000.²⁴

The Ninth Circuit upheld Hanousek's criminal conviction²⁵ for negligently discharging a harmful amount of oil into United States navigable water violating 33 U.S.C. sections 1319 (c)(1)(A).²⁶ The court found that a person who acted negligently and is charged with violating section 1319(c)(1)(A) can face criminal penalties, as provided by the plain language of the statute.²⁷ The court also found that because section 1319(c)(1)(A) is a public welfare statute, a court can impose criminal penalties on an individual who negligently violates it.²⁸ Moreover, the court held that the jury was properly instructed on ordinary negligence and causation by the district court and that the district court did not err by not providing the jury with Hanousek's proposed instruction on vicarious liability.²⁹ The court's final conclusion was that the criminal conviction should be upheld and that Hanousek had received a proper sentence as was provided under the sentencing guidelines.³⁰

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 - 1387 (1994); see 33 U.S.C. § 1319(c)(1)(A) (1994) (providing that criminal penalties are available for the individuals who "negligently violate[] section... 1321(b)(3)... of this title").

²¹ 33 U.S.C. 1321(b)(3) (1994) (stating that "[T]he discharge of oil or hazardous substance ... into the navigable waters of the United States ... in such quantities as may be harmful ... is prohibited").

²² *Hanousek*, 176 F.3d at 1119. M. Paul Taylor, an officer of Arctic & Pacific and of Arctic & Pacific Pipeline, Inc. was also charged and eventually acquitted of all but two counts. *Id.* at n.1.

²³ *Id.* at 1120.

²⁴ *Id.*

²⁵ *Id.* at 1126.

²⁶ 33 U.S.C. § 1319(c)(1)(A) (1994).

²⁷ *Hanousek*, 176 F.3d at 1121.

²⁸ *Id.* "Public welfare legislation is designed to protect the public from potentially harmful or injurious items ... and may render criminal 'a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety,'" *Id.* (citing *Staples v. United States*, 511 U.S. 600, 607 (1994) for the proposition that the public should be protected from harm; citing *Liparota v. United States*, 471 U.S. 419, 433, (1985) for the proposition that a reasonable person should know that the public will regulate threats).

²⁹ *Hanousek*, 176 F.3d at 1121.

³⁰ *Id.* at 1125. See U.S. SENTENCING GUIDELINES MANUAL § 3B1.1 (1998). This provision states that the court may "increase the offense level as follows: (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels. (b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels. (c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels. *Id.* The guidelines also define a participant as a "person who is criminally responsible for the commission of the offense, but need not have been convicted ..." *Id.* at Application Note 1. See also U.S. SENTENCING GUIDELINES MANUAL § 5C1.1 (1998) (allowing the sentencing for such crimes to be satisfied by a sentence of imprisonment.").

III. LEGAL BACKGROUND

A principle issue in *Hanousek* case is whether a court can impose criminal liability on a defendant who has acted with ordinary negligence. To understand how the *Hanousek* court came to the conclusion that it could impose such criminal liability on the defendant who had acted with ordinary negligence, one must consider the evolution of criminal punishment and why courts consider some types of negligent actions sufficient to warrant criminal punishment.

Criminal punishment, historically, has served many purposes including protecting society from harm by criminals, preventing individuals from participating in criminal conduct, and punishing criminals for their wrongful acts.³¹ According to Oliver Wendall Holmes, criminal law and the resulting punishment serve to "coerce individuals to conform their behavior to societal norms."³² Utilitarian theorists believe that punishing criminals helps maintain order in society and, thus, creates better future behavior in other members of society.³³ Utilitarians believe that deterrence is key in an orderly society and that such deterrence rests on "free will" — the fact that people will weigh the benefits of committing a crime against the harms from criminal punishments in determining which path to take.³⁴

When individuals are held criminally responsible for their acts of ordinary negligence, some question the ability of the punishment to deter because to hold a negligent person liable for such a crime requires no showing that the individual even knew what he or she was doing had potentially harmful effects.³⁵ Historically, in early English criminal law, ordinary negligence was sufficient to warrant criminal punishment.³⁶ However, the Anglican Church believed it was wrong to punish without a degree of moral blameworthiness.³⁷ And, by the end of the nineteenth century, American and British courts could not impose criminal punishment without proof of a requisite mental state or at least gross negligence.³⁸ Still today, most states only punish for gross negligence or greater degrees of fault.

