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Sturgeon v. Frost: Alaska’s Wild Lands and Wild Laws Prove the Need for a Mistake-of-Law Defense

Paul J. Larkin, Jr.* & John-Michael Seibler**

Two men walk into a bar. One is Bert Frost, Alaska Regional Director for the National Park Service (NPS); the other is Alaskan moose-hunter John Sturgeon, who is riding a hovercraft (okay, it’s a floating bar). Bert tells John, “Hey, you’re on federal land, and there is a ban on hovercrafts. I could have you charged with a crime.” John responds, “No, I’m on state land, and Alaska permits me to travel by hovercraft.” Bert replies, “Well, I disagree, but I won’t do anything about it this time. Just don’t use a hovercraft on federal land again.” Bert finishes his drink and leaves.

That story reads like the standard “a man walks into a bar” joke. What makes it different is that those facts describe a case pending before the Supreme Court of the United States.¹ Before it recesses for the term, the Court will decide whether federal or state law applies on large and intricately interwoven swaths of land in Alaska called Conservation System Units (CSUs).² A

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1. *See Sturgeon v. Frost*, No. 14-1209 (9th Cir. Feb. 18, 2015), SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/sturgeon-v-masica/> (last visited Jan. 6, 2016) (detailing the issue of the case and pre-hearing brief filings of interested parties) [hereinafter *Sturgeon*] (on file with the Washington and Lee Law Review).

2. *See id.* (stating the issue of the case as “whether section 103(c) of the Alaska National Interest Lands Conservation Act of 1980 prohibits the National Park Service from exercising regulatory control over State, Native Corporation,

ruling for the federal government could make midwinters bleak for anyone who travels the vast, uninhabited, and unexplored lands in Alaska—a state twice the size of Texas, with the lowest population density in the nation³—because the NPS’s rulebook contains some arcane, strict-liability criminal regulatory offenses.⁴ Alaska’s geography and the unpredictable location of unmarked federal land are the real problem in this case because they make it difficult to know where state land ends and federal land begins. Reasonable people will not know what laws apply or where, and a wrong turn can lead to imprisonment. Accordingly, this case is a paradigmatic example of the need for a Mistake-of-Law Defense.⁵

I. The Facts of Sturgeon v. Frost

In September 2007, John Sturgeon was operating his hovercraft on a moose hunt, as he had done for more than twenty years. While stopped on the Nation River to make repairs, armed NPS agents arrived. After a brief conversation, an agent “whipped out a rule book” and read, “The operation or use of hovercraft is prohibited.”⁶ The agents then did exactly what they should have done: they likely realized that the man was honestly

and private Alaska land physically located within the boundaries of the National Park System”).

3. See *Alaska Kid’s Corner*, STATE OF ALASKA (2016), <http://alaska.gov/kids/learn/population.htm> (last visited Jan. 27, 2016) (“Alaska contains 586,000 square miles of land. It is . . . two and a half times larger than Texas . . . Alaska has .93 square miles for each person in the state; by comparison, New York has .003 square miles per person.”) (on file with Washington and Lee Law Review).

4. See, e.g., 54 U.S.C. § 100722 (2012) (imposing strict liability for and listing the relevant standards and exceptions to causing any injury or destruction to a National Park System Unit, including through the use of “any instrumentality”).

5. For an explanation of the mistake of law defense, see Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725 (2012).

6. Erica Martinson, *Alaska-US Power Struggle over Moose Hunter Heads to the Supreme Court*, ALASKA DISPATCH NEWS (Dec. 25, 2015), <http://www.adn.com/article/20151225/alaska-us-power-struggle-over-moose-hunter-heads-supreme-court> (last visited Jan. 27, 2016) (on file with Washington and Lee Law Review).

and reasonably mistaken about the fact that he was on federal land, probably because there was no sign posted telling Sturgeon where he was, the agents gave Sturgeon a warning, and let him haul his hovercraft home with a motor boat.⁷

Sturgeon believes that he did nothing wrong, however, because NPS regulations did not apply. In his opinion, Congress, in the Alaska National Interest Lands Conservation Act of 1980 (ANILCA), left control over all non-federal land within CSUs to the state.⁸ That is true even though large tracts of federal and non-federal land overlap. Sturgeon sued the federal government hoping to persuade the courts that he is right. While the state of Alaska is on Sturgeon's side, the lower federal courts ruled against Sturgeon and Alaska, holding that NPS regulations apply to CSUs, which means that hovercraft usage is prohibited.⁹ The Supreme Court granted review and heard oral argument in January 2016.¹⁰

Perhaps, John Sturgeon will once more ride his hovercraft down the Nation River; perhaps he will not. "But one thing is certain: The case is no longer solely about one man and his boat."¹¹ The numerous organizations that have filed amicus briefs in the Supreme Court prove how many disparate interests are at stake.¹²

7. *See id.* ("Sturgeon says the federal government shouldn't have any authority over the water he was in. Nevertheless, he loaded his hovercraft on a motor boat and it remains in his yard in Anchorage, the engine mothballed for safe-keeping, more than eight years later.").

