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Administrative Law—The Uniform Controlled Substances Act—State v. King, 257 N.W.2d 693 (Minn. 1977)

CASE NOTES

Administrative Law—THE UNIFORM CONTROLLED SUBSTANCES ACT—*State v. King*, 257 N.W.2d 693 (Minn. 1977).

In 1971, the Minnesota Legislature adopted the Uniform Controlled Substances Act[1] (Uniform Act). The Uniform Act was promulgated in an attempt to coordinate drug abuse laws throughout the United States.[2] It has been adopted by forty-five states[3] since its promulgation in 1970.[4] The Uniform Act establishes five schedules categorizing specific controlled substances[5] according to pharmacological effect and potential danger to the health of the individual.[6] Substances listed in Schedule I are considered to have the highest potential for abuse[7] while those listed in Schedule V are considered to be the least harmful.[8] In adopting the Uniform Act, the Legislature empowered the State Board of Pharmacy (the Board) to define and regulate substances possessing the potential for abuse according to the standards set forth in the various schedules.[9] Pursuant to this authority, the Board can change the

1. *Compare* UNIFORM CONTROLLED SUBSTANCES ACT §§ 101-607 [hereinafter cited as Uniform Act] *with* Act of June 7, 1971, ch. 937, 1971 Minn. Laws 1923 (amended 1973, 1974, 1976, and 1978) (codified as MINN. STAT. §§ 152.01-.20) [hereinafter cited as Minnesota Act].

2. State v. King, 257 N.W.2d 693, 695 (Minn. 1977); UNIFORM CONTROLLED SUBSTANCES ACT, Commissioners' Prefatory Note (increasing use of drugs and the presence of federal drug control law necessitates uniform state action). *See generally* Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801-966 (1976).

3. *See* 9 UNIFORM LAWS ANNOTATED 47 (West Supp. 1974-1977).

4. *See* 9 UNIFORM LAWS ANNOTATED 145 (1973). The Act was designed to supplant the UNIFORM NARCOTIC DRUG ACT OF 1933 and the MODEL STATE DRUG ABUSE CONTROL ACT OF 1966. *Id.*

5. *See* MINN. STAT. § 152.02(2)-(6) (1976).

6. *See id.* § 152.02(8).

7. *See id.* § 152.02, subd. 7(1). This subdivision authorizes the Board to place a substance in Schedule I if the substance has "[a] high potential for abuse, no currently accepted medical use in the United States, and a lack of accepted safety for use under medical supervision." *Id.*

8. *See id.* § 152.02, subd. 7(5). A substance may be placed in Schedule V if it has "[a] low potential for abuse relative to the substances listed in Schedule IV, currently accepted medical use in treatment in the United States, and a limited physical dependence and/or psychological dependence liability relative to the substances listed in Schedule IV." *Id.*

9. *See id.* § 152.02(8), (9), (12). Subdivision 8 requires the Board to take into account the following factors in deciding to place a substance on one of the schedules:

> The actual or relative potential for abuse, the scientific evidence of its pharmacological effect, if known, the state of current scientific knowledge regarding the substance, the history and current pattern of abuse, the scope, duration, and significance of abuse, the risk to public health, the potential of the substance to produce psychic or physiological dependence liability, and whether the substance is an immediate precursor of a substance already controlled under this section.

Id. § 152.02(8).

criminal penalty for possession of a substance by rescheduling that substance.[10]

State v. King[11] involved the first judicial test of the Minnesota Uniform Controlled Substances Act[12] (Minnesota Act). At issue was whether the provisions of the Minnesota Act dealing with alterations in the schedules of controlled substances by the Board established an unconstitutional delegation of legislative power[13] and second, whether the procedure instituted for adopting regulations resulted in a denial of due process.[14] The defendant in *King* had been charged with possession of phentermine[15] on April 21, 1976,[16] nearly two years after the Board designated it as a Schedule IV controlled substance,[17] but prior to the effective date of a legislative enactment that added phentermine to Schedule IV.[18] The district court dismissed the complaint against the defendant,

10. *See id.* § 152.15 (penalty varies depending on the classification of the controlled substance).

11. 257 N.W.2d 693 (Minn. 1977).

12. MINN. STAT. §§ 152.01-.20 (1976), *as amended by* Act of Mar. 28, 1978, ch. 639, 1978 Minn. Laws 418.

13. 257 N.W.2d at 695, 697.