Most states, however, recognize limited exceptions which enable criminal liability to be placed on individuals who have acted with ordinary negligence.³⁹ Generally, those exceptions include instances where the court finds that a defendant, regardless of his or her mental state, has negligently handled an inherently dangerous instrument, engaged in an inherently dangerous activity or engaged in conduct that could cause widespread public injury.⁴⁰ These exceptions are likely well within Holmes' reasoning because he believed it was perfectly proper to sacrifice one inadvertently negligent actor to the rigors of criminal punishment if it created a greater good for society.⁴¹ Others, however, feel that punishing individuals who lack mental culpability causes unintended harm and, thus, feel that under no circumstances should someone who is merely negligent face criminal liability.⁴²

The Supreme Court has continuously held that, given the right circumstances and set of facts, it will allow criminal punishment for ordinary negligence.⁴³ *Hanousek* cited numerous Supreme Court cases from as early as 1922 which held that criminal punishment was valid in punishing a negligent actor guilty of violating a public welfare statute.⁴⁴

³¹ Garfield, *supra* note 3, at 877 n.4 (citing Oliver Wendall Holmes, Jr., *THE COMMON LAW* 49 (1923); *see also* Wayne R. LaFave & Austin W. Scott, Jr., *HANDBOOK ON CRIMINAL LAW* § 1.5 at 22 (2d ed. 1986).

³² *Id.*

³³ *Id.* at 881.

³⁴ *Id.* at 882.

³⁵ *Id.* at 883.

³⁶ *Id.* at 888.

³⁷ *Id.*

³⁸ *Id.* at 889.

³⁹ *Id.* at 890-91.

⁴⁰ *Id.* *See generally* *United States v. Dotterweich*, 320 U.S. 277, 281 (1943); *United States v. Balint*, 258 U.S. 250, 254 (1922) (recognizing that the state can impose the duty of acting with care on innocent individuals in order to lessen public danger and ill effects.)

⁴¹ Garfield, *supra*, note 3 at 884-85, n.30.

⁴² *Id.* (citing Jerome Hall, *Negligent Behavior Should Be Excluded From Penal Liability*, 63 COLUM. L. REV. 632, 641 (1963)).

⁴³ *Id.* at 882, n.9.

⁴⁴ *See* *Staples v. United States*, 511 U.S. 600 (1994); *Lipravora v. United States*, 471 U.S. 419 (1985); *Morissette v. United States*, 342 U.S. 246 (1952); *Dotterweich*, 320 U.S. at 281; *Balint*, 258 U.S. at 250 (supporting the proposition that under the right circumstances a court is justified in holding a person guilty of ordinary negligence criminally liable.)

The first case *Hanousek* cited was *United States v. Balint*.⁴⁵ In *Balint*, the Court reasoned that an individual accused of violating a public welfare statute was in the best position to prevent the violation from occurring, thus he or she should be held criminally liable if the violation is severe enough.⁴⁶ The Court overturned a demurrer to the indictment where several individuals were charged and held criminally liable for their negligent acts of selling opium and coca leaf derivatives in violation of a federal statute.⁴⁷ The individuals in this case who were criminally charged under the Anti-Narcotic Act had themselves negligently sold the drugs and, thus, violated the statute.

Another case considered by the *Hanousek* court was *United States v. Dotterweich*.⁴⁸ The Court in *Dotterweich* upheld a finding of criminal liability for the negligent acts of an individual who violated the Federal Food, Drug and Cosmetic Act.⁴⁹ In *Dotterweich*, the court held that under the statute Dotterweich, the president and general manager of a pharmaceutical company, was guilty of a misdemeanor for negligently shipping misbranded and adulterated drugs.⁵⁰ In this case, as in *Balint*, the defendant acted in violation of the statute and did not violate it through an omission or failure to act.⁵¹ The Court cited court's decision in *Balint* and the utilitarian notion that it is better to protect the larger interest by placing the burden on an individual in rationalizing its decision to hold Dotterweich criminally liable.⁵² The Court reasoned that because of the nature of Dotterweich's business – as a jobber for drugs – he should have been aware of the possibility of a violation and should have exercised due care.⁵³ The Court based their decision to hold Dotterweich liable on the theory that the public expects responsible parties to act when dealing with harmful or potentially harmful products.⁵⁴

The *Hanousek* court also discussed *Morrisette v. United States*.⁵⁵ In *Morrisette*, the Court reversed the Sixth Circuit's affirmation of the district court's conviction of Joseph Edward Morrisette,⁵⁶ who was charged with embezzling, stealing or knowingly converting any property owned by the government.⁵⁷ Such acts carry criminal penalties.⁵⁸ Morrisette, a well-liked community member and World War II veteran, had picked up three tons of bomb casings he found lying in a field while out hunting in the Michigan woods.⁵⁹ Morrisette then took them to be crushed and was paid \$84 for them.⁶⁰ Throughout the entire investigation, Morrisette continually professed his innocence, told investigators exactly what he had done, and claimed he had no idea he had violated a statute.⁶¹ In holding that Morrisette did not violate the statute, the Court reasoned that presumptive intent should not be used in this case and that Congress' ability to imply culpability for the violation of certain statutes had its limits.⁶² The Court also emphasized that, though courts did occasionally hold negligent actors criminally responsible for their acts, the exact line for when it was permissible and when it was not had not been delineated clearly by any of the courts.⁶³

The *Morrisette* Court said it is the responsibility of Congress, not the courts, to decide at what point it should assign criminal punishment for negligent acts through determining when potential unfairness to certain defendants is outweighed by the benefit to society of deterring harmful behavior.⁶⁴ The Court said that it is the

⁴⁵ *Balint*, 258 U.S. at 250.