8. *See* 16 U.S.C. § 3101(d) (2012) ("Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby.").

9. *See* Martinson, *supra* note 6 (discussing Sturgeon's supporters and the State of Alaska's position and brief filings, as well as the disposition of the case in lower courts); *see also* Sturgeon v. Masica, 768 F.3d 1066, 1069–71 (9th Cir. 2014) (providing the opinion of the Ninth Circuit on appeal and discussing the facts and lower court disposition of the case).

10. *See* Sturgeon, *supra* note 1 (listing the dates of the certiorari petition and grant, as well as the dates for arguments).

11. Martinson, *supra* note 6.

12. Alaska's congressional delegation (U.S. Senators Dan Sullivan and Lisa Murkowski; Representative Don Young) filed an amicus brief, and nearly three-dozen other organizations filed additional briefs. *See* Sturgeon, *supra* note 1 (providing a list of the individuals and organizations that filed amicus briefs).

Interestingly, even though this dispute began with an alleged crime, the parties and amici do not discuss the problems that criminal enforcement of the NPS regulations create for people like Sturgeon.¹³ Those problems are serious ones, however, and arise from two facts: first, vast, uninhabited, unsurveyed areas in Alaska do not clearly signal when someone has crossed onto federal property. Second, NPS regulations buried deep within the Code of Federal Regulations punish conduct that no one would instinctively assume is wrong. Together, those facts call for application of a Mistake-of-Law defense.¹⁴

II. Regulatory Offenses Raise Particularly Troublesome Notice Problems for Criminal Law

The NPS agents did not question Sturgeon because he was committing a violent crime, because he was transporting a controlled substance like heroin, or even because he was handling his hovercraft in a reckless manner. No, the agents told Sturgeon that his use of a hovercraft on federal property was a crime punishable by imprisonment.¹⁵ Given that Article I of the Constitution grants “[a]ll legislative Powers”¹⁶ to Congress, it might seem odd that the NPS, a federal administrative agency, would have the authority to define crimes.¹⁷ Yet, the Supreme Court has held that Congress may delegate that power to agencies. In *United States v. Grimaud*,¹⁸ the Court concluded that

13. See generally Craig W. Richards, *Brief of Amicus Curiae State of Alaska Supporting Petitioner*, SCOTUSBLOG (May 4, 2015), http://www.scotusblog.com/wp-content/uploads/2015/10/14-1209.Sturgeon.v.Masica.State_.Alaska.Amicus.Brief_.Cert_.Petition.5.4.15....pdf (offering the full text of Alaska’s amicus brief).

14. See *supra* note 5 and accompanying text (discussing Mistake-of-Law jurisprudence).

15. See *supra* note 4 and accompanying text (defining the regulations in question and showing that the mere use of “any instrumentality” on the relevant federal land constitutes a federal offense under the statute).

16. U.S. CONST. art. I, § 1.

17. See Paul J. Larkin, Jr., *The Dynamic Incorporation of Foreign Law, and the Constitutional Regulation of Federal Lawmaking*, 38 HARV. J.L. & PUB. POL’Y 337, 356–59 (2015) (noting that the text of the Constitution appears to grant Congress exclusive legislative authority).

18. 220 U.S. 506 (1911).

“the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense.”¹⁹ *Grimaud* appears to end the discussion of the NPS regulations.

Yet it does not; *Grimaud* only answered the question of whether Congress may delegate to agencies rulemaking authority enforceable through the criminal law.²⁰ The answer says nothing about the entirely separate issues of whether the government has the obligation to notify the public when agency regulations expose them to criminal liability and whether the government can satisfy that burden simply by publishing those rules in the Code of Federal Regulations. The answers to those questions, it turns out, are “yes” and “no,” respectively.

A. *The Federal Government Must Notify the Public of Federal Offenses*

It is settled law that the Due Process Clause requires the government to afford everyone notice of the conduct made a crime.²¹ The Court has developed three related doctrines to enforce that requirement. The Rule of Lenity directs courts to construe ambiguities in criminal statutes in a defendant’s favor.²² The Void-for-Vagueness Doctrine prohibits criminal enforcement of an insolubly ambiguous or indecipherable statute.²³ The

19. *Id.* at 521.

20. *See id.* (holding that Congress’ grant to a federal agency of the authority to make administrative rules enforced by the criminal law is not an unconstitutional delegation of legislative power).