14. *Id.* at 697-98. A third less controversial issue, which simply involved a careful reading of the statute, was whether or not the Legislature had intended to delegate to the Board the authority to add, delete, or reschedule drugs. *See id.* at 695-97. The question involved a judicial reconciliation of one provision in the statute which allowed the Board to promulgate regulations controlling substances, *see* MINN. STAT. § 152.02(8), (12) (1976), and another provision which required the Board and the Advisory Council on Controlled Substances to report annually to the Legislature and recommend changes in the law. *See id.* § 152.02(13). The district court had ruled that the Legislature, by these conflicting sections, had not intended to delegate to the Board the power to regulate controlled substances. *See* 257 N.W.2d at 695-97. The supreme court disagreed, holding that subdivision 12 is a specific provision, while subdivision 13 is meant to deal with drug control generally. *Id.* at 696-97.

15. Phentermine is a stimulant, chemically related to amphetamines, used for treatment of obesity. *See* PHYSICIANS' DESK REFERENCE 974-75 (32d ed. 1978).

16. 257 N.W.2d at 695.

17. Phentermine was added to Schedule IV pursuant to a rule promulgated by the Board effective on November 8, 1974. *See* 257 N.W.2d at 695. MINN. STAT. § 152.02(12) (1976) provides that federal reschedulings published in the Federal Register become automatically effective in Minnesota within 30 days absent a request for a hearing. After phentermine became controlled under federal law, *see* 38 Fed. Reg. 18,013 (1973), the Board, "out of an abundance of caution" gave notice to interested parties and held hearings without a request. *See* Appellant's Brief and Appendix at 5. The 30-day provision was held to constitute both a denial of due process and an unconstitutional delegation of legislative authority in State v. Dougall, 89 Wash. 2d 118, 570 P.2d 135 (1977), because the provision did not provide notice that possession of valium was a violation of Washington law and because the authority to adopt future federal regulations was an improper delegation of legislative power. *Id.* at 121-23, 570 P.2d at 137-38. *But see* Samson v. State, 27 Md. App. 326, 333-35, 341 A.2d 817, 822-23 (1975) (30-day provision upheld).

18. The defendant was charged with possession of phentermine on April 21, 1976, *see* 257 N.W.2d at 695, only one day after approval of a law placing the drug on Schedule IV. *See* Act of Apr. 20, 1976, ch. 338, § 4, 1976 Minn. Laws 1349 (amending MINN. STAT. §

holding that the Legislature had neither the intent nor the constitutional power to delegate to an administrative agency the authority to add controlled substances to the statutory schedules.[19] Moreover, the court ruled that possession of phentermine did not constitute a crime because the drug had not been declared "controlled" by the Legislature and, therefore, the defendant was not on notice that possession was illegal.[20] The Minnesota Supreme Court reversed, holding that the state constitution did not prevent the Legislature from delegating its power to schedule narcotic substances to the Board[21] and that the conviction was proper because all citizens are presumed to know what the law prohibits.[22]

In addressing the delegation issue, the Minnesota court referred to previously established standards used to determine the validity of legislative grants of power to the executive branch. Prior decisions indicate that the discretion to determine when and upon whom a law shall take effect is a purely legislative power that may not be delegated to an administrative agency.[23] However, the power to ascertain a fact, the finding of which will make the law operative, may properly be dele-

152.02(5) (1974)). Because the amendment to the Minnesota Act was silent regarding date of effectiveness, it became effective on August 1, 1976. *See* MINN. STAT. § 645.02 (1976) (unless law states otherwise, all statutes become effective on the next August first following enactment). The rationale for adding phentermine to the statutory schedule when the drug was already controlled pursuant to a regulation was an unwritten legislative practice designed to ease an apparent police enforcement problem by placing the entire schedule of controlled substances in a single source. Interview with David E. Holmstrom, Executive Secretary of the Minnesota Board of Pharmacy, in St. Paul (Dec. 22, 1978). The reasoning behind this practice raises serious due process questions regarding the presumption that all are bound to know the law. If law enforcement agencies have difficulty finding the statutes they are charged with enforcing, is it constitutionally proper to presume that all citizens, who have even less access to the law, are aware of the law? For full discussion of the notice issue, *see* notes 43-75 *infra* and accompanying text.

19. 257 N.W.2d at 695.

20. *See* Appellant's Brief and Appendix at A-15 to -16.

21. 257 N.W.2d at 697; *see* MINN. CONST. art. 3, § 1 (separation of powers).

22. 257 N.W.2d at 697-98.