⁴⁶ *Id.* The court stated that "Again where one deals with others and his mere negligence may be dangerous to them...the policy of the law may, in order to stimulate proper care, require the punishment of the negligent person" *Id.*

⁴⁷ *Id.* at 251-52. The court reasoned that Congress had rationalized that even if it meant that an innocent purchaser of drugs might face criminal liability, the statute was intended to place criminal punishment on any violators. *Id.*

⁴⁸ *Dotterweich*, 320 U.S. at 277.

⁴⁹ *Id.* at 285.

⁵⁰ *Id.* at 278.

⁵¹ *Id.*

⁵² *Id.* at 281.

⁵³ *Id.* at 280.

⁵⁴ See generally Kevin A. Gaynor & Thomas R. Bartman, *Criminal Enforcement of Environmental Laws*, 10 COLO. J. INT'L ENVTL. L. & POL'Y (1999) (citing *Dotterweich*, 320 U.S. at 277 and *United States v. Park*, 421 U.S. 658 (1975)).

⁵⁵ *Morrisette v. United States*, 342 U.S. 246 (1952).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 247.

⁵⁹ *Id.*

⁶⁰ *Id.* at 247.

⁶¹ *Id.* at 248.

⁶² *Id.* at 256.

⁶³ *Id.* at 260.

⁶⁴ Garfield, *supra* note 3, at 886.

responsibility of courts, on the other hand, act to assure the fairness of legislation and assure it is only applied to when widespread public injury or participation in an inherently dangerous activity might be deterred by its enactment.⁶⁵ In the *Morissette*, *Dotterweich* and *Balint* cases, the Court attempted to determine what boundaries to place on criminal liability for negligent actions, but has largely acted inconsistently.⁶⁶ Clearly, any real directive regarding under exactly what circumstances, if any, a court should impose criminal liability would likely have to be the Congress, not the courts.

Environmental violations, as in *Hanousek*, are often considered by the courts and by Congress to be public welfare offenses.⁶⁷ Specifically, violations of the Clean Water Act are considered public welfare offenses.⁶⁸ In *United States v. Frezzo Brothers, Inc.*, the Third Circuit upheld the criminal conviction of an individual guilty of ordinary negligence, stating that the Clean Water Act gave the prosecutor greater leeway because it had a reasonableness standard which said that a person could be held criminally liable if a reasonable person would have known of the likelihood of such a spill.⁶⁹ Additionally, in *State v. Hazelwood* (commonly known as the "Exxon Valdez" case), the Alaska court upheld a conviction under the Clean Water Act based on ordinary negligence because of the important public policy in deterring future oil spills.⁷⁰ The court held that "Reasonable deterrence... is the basic principle of the due process balance between individual and societal interests."⁷¹

Generally, public welfare cases require that the prosecution prove that the defendant knew his or her conduct was illegal.⁷² In *United States v. Ahmad* the Fifth Circuit held that in order to be criminally liable, the defendant must have knowingly violated the CWA; the court further held that violating the CWA is not a public welfare offense and thus should not carry criminal penalties for negligent conduct.⁷³

In *Hanousek*, the court based the defendant's criminal liability on 33 U.S.C. § 1319(c)(1)(A).⁷⁴ This provision says if a person is negligent – "[a]ny person who violates section ... 1321(b)(3) ... of this title ... shall be punished" by a fine or imprisonment or both.⁷⁵ Congress stated in section 1321(b)(3) that there shall be a policy against discharges of oil "in or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone."⁷⁶

Given the variety of interpretations of public welfare statutes only within the Courts of Appeals and Supreme Court in the last 70 or 80 years, clearly the legal history is very inconsistent and is subject to individual judge's feelings regarding the facts of each specific case.

IV. INSTANT DECISION

The Ninth Circuit Court of Appeals began its analysis by addressing *Hanousek's* contention that the district court had failed to instruct the jury that, under 33 U.S.C. § 1319(c)(1)(a), *Hanousek* had to have been proven by the government to have acted with criminal negligence, not just ordinary negligence.⁷⁷ The district court had provided the jury with an ordinary negligence definition.⁷⁸ The court considered this a question of statutory interpretation to be reviewed de novo.⁷⁹

⁶⁵ *Id.* at 888.

⁶⁶ *Cf. Morissette*, 342 U.S. at 246; *United States v. Dotterweich*, 320 U.S. 277 (1943); *United States v. Balint*, 258 U.S. 250 (1922).

⁶⁷ Garfield, *supra* note 3, at 904.

⁶⁸ *Id.* at 905.

⁶⁹ Garfield, *supra* note 3, at 905–06 (discussing *United States v. Frezzo Brothers, Inc.*, 602 F.2d 1123 (3d Cir. 1979)).

⁷⁰ *Id.* at 907–09 (discussing *State v. Hazelwood*, 946 P.2d 875, 884 (Alaska 1997)).