21. *See, e.g.,* *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (“No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.”); *see also* *Rogers v. Tennessee*, 532 U.S. 451, 459 (2001) (identifying “core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct”).

22. *See, e.g.,* *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) (plurality opinion) (noting that “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity”) (internal punctuation omitted).

23. *See, e.g.,* *United States v. Harriss*, 347 U.S. 612, 617 (1954) (holding that a criminal statute is unconstitutionally vague if it “fails to give a person of

Unreasonable Expansion Doctrine prohibits courts from retroactively applying a statute in an unforeseeable manner.²⁴ Together, those doctrines ensure that no one can be punished without receiving fair warning of the line between legal and illegal conduct.²⁵ If that were not the case, the government could create laws in secret, wait for an unsuspecting person to cross an invisible line, and then pounce on someone who reasonably believed that he was law-abiding, a result that the courts have found intolerable.²⁶ Accordingly, the first question must be answered affirmatively.

B. Listing Agency Rules in the Code of Federal Regulations Does Not Invariably Provide Adequate Notice

Here is where the rubber meets the road. The problem for people like Sturgeon—“a person of ordinary intelligence,”²⁷ precisely the type of person whom the government must notify²⁸—is that the federal government does not notify them of

ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute”).

24. *See, e.g.*, *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964) (“[A] deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language.”).

25. *See, e.g.*, Paul J. Larkin, Jr., *Finding Room in the Criminal Law for the Desuetude Principle*, 65 RUTGERS L. REV. COMMENTS. 1, 3 (2014) (“An elementary principle of criminal and constitutional law is that the government must identify particular conduct as criminal so that the average person, without resort to legal advice, can comply with the law. Three complimentary doctrines reinforce that principle.”).

26. *See, e.g.*, *Screws v. United States*, 325 U.S. 91, 96 (1945) (plurality opinion) (“To enforce such a [vague] statute would be like sanctioning the practice of Caligula who ‘published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it.’”); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, pt. 1, § 2, at 45 (1753) (noting that Caligula “wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people.”).

27. *United States v. Harriss*, 347 U.S. 612, 617 (1954).

28. Criminal laws must be understandable by the average person. *See, e.g.*, *Burrage v. United States*, 134 S. Ct. 881, 892 (2014) (noting “the need to express criminal laws in terms ordinary persons can comprehend”); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (“[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence

what agency regulations can land them in jail. In fact, the government makes no effort to notify the public that it has created any new offenses. The government publishes criminal statutes in the U.S. Code and agency rules in the Code of Federal Regulations, but that is the extent of the government's effort to notify the public of what is a crime. Beyond that, the government "privatizes" its notice obligation. The government leaves to parents, friends, teachers, ministers, other adults in their communities, the media, and so forth the burden of informing young and old alike what is unlawful, principally, the argument goes, because there is no other ready way to provide that information.²⁹

Historically, the government's "privatization" has not been a problem. People learn the mores and customs of the community from the people just mentioned, and the criminal code only outlawed conduct that any reasonable person would have known to be immoral or dangerous (for example, murder, rape, and theft).³⁰ In addition, the criminal law required the government to prove in each case that a particular individual acted with an "evil intent," known to the criminal law as *mens rea*.³¹ The common-

must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.").

29. See *United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring in part and concurring in the judgment) ("It may well be true that in most cases the proposition that the words of the United States Code or the Statutes at Large give adequate notice to the citizen is something of a fiction, . . . albeit one required in any system of law[.]"); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 207 (1985) ("Publication of a statute's text always suffices; the government need make no further effort to apprise the people of the content of the law.").

30. See, e.g., OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 125 (Belknap Press 2009) (1881) ("[T]he fact that crimes are also generally sins is one of the practical justifications for requiring a man to know the criminal law."); JOHN SALMOND, *JURISPRUDENCE* 427 (8th ed. 1930) ("The common law is in great part nothing more than common honesty and common sense. Therefore although a man may be ignorant that he is breaking the law, he knows very well in most cases that he is breaking the rule of right."); Livingston Hall & Selig J. Seligman, *Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641, 644 (1940) ("[T]he early criminal law appears to have been well integrated with the mores of the time, out of which it arose as 'custom.'").

31. See Eugene J. Chesney, *Concept of Mens Rea in the Criminal Law*, 29 J. CRIM. L. & CRIMINOLOGY 627, 637-38 (1939) (discussing the historical progression of evil intent to *mens rea*).

law rule was “*actus non facit reum nisi mens sit rea*”³²—a crime consists of “a vicious will” and “an unlawful act consequent upon such vicious will.”³³ Together, those features of the criminal law prevented morally blameless parties from being convicted.