23. *See, e.g.*, State v. Mathiasen, 273 Minn. 372, 378, 141 N.W.2d 805, 810 (1966) (what constitutes a crime is within legislative province); McGuire v. Viking Tool & Die Co., 258 Minn. 336, 348, 104 N.W.2d 519, 528 (1960) ("It is axiomatic that an administrative body can neither make nor change substantive law. It may adopt administrative rules, but in doing so cannot change existing, or make new, law.") (quoting Bielke v. American Crystal Sugar Co., 206 Minn. 308, 312, 288 N.W. 584, 586 (1939)); Hassler v. Engberg, 233 Minn. 487, 515, 48 N.W.2d 343, 359 (1951) (legislative power may not be delegated); State v. Meyer, 228 Minn. 286, 292-98, 37 N.W.2d 3, 8-12 (1949) (judiciary may not encroach on exclusively legislative power to fix and determine punishment for violation of the law; legislature may not interfere in judicial function of imposing sentence); Lee v. Delmont, 228 Minn. 101, 112, 36 N.W.2d 530, 538 (1949) (purely legislative power may not be delegated unless authorized by constitution); State v. Sobelman, 199 Minn. 232, 235, 271 N.W. 484, 485 (1937) (exclusive province of legislature to declare what acts constitute a crime); State v. Bean, 199 Minn. 16, 20, 270 N.W. 918, 920 (1937) (same).

gated.[24] In such a case, the court has held that the Legislature may declare a law to be operative only upon the subsequent establishment of a fact, and when the law does take effect, it is by force of legislative action as if the Legislature had fixed the time for its becoming effective.[25] In addition, for a legislative delegation to be valid, a reasonably clear policy or standard of action must control the agency in ascertaining the facts so that the law takes effect by virtue of its own terms and not according to the whims of the agency.[26] What is a sufficiently definite standard may vary according to the complexity of the subject to which the law applies.[27] The court has recognized that in some circumstances it may be impossible for the Legislature to deal directly with the many complex details of a particular subject.[28] The vital distinction to be drawn is between an unconstitutional delegation of power to make a law, which necessarily involves discretion as to what the law shall be, and a valid cession of authority or discretion as to what action should

24. *See, e.g.*, Hassler v. Engberg, 233 Minn. 487, 515, 48 N.W.2d 343, 360 (1951) (legislature may delegate power to determine fact upon which the operation of the law depends); Lee v. Delmont, 228 Minn. 101, 113, 36 N.W.2d 530, 538 (1949) (same); Williams v. Evans, 139 Minn. 32, 41-42, 165 N.W. 495, 497 (1917) (legislature may declare laws operative only upon subsequent establishment of some fact).

25. *See, e.g.*, Hassler v. Engberg, 233 Minn. 487, 515, 48 N.W.2d 343, 360-61 (1951) (administrative officers may exercise discretion according to conditions imposed by legislature); Lee v. Delmont, 228 Minn. 101, 113, 36 N.W.2d 530, 538 (1949) (delegation is valid when law takes effect by its own terms); Williams v. Evans, 139 Minn. 32, 42, 165 N.W. 495, 497 (1917) (when valid rule takes effect it is by force of legislative action as if legislature had acted).

26. *See* Anderson v. Commissioner of Highways, 267 Minn. 308, 311, 126 N.W.2d 778, 780 (1964) (application of laws must not depend upon whim of administrative officer, but upon facts determined by administrative officer within clear, controlling policy of law); Reyburn v. Minnesota State Bd. of Optometry, 247 Minn. 520, 523, 78 N.W.2d 351, 354 (1956) (same); Dimke v. Finke, 209 Minn. 29, 37, 295 N.W. 75, 80 (1940) (same).

27. *See, e.g.*, Anderson v. Commissioner of Highways, 267 Minn. 308, 311-15, 126 N.W.2d 778, 780-83 (1964) (flexible and practical guide, not rigid standard, is necessary for "habitual violator" standard); State *ex rel.* Brown v. Johnson, 255 Minn. 134, 140, 96 N.W.2d 9, 14 (1959) (flexible standards may be necessary to carry out legislative policy where rigid standards could destroy administrative flexibility necessary to enforce the law); Johnson v. Richardson, 197 Minn. 266, 273, 266 N.W. 867, 871 (courts will uphold laws where legislature defines general policy and leaves to an agency adaptation of such policy to varying conditions), *appeal dismissed per curiam sub nom.* Tornius v. Johnson, 299 U.S. 508 (1936).