⁷¹ *Id.* (discussing *Hazelwood*, 946 P.2d at 884).

⁷² See generally Lawrence Friedman & H. Hamilton Hackney III, *Questions of Intent: Environmental Crimes and "Public Welfare" Offenses*, 10 VILL. ENVTL L.J. (1999).

⁷³ 101 F.3d 386, 387 (5th Cir. 1996).

⁷⁴ Federal Water Pollution Control Act, 33 U.S.C. § 1319 (c)(1)(A) (1994).

⁷⁵ *Id.* §§ 1319, 1321.

⁷⁶ *Id.* § 1321(b)(3).

⁷⁷ *United States v. Hanousek*, 176 F.3d 1116, 1120 (9th Cir. 1999). *Hanousek* argued that the definition of gross negligence was "a gross deviation from the standard of care that a reasonable person would observe in the situation." See also MODEL PENAL CODE § 2.02(2)(d) (1985).

⁷⁸ *Hanousek*, 176 F.3d at 1120 (stating that ordinary negligence requires no showing that the actor grossly deviated from any standard of care).

⁷⁹ *Id.*

To determine criminal liability, the *Hanousek* court looked at the plain language of the Clean Water Act codified in sections 1319(c)(1)(A) and 1321 (b)(3), which together determine criminal liability.⁸⁰ The court looked at the relevant sections and at the entire Clean Water Act and found that neither explicitly defined the term "negligently," so it then looked to the ordinary definition in *Black's Law Dictionary*.⁸¹ The court defined "negligently" as "a failure to use such care as a reasonably prudent and careful person would use under similar circumstances."⁸² Using that definition, the court reasoned that had Congress intended a heightened standard for negligence, it would have stated so, as it did in 33 U.S.C. § 1321(b)(7)(D).⁸³ The court concluded that case history also supported the conclusion that if Congress intends a certain standard in one part of the statute and includes it there, but not elsewhere, the omission is intentional and should not be implied.⁸⁴

Hanousek next argued that Congress could not have meant to differentiate between "negligen[ce]" in 33 U.S.C. § 19(c)(1)(A) from "gross negligence" in 33 U.S.C. § 1321(b)(7)(D) because the latter phrase was just added to the statute in the 1990 Amendments.⁸⁵ However, the court directly rejected this argument because there is a presumption that Congress knows its former legislation and passes laws with it in mind.⁸⁶

Hanousek next argued that the court violated his right to due process by using an ordinary negligence standard to determine that he was guilty of a criminal violation.⁸⁷ The court reviewed *de novo* whether the conviction violated Hanousek's due process.⁸⁸ The Clean Water Act's criminal provisions are considered public welfare legislation, which means they are designed to protect the public from potentially dangerous consequences.⁸⁹ Additionally, the court recognized its ability to enforce the public welfare statutes and cause conduct that a reasonable person knows would likely be subject to strict public regulation and may harm the community's safety and health to be subject to criminal penalties.⁹⁰ As such, the Ninth Circuit noted that courts have long held that a person found to have negligently violated a public welfare statute could be subject to criminal liability without his or her due process being violated.⁹¹ Then, the court rejected Hanousek's attempt to distinguish *Weizenhoff*, where Hanousek argued that, unlike the defendants in that case who were permittees, he was only a roadmaster in charge of overseeing the construction project.⁹² The court said that this difference did not matter because, as the roadmaster, Hanousek still should have been on notice that he was dealing with a strict liability offense because of the high-pressure pipeline and his willingness to admit that he was not unaware of potential hazards.⁹³ The court concluded that given the facts of the case and the precedent, Hanousek's due process was not violated because he was subject to criminal liability for his ordinary negligence.⁹⁴

The court next addressed Hanousek's argument that the district court erred when it did not instruct the jury that he could not be vicariously liable for the backhoe operator's negligence.⁹⁵ Again, the court reviewed *de novo* and stated that it would affirm the district court if it found the lower court's instructions adequately covered the defense theory.⁹⁶ The court then compared the instructions that the district court used with

⁸⁰ *Id.* See generally *In re Rufener Constr. Inc.*, 53 F.3d 1064, 1067 (9th Cir. 1995). Declaring that plain language means the reader must "derive meaning from [the] context, and this requires reading the relevant statutory provisions as a whole." *Id.* at 1120 (cited by the Hanousek court as "Carpenters Health and Welfare Trust Funds v. Robertson (*In re Rufener Constr.*), 53 F.3d 1064 (9th Cir. 1995)").

⁸¹ *Hanousek*, 176 F.3d at 1121; BLACK'S LAW DICTIONARY, 1035 (6th ed. 1990).

⁸² *Id.* at 1121.

⁸³ *Id.*

⁸⁴ *Id.* (citing *Russello v. United States*, 464 U.S. 16, 23, (1983)).

⁸⁵ *Id.* See also Oil Pollution Control Act of 1990, Pub.L. No. 101-380, 104 Stat. 484 (1990).