But those two elements no longer guarantee that the average person knows where to find the line between what is lawful and unlawful. The law and life have changed since common law days, and the Supreme Court has not yet caught up with those developments.

Beginning in the nineteenth century, legislatures adopted a series of nontraditional criminal laws known as “public welfare offenses”³⁴—“infractions, violations, or crimes that can be committed without any intent to break the law, any knowledge of what the law is, or even any negligence in learning what the law prohibits.”³⁵ Public welfare offenses consist in the violation of health, safety, environmental, housing, and financial rules designed to protect the public against the hazards of industrialization, urbanization, and commerce.³⁶ These new crimes often forbid non-blameworthy conduct and dispense with any proof of an evil intent, thereby eliminating any consideration of blameworthiness. Strict liability offenses are categorically different from common-law crimes.³⁷

32. Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974 (1932) (“An act does not make one guilty unless the mind is guilty.”).

33. 2 BLACKSTONE, *supra* note 26, bk. 4, ch. 2, § 20, at 2175; *see also, e.g.*, Roscoe Pound, *Introduction to FRANCIS BOWES SAYRE, A SELECTION OF CASES ON CRIMINAL LAW* 8–9 (1927) (“Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong.”).

34. *See, e.g.*, Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 67 (1933) (“The decisions permitting convictions of light police offenses without proof of a guilty mind came just at the time when the demands of an increasingly complex social order required additional regulation of an administrative character unrelated to questions of personal guilt[.]”).

35. Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 HARV. J.L. & PUB. POL’Y 1065, 1067 (2014) [hereinafter Larkin, *Strict Liability Offenses*].

36. *See* Sayre, *supra* note 34, at 67 (noting that public welfare offense first arose “in the adulterated food and liquor cases” and other regulations necessary to regulation).

37. “The environmental laws, for example, allow manufacturers to discharge certain pollutants into the air, water, or land so long as a responsible

The enactment of those laws created a notice problem that was unknown to the common law. No longer can the average person rely on the Decalogue or community norms. Now, knowledge of intricate rules, sometimes requiring scientific knowledge, can be required, even though the average person cannot be expected to know that information. It is reasonable to enforce strict liability rules through the civil or administrative process, but using the criminal law to enforce public welfare offenses can demand too much knowledge of the average person.³⁸ Everyone knows the law forbids murder, rape, and pillaging. Few know whether garbage is a “hazardous waste.” Given the federal government’s decision to rely on private parties to provide the notice required by the Due Process Clause, this transition poses a grave risk of convicting morally blameless parties because the burden of providing the necessary information is more than the community can bear. The average person receives his or her legal training from other average persons, not from law school professors, and certainly not from scientists. The result is to demand that the public not only perform a duty that is properly the government’s burden to discharge— notifying everyone where the line between lawful and unlawful conduct lies under federal statutes—but also sometimes to ensure that everyone is educated

party has a permit for that activity and does not exceed the maximum authorized amount each period. By contrast, no one can obtain a permit to commit a bank robbery, and there is no maximum number of burglaries that a person can commit during a calendar year.” Larkin, *Strict Liability Offenses*, *supra* note 35, at 1093–94 (citations omitted).

38. For that reason, criminal scholars have consistently condemned strict liability offenses. *See, e.g.*, LON L. FULLER, *THE MORALITY OF LAW* 77 (2d ed. 1969) (“Strict criminal liability has never achieved respectability in our law.”); H.L.A. Hart, *Negligence, Mens Rea, and Criminal Responsibility*, in H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 152 (1968) (“Strict liability is odious[.]”); Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 *HARV. L. REV.* 1097, 1109 (1952)

The most that can be said for such provisions [prescribing liability without regard to any mental factor] is that where the penalty is light, where knowledge normally obtains and where a major burden of litigation is envisioned, there may be some practical basis for a stark limitation of the issues; and large injustice can seldom be done. If these considerations are persuasive, it seems clear, however, that they ought not to persuade where any major sanction is involved.

See generally Larkin, *Strict Liability Offenses*, *supra* note 35, at 1121 n.46 (collecting authorities).

about highly-reticulated, scientifically-based regulatory schemes that only a small number of people understand well.

The three doctrines noted above—the Rule of Lenity, the Void-for-Vagueness Doctrine, and the Unforeseeable Expansion Doctrine—recognize that there is a limit on the knowledge that the criminal law can demand a person to have. Regulatory crimes can often cross that line. While “[i]t is reasonable to expect that the average person knows not to murder, rape, rob, or swindle someone else,” it is “unreasonable to assume that that average person has the same legal knowledge as an attorney, let alone that he has as much scientific expertise as an agency official with a doctorate in biochemistry.”³⁹

Two additional factors aggravate the notice problem. First, legislatures often delegate lawmaking authority to administrative agencies for a variety of reasons, such as the ability to enable agency officials knowledgeable about a technical or scientific subject to bring their expertise to bear on newly emerging problems or newly developed science.⁴⁰ Those delegations greatly increase the amount of law that someone must know to remain law-abiding and can demand far more knowledge than the average person has. There were only nine felonies at common law,⁴¹ whereas today there are more than 4,000 federal criminal laws,⁴² and the number of pertinent regulations has been estimated to exceed 300,000.⁴³ No one could know all of those laws⁴⁴ (remember: one of the NPS agents had to pull out a

39. Larkin, *Strict Liability Offenses*, *supra* note 35, at 1092–93.

40. *Id.* at 1088–89.

41. STUART P. GREEN, 13 WAYS TO STEAL A BICYCLE: THEFT LAW IN THE INFORMATION AGE 10, 280 n.3 (2012) (reporting that, by the 1160s, the nine felonies included: murder, rape, manslaughter, robbery, sodomy, larceny, arson, mayhem, and burglary).

42. See Paul J. Larkin, Jr., *Regulatory Crimes and the Mistake of Law Defense*, HERITAGE FOUND. LEGAL MEMORANDUM No. 157 at 4 (July 9, 2015), http://thf_media.s3.amazonaws.com/2015/pdf/LM157.pdf [hereinafter Larkin, *Regulatory Crimes*].

43. John Malcolm, *Criminal Law and the Administrative State: The Problem with Criminal Regulations*, HERITAGE FOUND. LEGAL MEMORANDUM NO. 130 at 3 (Aug. 6, 2015), http://thf_media.s3.amazonaws.com/2014/pdf/LM130.pdf.

44. See, e.g., William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1881 (2000) (“Ordinary people do not have the time or training to learn the contents of criminal codes; indeed, even criminal law professors rarely know

rulebook to find the hovercraft regulation⁴⁵), especially because they do not necessarily mirror any prevailing moral code.⁴⁶ And the normal sources of instruction—family, church, community, and so forth—cannot make up the difference because “the average person learns the law from other average persons, not from individuals educated, trained, and experienced in what a technical regulatory scheme forbids.”⁴⁷

The second factor stems from how agencies make law. Agency officials responsible for implementing regulatory schemes often construe relevant statutes and regulations in publicly available memoranda called “guidance documents” or “compliance manuals.”⁴⁸ Those documents are an important source of law because the courts defer to an agency’s interpretation of its governing laws.⁴⁹ Yet, agencies also may prepare memoranda outlining criteria to be considered when interpreting laws that are difficult for the average person to find or that the agency does not make public. Memoranda like that are “tantamount to ‘secret’ or ‘underground’” laws.⁵⁰ Allowing someone to be

much about what conduct is and isn’t criminal in their jurisdictions.”).

45. See *supra* note 6 and accompanying text (recounting the interaction between the park agent and Mr. Sturgeon).

46. See, e.g., GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* § 9.3.4, at 731–32 (1978) (“The tight moral consensus that once supported the criminal law has obviously disappeared. . . . In a pluralistic society, saddled with criminal sanctions affecting every area of life, one cannot expect that everyone know what is criminal and what is not.”).

47. Larkin, *Strict Liability Offenses*, *supra* note 35, at 1090.

48. Paul J. Larkin, Jr., *The Dynamic Incorporation of Foreign Law and the Constitutional Regulation of Federal Lawmaking*, 38 HARV. J. L. & PUB. POL’Y 337, 384 (2015).

49. See, e.g., *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (deferring to the Secretary of Labor’s interpretation of regulations regarding disciplinary deductions of pay); *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (holding that the EPA’s interpretation of a statutory term was entitled to deference).

50. See Larkin, *Strict Liability Offenses*, *supra* note 35 (paraphrasing Kathleen F. Brickey, *Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory*, 71 TUL. L. REV. 487, 502–03 (1996) (“[M]uch of environmental law is hidden in detailed preambles that are not published in the Code of Federal Regulations with the regulations they explain, and in private informal guidance memoranda and letters—hence, the problem of ‘underground’ environmental law.”)).

convicted for violating such memoranda would be like treating the secret laws of Caligula⁵¹ as valid.

For those reasons, mere publication of regulations in the Code of Federal Regulations of the Federal Register does not satisfy the Due Process requirement that the government notify the public of what conduct is a crime, whether or not it is a strict liability offense.