⁸⁶ *Id.* See also *United States v. Trident Seafoods Corp.*, 92 F.3d 855, 862 (9th Cir. 1996), *cert. denied*, 519 U.S. 1109 (1997).

⁸⁷ *Id.*

⁸⁸ *Id.* See also *United States v. Savinovich*, 845 F.2d 834, 838-39 (9th Cir. 1988).

⁸⁹ *Id.* See also *Staples v. United States*, 511 U.S. 600, 607 (1994); *United States v. Weitzenhoff*, 35 F.3d 1275, 1286 (specifically stating that the CWA's criminal provisions "are clearly designed to protect the public at large from the potentially dire consequences of water pollution...and as such fall within the category of public welfare legislation.")

⁹⁰ *Id.* (citing *Liparota v. United States*, 471 U.S. 419, 433 (1985)).

⁹¹ *Id.* See *Staples*, 511 U.S. at 607; *Morissette v. United States*, 342 U.S. 246, 256 (1952); *United States v. Dotterweich* 320 U.S. 277, 281 (1943); *United States v. Balint*, 258 U.S. 250 (1922).

⁹² *Id.* at 1122.

⁹³ *Id.* See also *Staples*, 511 U.S. at 607 (holding that as long as the defendant knew that he was dealing with a dangerous device that could put the public in danger, he should also be aware that he could be subject to strict liability).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

Hanousek's suggested instructions which the court rejected and concluded that the district court had satisfied its duty to explain to the jury that Hanousek could be convicted only on his negligence, not on the negligence of others working on the site.⁹⁷

Hanousek also argued that the district court erroneously allowed the government to strike "foul blows" in closing arguments by telling the jury it could convict Hanousek based on vicarious liability.⁹⁸ The court ultimately found that the prosecutor acted appropriately in telling the jury that both Hanousek and Taylor were responsible and should both be held liable.⁹⁹

Hanousek's fourth argument was that the district court, in instructing the jury on causation, failed to inform them that in order to find him guilty under both provisions, the result must have been within the foreseeable risk of Hanousek's conduct.¹⁰⁰ Hanousek, the court said, did not object, but instead requested that the court offer the jury the Model Penal Code § 2.03 instruction.¹⁰¹ The Ninth Circuit concluded that the district court's instruction was adequate because it required the jury to find a "direct and substantial" connection to the discharge of oil.¹⁰²

The court then addressed whether Hanousek's sentence was warranted given the sufficiency of the evidence.¹⁰³ Reviewing the evidence in the light most favorable to the government, the court considered whether a rational finder of fact could have found against Hanousek beyond a reasonable doubt.¹⁰⁴ The court concluded that the evidence was, in fact, sufficient to warrant Hanousek's conviction for violating 33 U.S.C. §§ 1319(c)(1)(A) and 1321(b)(3).¹⁰⁵

Hanousek's final argument was that his sentence was too excessive.¹⁰⁶ Hanousek argued that the court erroneously increased his punishment two levels because he was a supervisor.¹⁰⁷ The court found that under United States Sentencing Guidelines § 3B1.1(c), the district court acted within its discretion in increasing Hanousek's sentence because of his supervisory role.¹⁰⁸

Hanousek, the court contended, correctly found mathematical errors in the final judgment, but also found these errors merely clerical in nature and that they did not affect Hanousek's sentence.¹⁰⁹ Although Hanousek argued that the court erroneously relied on that incorrect information from the probation officer that said the sentence had to be served as a term of imprisonment, this court did possess the ability to determine the sentence.¹¹⁰ And, though the Ninth Circuit lacked jurisdiction to determine the correctness of Hanousek's sentence, it recognized the district court's ability to use its discretion in determining the sentence.¹¹¹

In conclusion, the court held that first, that Congress, in 33 U.S.C. § 1321(b)(3), created criminal penalties for negligent violators; second, that convictions under section 33 U.S.C. § 1321(b)(3) and 1319(c)(1)(A) do not violate due process; third, that the court provided the jury with the proper instruction; fourth, that the district court was specifically correct in its instructions regarding causation and vicarious liability; fifth, that the district court did not err in refusing to provide Hanousek's instructions to the jury on vicarious liability; sixth, that there

⁹⁷ *Id.* at 1123.

⁹⁸ *Id.* The prosecutor detailed what had happened and said to the jury that the "buck stops" with Hanousek and M. Paul Taylor, an officer of the pipeline. *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1124. The court noted that during trial Hanousek did not directly object to the instruction, which said Hanousek should be held liable if his conduct had a direct and substantial connection to the oil spill and if that spill would not have happened without his actions. *Id.*

¹⁰¹ *Id.* MODEL PENAL CODE § 2.03(3) (providing that "the element of causation is not established if the actual result is not within the risk of which the particular defendant was aware or should have been aware unless: (a) the actual result differs from the probable result only in the respect that a different person or different property is injured or harm would have been more serious or more extensive than that caused; or (b) the actual result involves the same kind of injury or harm as the probable result and is not too remote or accidental in its occurrence to have a just bearing on the actor's liability or on the gravity of his offense.").

¹⁰² *Id.* at 1124 (citing *United States v. Warren*, 25 F.3d 890, 895-96 (9th Cir. 1994), which says a court can choose to not use proposed defense theories if they are essentially the same as others covered in the instructions already given).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1125.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1126.

¹¹¹ *Id.*

was enough evidence to support Hanousek's conviction; and, seventh, that Hanousek's sentence was proper under the sentencing guidelines.¹¹²

V. COMMENT

In *Hanousek*, the Ninth Circuit supported its decision to hold the defendant criminally liable for his ordinary negligence based on years of court precedent, dating back to the Industrial Revolution.¹¹³ However, through examining the specific facts of *Hanousek* and comparing them with precedent, the court arguably has overstepped its bounds. Because Hanousek actually committed an omission, was not the one who directly acted in violation the statute in causing the oil spill and had no way of knowing that the train would cause rocks to land near the tracks, he should not be subject to the same criminal liability used by courts to punish other negligent actors.

Courts have considered criminal liability appropriate for some negligent actors because, under a utilitarian view, such punishment will deter future wrongdoing and thus benefit the society as a whole.¹¹⁴ Under this view, if only one individual's autonomy and freedom are compromised to increase the happiness, safety and well being of society, the punishment is justified even if the person punished completely lacked mental culpability. Because courts grant such punishments only in public welfare offenses, courts have justified them, saying that society is better protected and is healthier through the punishment of one individual.¹¹⁵ Additionally, because many of these public welfare offenses are environmental in nature and thus hard to detect and prove, once an individual is found to have acted in some way to contribute to the crime, courts are likely to want to punish him or her in any way if it might mean the prevention of future harm. Deterrence is a critical factor in courts' decisions to hold negligent actors criminally liable.¹¹⁶ In Hanousek's case, the Ninth Circuit essentially held that, but for the negligent supervision of the backhoe operator, this accident would not have occurred and, given a supervisor's responsibility and duty to control those who are under him or her, Hanousek deserved to receive the harsher criminal punishment.¹¹⁷

For several reasons, the specific facts of the *Hanousek* case show that the Ninth Circuit overstepped its bounds in finding the appellant criminally liable for several reasons. Hanousek supervised Thoe, the backhoe driver, on the "6-mile" site.¹¹⁸ Thoe's responsibility was to take the rock from the quarry, cart it up a hill across the protected area of pipeline and load it in the train for transport to the pier that was under construction.¹¹⁹ Hanousek never requested that Thoe look out for the possibility that the train might pick up some rocks and deposit them further up alongside the track; additionally, the court never indicated that the train had ever picked up rock before or that Thoe had taken the initiative to go pick up the extra rock if that had ever happened before.¹²⁰ Furthermore, Hanousek was not even present at the time Thoe ruptured the pipeline with his backhoe; thus, he could not have imagined a circumstance under which Thoe would have to go outside the bounds of his employment responsibilities because of the train.¹²¹

¹¹² *Id.* Hanousek, the court contended, correctly found mathematical errors in the final judgment, but also found these errors merely clerical in nature and that they did not affect Hanousek's sentence. *Id.* Although Hanousek argued that the court erroneously relied on that incorrect information from the probation officer that said the sentence had to be served as a term of imprisonment, this court did possess the ability to determine the sentence. *Id.* And, though the Ninth Circuit lacked jurisdiction to determine the correctness of Hanousek's sentence, it recognized the district court's ability to use its discretion in determining the sentence. *Id.*

¹¹³ See generally *Morissette v. United States*, 342 U.S. 246 (1952); *United States v. Dotterweich* 320 U.S. 277 (1943); *United States v. Balint*, 258 U.S. 250 (1922).

¹¹⁴ Garfield, *supra*, note 3, at 877-78. The author notes that the number one goal of modern criminal punishment is to protect society from harm. *Id.* Thus, modern criminal law focuses on the utilitarian aspect of punishment, rather than simply on the retributivist notion of punishing the wrongdoer with an amount of punishment equal to his or her crime. *Id.*

¹¹⁵ *Id.* at 878-79. The author discusses the development of such public welfare offenses as a reaction to the increasing technology of the Industrial Revolution. *Id.*

¹¹⁶ Benjamin S. Sharp, *Environmental Enforcement Excesses: Overcriminalization and Too Severe Punishment*, 21 ENVTL. L. REP. 10658 (1991) (referencing a 1987 EPA memorandum citing deterrence as the main reason to use criminal punishment for negligent actors).

¹¹⁷ *Hanousek*, 176 F.3d 1116 (9th Cir. 1999).