III. NPS's Nonobvious Criminal Regulations and Alaska's Vast, Wild, and Unmarked Terrain Provide a Paradigmatic Case for Application of the Mistake-of-Law Defense

Some NPS rules outlaw innocuous conduct, and many regulations create strict liability. Driving a hovercraft on state property, for example, is lawful in Alaska, so there is no reason to presume that people like Sturgeon know that the same conduct is a crime on federal land. Other kindred NPS regulations are the following:

- It is a crime to roll something down a hillside or mountainside.⁵²
- It is a crime to toss a rock into a valley or a canyon.⁵³
- It is a crime to park your car in a way that inconveniences someone.⁵⁴
- It is a crime to ski, snowshoe, ice skate, sled, inner tube, toboggan, or do any “similar winter sports” on a road or “parking area” “open to motor vehicle traffic.”⁵⁵
- It is a crime to “allow” a pet to make a noise that “frightens wildlife.”⁵⁶

51. See 1 BLACKSTONE, *supra* note 26, pt. 1, § 2, at 46 (describing the deceptive publishing practices of Caligula).

52. See 36 C.F.R. § 2.1(a)(3) (2015) (“Tossing, throwing or rolling rocks or other items inside caves or caverns, into valleys, canyons, or caverns, down hillsides or mountainsides, or into thermal features.”).

53. *Id.*

54. See *id.* § 261.10(f) (“Placing a vehicle or other object in such a manner that it is an impediment or hazard to the safety or convenience of any person.”).

55. *Id.* § 2.19(a).

56. See *id.* § 2.15(a)(4) (prohibiting “[a]llowing a pet to make noise that is unreasonable considering location, time of day or night, impact on park users,

- It is a crime to use aircraft on a hunting or fishing expedition.⁵⁷ (Consider here that Alaska's terrain is so rugged, that even its capital city of Juneau is accessible only by plane or boat. So, if you want to go hunting or fishing from Juneau, and do not know if you will cross NPS territory, you better take a boat.)
- Depending on how you interpret the word "structure," a park employee could determine that it is a crime to pitch a tent or tree-stand.⁵⁸

If you think that those crimes seem far removed from conduct ordinarily understood as blameworthy, you are right. Criminal law and regulatory law exist for different purposes. Criminal law "enforce[s] the moral code that every person knows by heart."⁵⁹ By contrast, regulations "efficiently manage components of the national economy using civil rules, rewards, and penalties to incentivize desirable behavior without casting aspersions on violations attributable to ignorance or explanations other than defiance."⁶⁰ Treating conduct as trivial as tossing a rock down a hillside in the same way that we treat "common-law crimes like murder, robbery, or theft 'ignores the profound difference between the two classes of offenses and puts parties engaged in entirely legitimate activities without any intent to break the law at risk of criminal punishment.'"⁶¹ Yet, such regulations are abundant, inaccessible, and out of touch with

and other relevant factors, or that frightens wildlife by barking, howling, or making other noise").

57. See *id.* § 13.450(a) ("Notwithstanding the provisions 43 CFR [§] 36.11(f) the use of aircraft for access to or from lands and waters within a national park or monument for purposes of taking fish or wildlife for subsistence uses within the national park or monument is prohibited except as provided in this section.").

58. See *id.* § 261.10(a) ("Constructing, placing, or maintaining any kind of road, trail, structure, fence, enclosure, communication equipment, significant surface disturbance, or other improvement on National Forest System lands or facilities without a special-use authorization, contract, or approved operating plan when such authorization is required."). It is a crime to abandon such personal property. *Id.* § 261.10(e).

59. Paul J. Larkin, Jr., *Prohibition, Regulation, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 HOFSTRA L. REV. 745, 747 (2014) (internal citations omitted).

60. *Id.*

61. Larkin, *Regulatory Crimes*, *supra* note 42.

common morals, depriving the average person of adequate notice of what the law prohibits. For reasons such as those, two former Attorneys General—Michael Mukasey⁶² and Edwin Meese III⁶³—have urged adoption of a Mistake-of-Law defense.

Alaska exemplifies the need for this defense because the state's terrain makes the notice problem particularly complicated.⁶⁴ Alaska has extraordinarily long days in the summer and long nights in the winter due to its far northern latitude.⁶⁵ The way people live and move around in the state can be influenced by “[v]iolent storms and fog conditions,”⁶⁶ whiteouts, and frigid temperatures. Alaska has a “minimum average January temperature of -20° F” in some interior areas and “of 18° F” in some coastal areas.⁶⁷ A region of basins and plateaus rests in between two immense mountain systems, the Pacific Mountains and Valleys, and “a northward extension” of the Rocky Mountains.⁶⁸ Because these geographic features are

62. See Michael B. Mukasey & Paul J. Larkin, Jr., *The Perils of Overcriminalization*, HERITAGE FOUND., LEGAL MEMORANDUM No. 146 (Feb. 12, 2015), <http://www.heritage.org/research/reports/2015/02/the-perils-of-overcriminalization> (discussing the recent increase in federal laws that impose criminal penalties and how this increases the chance of someone being charged with a crime for an honest mistake).