¹¹⁸ *Id.* at 1119.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

The *Hanousek* decision lacks evidence that Hanousek's negligence was the proximate cause of Thoe's rupture of the pipeline because of the presence of a superseding intervening cause – the train. Looking at the facts above – that Hanousek was not present when the accident occurred, that the plow of the train happened to pick up some rocks and carry them beyond the train, and that it occurred to Thoe to leave his worksite and pick up the extra rocks (something he was not instructed to do nor had ever done in the past) – it seems that the element of proximate cause is missing. More specifically, the court never indicates that Hanousek's failure to realize that such a problem could occur actually caused the problem. And, given the number of odd occurrences which caused Thoe to travel past the work platform and onto the unprotected area, the court is arguably unreasonable in assigning criminal liability to Hanousek. Were he to have been the person who, knowing which area had been protected by the work platform, chose to drive the backhoe over to pick up the rocks on the soft soil, criminal liability could reasonably attach to his actions given the interpretation of previous courts. However, the fact that he could have honestly never predicted such a set of circumstances leaves the use of criminal punishment for Hanousek unreasonable and void of the positive social effect that courts use to justify its use in such public welfare situations.

Many of the cases that the *Hanousek* court relied on are not on point and do not support its holding. Furthermore, many seem to have facts and reasoning which contradict Hanousek's conviction. In *Balint*, *Morissette*, and *Dotterweich*, each defendant was charged with criminal liability because he acted positively in violating a statutory provision. However, in *Hanousek*, the court never alleged that Hanousek positively acted in violation – only that he failed to take precautions necessary to prevent Thoe's act from causing a violation of the Clean Water Act. Thus, this seems almost to add an extra step to the Supreme Court's reasoning in the three previous cases. That is, prior to *Hanousek*, cases indicated that an individual could be subject to criminal liability if he or she acted in violation of a public welfare statute that the individual should have known about. Under *Hanousek*, however, an individual can be held criminally liable if, because of his or her negligent failure to take necessary precautions which the court deems he or she should have known might be necessary, another person acts in violation of a statute. The *Hanousek* court basically says that because Hanousek was responsible for overseeing the loading of rocks onto the train by Thoe and other backhoe operators, he should have also been able to foresee the likelihood that the train which would carry the rocks from the site, would get rocks stuck in the plow and, additionally, would somehow expel those rocks at a point beyond the covered work site.

The Ninth Circuit in *United States v. Weitzenhoff* held that the defendants, managers of a Hawaii sewage treatment plant operated under an EPA permit through the Clean Water Act, were guilty of criminal violations for violating their permit even though they did not know the requirements or existence of a permit but only knew that their conduct resulted in a violation.¹²² The court found against the defendants because it found important the fact that though ignorant of violating the permit itself, the two individuals realized that they were bypassing filtration devices in placing the pollutants directly into the Pacific Ocean.¹²³ This case is distinguishable from *Hanousek* – and even would act to support not using criminal penalties. In *Weitzenhoff*, the defendants both knew that their acts were covered by a permit, and though they believed they were complying with the provisions of the permit, their actions in bypassing part of the pipe and placing the pollutants directly into the water were certainly within their control. Unlike the defendants in *Weitzenhoff*, Hanousek committed no action which could be deemed to cause the rupture of the pipeline, yet the court found that his failure to realize the other area of the pipeline should be covered was sufficient to establish criminal liability. Additionally, in *Weitzenhoff*, the two individuals actually committed the crime – in contrast to *Hanousek*'s mere supervisory role.

Furthermore, the Ninth Circuit cited *Morissette* to establish that courts use criminal responsibility to punish negligent actors where they believe the negligent actor is in a better position to prevent the violation with no more care or exertion than would be reasonably expected given his or her duties.¹²⁴ In *Hanousek*, the court never considered what actions Hanousek could have actually taken that would have prevented the accident from occurring because Hanousek arguable exercised reasonable care. Using that test, Hanousek, likely, never could have reasonably considered the possibility that a train might strew rock beyond the area where Thoe and other workers loaded rocks on the train. Moreover, given that there was a protective covering across the entire area

¹²² 35 F.3d 1275 (9th Cir. 1994).

¹²³ *Id.* at 1275.

¹²⁴ *United States v. Morissette*, 342 U.S. 246, 256 (1952).

necessary to cross with backhoes to load the train, it would also appear that Hanousek had taken adequate precaution to prevent a violation of the public welfare statute, even if he did know what the statute required in terms of protection. The court in *Hanousek* seemed to imply that, as a supervisor, Hanousek needed to possess extrasensory powers which enable him to envision any possible scenario. However, given the court's test in *Morissette*, which is cited in *Hanousek* but not applied therein, the appellant likely would not have been found guilty of violating the CWA.

The Ninth Circuit cited *Balint* to support the proposition that an individual can be found guilty of a public welfare offense where he or she acts with ordinary negligence.¹²⁵ However, the *Hanousek* court also cited a passage from the *Balint* decision appearing to support holding Thoe criminally responsible for his own actions.¹²⁶ The passage appears to allow individuals who unknowingly violate a statute through their actions – as seen in the examples given – to be held criminally liable. However, in *Hanousek*, the appellant was only convicted based on a failure to act – and arguably, his failure to act did not cause the accident. Instead, it was the negligent act of Thoe in driving the backhoe into an area where he was not authorized or supposed to work which created the statutory violation – the oil spill.