63. See Meese & Larkin, *supra* note 5, at 729 (“Legislatures and courts have made vast changes to the structure of the criminal justice system, to the officials who comprise that system, and to the procedures that govern how those actors play their roles.”).

64. See Martha Shulski & H. Michael Mogil, *Alaska's Climate and Weather*, WEATHERWISE (Jan.–Feb. 2009), <http://www.weatherwise.org/archives/back%20issues/2009/january-february%202009/full-shulski-mogil.html> (last visited Jan. 26, 2016) (explaining Alaska's complicated and diverse geography) (on file with Washington and Lee Law Review).

65. See *The Geography of Alaska*, ALASKA: HIST. & CULTURAL STUDS., <http://www.akhistorycourse.org/articles/article.php?artID=123> (last visited Jan. 22, 2016) (discussing how Alaska is made up of four interlinked regions) (on file with the Washington and Lee Law Review).

66. See *id.* (discussing how the geography of Alaska influences the climate in certain regions).

67. See *id.* (“Large water bodies such as oceans heat and cool more slowly than land areas. As a result, coastal areas tend to have less seasonal extremes than interior or continental areas.”).

68. See *id.* (listing the four different regions that make up Alaska).

riddled with “hills, valleys, and rivers,” even geographers ask the question: “How can we make sense of this complexity?”⁶⁹

Atop that is the problem that the establishment of Alaska CSUs have created.⁷⁰ They are scattered like jigsaw pieces throughout Alaska, with no obvious rhyme or reason for where they are located and with no signage indicating where they begin and end.⁷¹ Unlike the signs at an interstate or national border, the federal government does not demark federal land everywhere. Without adequate signage, it can be impossible to know when one is on land subject to federal regulation. A person can unwittingly cross onto federal land and be subject to new, unforeseeable crimes. Unlike Alaska’s trespass law, which limits trespass to cases where an owner has given notice by “posting in a reasonably conspicuous manner under the circumstances,”⁷² NPS regulations have no such requirement. The result is that it can be impossible to know when you have driven, hiked, skied, or snowshoed your way onto federal land. For a person traversing Alaskan terrain, NPS jurisdiction could have the same effect as a minefield.

The criminal law should not be used to trap an unwitting public. Anglo-American law has long held that everyone is presumed to know the law, so ignorance or a mistake of law is no defense to a crime.⁷³ The Supreme Court recognized in *Cheek v.*

69. See *id.* (describing how each region in Alaska is geographically unique).

70. See Rebecca Wilhelm, *Supreme Court to Hear Arguments in Alaska Land-Use Case*, BLOOMBERG (Jan. 20, 2016), <http://www.bna.com/supreme-court-hear-n57982066378/>

(last visited Jan. 28, 2016) (“In 1980 Congress passed ANILCA, which was designed to resolve land title disputes between the state and native corporations. The statute also created conservation system units, establishing new national parks and bringing lands reserved for Alaska, private parties and native corporations under federal management.”) (on file with the Washington and Lee Law Review).

71. An amicus brief filed by Alaska in the Supreme Court contains a map of the state with disputed areas outlined showing just how complex and unpredictable they are. See Brief for State of Alaska as Amicus Curiae Supporting Petitioners at app. 1, *Sturgeon v. Frost*, No. 14-1209 (9th Cir. Nov. 23, 2015), http://www.scotusblog.com/wp-content/uploads/2015/12/14-1209_amicus_pet_Alaska.authcheckdam.pdf (providing a map of the federal Conservation System Units within Alaska).

72. ALASKA STAT. § 11.46.350(b)(2) (2015).

73. See, e.g., Meese & Larkin, *supra* note 5, at 738 (noting that it was previously acceptable to expect people to be knowledgeable of the law; with the

*United States*⁷⁴ that the rule is “[b]ased on the notion that the law is definite and knowable.”⁷⁵ Given the reams of regulations that exist today, that assumption is no longer true; in fact, it is laughable.⁷⁶

Congress and the courts should align the criminal law with contemporary reality by endorsing a Mistake-of-Law Defense to protect good people from being tripped up by unknowable rules. Otherwise, the invisible borders of federal jurisdiction and the NPS’s strict liability rules will repeat the injustice that the 1997 prosecution of three-time Indy 500 winner Bobby Unser caused.⁷⁷ The federal government prosecuted Unser for unlawfully operating a snowmobile on prohibited land even though he became lost and nearly died in a blinding blizzard.⁷⁸ Like Unser, Alaskans—and visitors to that state—are at risk of being subject to rules that they do not know, in places where they have no way of knowing that they apply.⁷⁹

passage of time, however, the law is becoming more complex, making it difficult for people to know every law).

74. 498 U.S. 192 (1991).

75. *Id.* at 199.

76. See Mukasey & Larkin, *supra* note 62 ([T]he sheer number of federal laws that impose criminal penalties has grown to an unmanageable point.”).

77. See Conn Carroll, *Bobby Unser vs. the Feds*, DAILY SIGNAL (Mar. 14, 2011), <http://dailysignal.com/2011/03/14/bobby-unser-vs-the-feds/> (last visited Jan. 26, 2016) (discussing concerns with “overcriminalization” and how offenses that are not morally blameworthy are now being criminalized) (on file with the Washington and Lee Law Review); Brian W. Walsh, *Traps for the Innocent*, HERITAGE FOUND. (Oct. 15, 2010), <http://www.heritage.org/Research/Commentary/2010/10/Traps-for-the-Innocent> (“Unser was convicted of a federal crime for allegedly operating a snowmobile in a national wilderness. If he did indeed enter it, he did so unknowingly while he and a friend were lost for two days and two nights in a ground blizzard.”).

78. See Susan Drumheller, *Unser: Blizzard Sent Him off Trail Auto Racing Champion Recounts Accidental Foray in Wilderness*, SPOKESMAN-REV. (Feb. 14, 1997), <http://www.spokesman.com/stories/1997/feb/14/unser-blizzard-sent-him-off-trail-auto-racing/> (last visited Jan. 30, 2016) (explaining the events surrounding Bobby Unser’s citation for snowmobiling in the wilderness of Colorado) (on file with the Washington and Lee Law Review).

79. See Robert Barnes, *A Moose-Hunter and His Hovercraft Tell the Supreme Court Alaska Is Different*, WASH. POST (Jan. 18, 2016), https://www.washingtonpost.com/politics/courts_law/a-moose-hunter-and-his-hovercraft-tell-the-supreme-court-alaska-is-different/2016/01/18/f9a2e9ee-bb10-11e5-b682-4bb4dd403c7d_story.html (last visited Jan. 27, 2016) (discussing that, because Alaska is a big state, of which the federal government owns 60% of the land, it is difficult for someone to determine if they are on federal or state

Finally, a Mistake-of-Law Defense is also straightforward and easy for courts to apply. The defense would entitle a defendant to be exonerated if a reasonable person in the defendant's position would not have believed—and if the defendant himself did not believe—that the charged conduct was illegal.⁸⁰ That standard focuses on the problem of notice and directly addresses the notice problem.⁸¹ The defense also would not burden the government. A defendant can be required to bear the burden of producing evidence to support this defense, as well as the burden of persuasion by a preponderance of the evidence.⁸² Also, “[a]s a practical matter, a defendant will need to testify at trial in order to persuade the jury that he did not know that his conduct was prohibited.”⁸³ Once a defendant testifies the prosecution can cross-examine him to persuade the jury that he should not be believed.⁸⁴ Accordingly, the government will have ample opportunity to challenge the defense.

Conclusion

Regardless of who wins in *Sturgeon v. Frost*, the case demonstrates a compelling need for a Mistake-of-Law Defense. *Sturgeon* shows that there can be not only inadequate notice of *what* is a crime, but also of *where* that is the case. NPS's failure to mark clearly its jurisdictional borders also reveals why this defense is necessary: people often have no way of knowing

land) (on file with the Washington and Lee law Review).

80. See Paul J. Larkin, Jr., *Fighting Back Against Overcriminalization: The Elements of a Mistake of Law Defense*, HERITAGE FOUND. (June 12, 2013), <http://www.heritage.org/research/reports/2013/06/fighting-back-against-overcriminalization-the-elements-of-a-mistake-of-law-defense> (explaining the elements of the Mistake-of-Law Defense that a defendant will need to prove to use this defense).

81. See Paul J. Larkin, Jr., *A Mistake of Law Defense as a Remedy for Overcriminalization*, 26 A.B.A. J. CRIM. JUST. 10, 15–16 (Spring 2013) (setting forth a draft statute creating a Mistake-of-Law Defense).

82. See Paul J. Larkin, Jr., *Taking Mistakes Seriously*, 28 BYU J. PUB. L. 71, 109 n.143 (2013) (collecting cases holding that the defendant can be made to bear the burdens of production and proof on a defense).

83. *Id.* at 109.

84. See *id.* at 108–09 (explaining why there are no other practical problems with a Mistake-of-Law Defense).

whether they are on federal land. Because the average person in the Alaskan wilderness has no notice of all conduct that is a crime, a Mistake-of-Law Defense is needed to accommodate the realities of law and life.