Given these doubts as to whether Hanousek can be held to fall within the requirements set for the in other cases, one must consider whether such criminal penalties are really the answer to curing violations of public welfare statutes. Clearly, if one believes that Hanousek could in some way have realized that the statute necessitated his placing a protective cover over that portion of the pipeline where the break occurred, then the belief that criminal punishment for negligent acts has a deterrent effect has some legs on which to stand. However, because Hanousek had no way to predict the problem, it would not be reasonable to hold him criminally liable if one considers the numerous factors at play here which Hanousek had no way to control.

Regardless of whether deterrence can be accomplished by sacrificing Hanousek, there are several arguments in opposition to the use of criminal penalties for negligent violators of public welfare acts. Because such criminal punishment actually ends up punishing the innocent, the notions of retributivism and “just desserts” are offended and rejected by the court's actions. Retributivists contend that criminal punishment for ordinary negligence ends up punishing the innocent, thus defying the very notions of retributivism because the punishment is not directed to a specific “wrong.” Retributivists believe that punishment's goal instead should be to make the wronged party whole and to punish the guilty party to the exact extent that he or she created harm.¹²⁷ Punishing individuals found to have acted with ordinary negligence requires no mental element – a key component in any other criminal conviction. Thus, how can future individuals prevent the actions if the negligent actors did not intend their results in the first place. Also, critics say that punishing ordinary negligent conduct will lessen the force and threat of criminal punishment causing it to be less effective.¹²⁸

Such punishment may even deter qualified individuals from taking potentially risky jobs in industries closely tied to the environment – such as the oil and shipping industries. Responsible individuals will find gainful employment elsewhere, rather than risk potential prison time for failing to monitor their employees closely enough or for being negligent actors. Because Hanousek was punished for unpredictable circumstances, it is unlikely that anyone will want to supervise employees, especially in the oil industry given the potential responsibilities for employees' actions.

Hence, the key question remains: when should ordinary negligence be applied to public welfare statutes? Or, how should ordinary negligence be punished under public welfare statutes? The deterrent effect is questionable because the criminal punishment for negligent crimes involves no mental state and in no other area of the law would individuals be subject to prison time. Thus, it is illogical to hold ordinary negligent defendants like Hanousek criminally liable.

Without concrete evidence that these actors could have prevented the harm and without concrete evidence that the punishment would really deter future offenders, it would seem that hefty monetary and mitigation penalties might serve the same purpose, while not punishing the morally innocent with unnecessary imprisonment. In fact, because these crimes require specific remedies – cleaning up an oil spill in this case –

¹²⁵ *United States v. Balint*, 258 U.S. 250, 252 - 53 (1922).

¹²⁶ *Id.* “[W]here one deals with others and his mere negligence may be dangerous to them, as in selling diseased food or poison, the policy of the law may, in order to stimulate proper care, require the punishment of the negligent person though he be ignorant of the noxious character of what he sells.” *Id.*

¹²⁷ Garfield, *supra* note 3, at 911.

¹²⁸ *Id.*

imprisonment does not serve such a purpose. However, chances are that if the change is to ever occur, the legislature and not the courts will have to be the leading force behind it.¹²⁹ If the criminal system's main goals are punishment and deterrence and neither is achievable, then it is futile to imprison individuals like Hanousek.

VI. CONCLUSION

Courts should abandon the tradition of applying the negligence standard for crimes convicted under the CWA and other public welfare statutes. Given the fact that since the Industrial Revolution courts have upheld criminal convictions for negligent actors under public welfare statutes, the trend will likely continue. However, *Hanousek*, which was denied certiorari by the Supreme Court, does stand to be distinguished and overturned given the lack of direct precedent and reasoning.¹³⁰ This case should be distinguished based on the presence of superseding intervening cause, the lack of proximate cause, the inability of the court to gain firm support from Supreme Court precedent and, simply, the facts of the case. Because the train caused the rocks to land in the unprotected area, placing Hanousek in a halfway house remedies very little since his only means of control lies in his ability to read a crystal ball and see the bizarre twist of fate that the plow of a train can cause.

TANYA WHITE



¹²⁹ Garfield, *supra* note 3, at 886-87.

¹³⁰ *Hanousek v. United States* 120 S.Ct. 860 (2000). In his dissent, Justice Clarence Thomas, joined by Justice Sandra Day O'Connor, argued to hear the case because the issue of whether the CWA is a public welfare statute is an issue upon which courts are divided. *Id.* at 860. Justice Thomas argued that *Hanousek* is an example of where the CWA should not be considered a public welfare statute because in this case the defendant was held liable for the results caused by an ordinary piece of equipment used in "ordinary industrial and commercial activities." *Id.* at 861. Like argued above, Justice Thomas discussed the likelihood that a broad reading of the CWA would cause too many contractors and construction workers to be held liable. *Id.*