28. *See, e.g.*, City of Minneapolis v. Krebes, 303 Minn. 219, 223-24, 226 N.W.2d 617, 620-21 (1975) (quoting *Anderson* and *Lee*); Anderson v. Commissioner of Highways, 267 Minn. 308, 311-13, 126 N.W.2d 778, 780-82 (1964) (term "habitual violator" held sufficient guide; modern tendency is to be more liberal in grants of discretion to facilitate administration of laws under increasingly complex economic and governmental conditions); Reyburn v. Minnesota State Bd. of Optometry, 247 Minn. 520, 526, 78 N.W.2d 351, 356 (1956) (term "unprofessional conduct" provides sufficient standard for Board in revoking licenses); Lee v. Delmont, 228 Minn. 101, 113, 36 N.W.2d 530, 539 (1949) ("Legislation must often be adapted to complex conditions involving a host of details with which the legislature cannot deal directly.").

be taken within the letter of the law.[29]

As applied to the Uniform Act, these standards[30] have led several jurisdictions to uphold the delegation of power to schedule substances, while a minority of state courts confronting the issue have found the delegation to be unconstitutional. The minority view holds that the Uniform Act unlawfully delegates to regulatory agencies the authority to define a crime and the authority to establish its punishment.[31] According to the minority position, any republishing of controlled substance schedules with additions or changes creates a new crime.[32] The weakness in this position is that it takes too narrow a view of the statute. Under the Uniform Act, the agency does not define what conduct constitutes a crime[33]—the legislature makes that determination when it adopts the statute by deciding that the use of certain substances with defined effects should be illegal.[34] Therefore, lacking the technical expertise to determine which substances have the defined effects, the Leg-

29. Williams v. Evans, 139 Minn. 32, 42, 165 N.W. 495, 497 (1917).

30. The standards used to determine whether a legislative body has impermissibly delegated its power are similar across the nation and were developed in a series of landmark United States Supreme Court cases. *See, e.g.*, Panama Refining Co. v. Ryan, 293 U.S. 388, 426 (1935) (Congress may give authorization to determine facts and may establish primary standards leaving an agency to "fill up the details."); Hampton & Co. v. United States, 276 U.S. 394, 409 (1928) (Congress must lay down "an intelligible principle" by which the agency is directed to conform); United States v. Grimaud, 220 U.S. 506, 517 (1911) (content of legislatively declared crime may be filled in by admimistrative agency thus allowing criminal sanction for violation of administrative rules or regulations); Field v. Clark, 143 U.S. 649, 693-94 (1892) (legislature may not delegate its exclusive power to make a law, but it may delegate the authority to determine a fact upon which the law makes its own action depend); United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.) (legislature has exclusive authority to define crime and ordain its punishment); Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 388 (1813) (President may determine a fact which makes the law operative).

31. Of the 45 states which have adopted the Uniform Act, only nine, other than Minnesota, have been faced with the delegation issue. Two states have adopted the minority view. *See* Howell v. State, 300 So. 2d 774, 781 (Miss. 1974); State v. Gallion, 572 P.2d 683, 687-90 (Utah 1977). Seven jurisdictions have upheld their versions of the Uniform Act when confronted with the same issue. *See* note 36 *infra* and accompanying text.

32. *See* Howell v. State, 300 So. 2d 774, 781 (Miss. 1974) (attempted delegation to reschedule controlled substances changed punishment for possession of substances from that fixed by legislature and thus violated separation of powers provision of the state constitution); State v. Gallion, 572 P.2d 683, 687 (Utah 1977) (authorizing attorney general to add, delete, or reschedule substances was unconstitutional delegation of legislative power).

33. *Compare* State v. Cutright, 193 Neb. 303, 306-07, 226 N.W.2d 771, 774 (1975) (legislature defined crime and established penalty for its violation) *and* MINN. STAT. §§ 152.09, .15 (1976) (same) *with* Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 782-83, 104 N.W.2d 227, 230-31 (1960) (agency given absolute power to define crime).

34. *See, e.g.*, MINN. STAT. § 152.02(7), (9) (1976) (specific criteria to be followed by agency in exercising its authority to regulate and define additional controlled substances). *See also* State v. Vail, 274 N.W.2d 127, 132 (Minn. 1979) (major concern of Legislature in adopting Uniform Act was the morphological effects of drug use).

islature acts properly when it authorizes a panel of experts to make that determination.[35]

The Minnesota court in *King* followed the majority position[36] and held that the Legislature had not delegated the authority to enact criminal law to the Board.[37] The addition of phentermine to the list of controlled substances was regarded as a properly delegated finding of fact.[38] This grant of authority to the Board is a constitutional delegation of discretionary power within limited, well-defined standards governing addition to the statutory lists.[39] Furthermore, the court stated that the additions are made within the framework of detailed rulemaking procedures.[40] The court found that the Legislature, in adopting the Minnesota Act, had made possession of those chemical substances that posed a health hazard to society a crime and then placed responsibility for determining which substances should be added to the schedules with the Board.[41] Because the Legislature had defined the crime and had set specific criteria for determining what types of drugs should be controlled, the Board was merely in a position to regulate the drug within legislatively defined parameters.[42]

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35. The State Board of Pharmacy was designed to be an expert panel. It consists of seven members, five of whom must be pharmacists actively participating in the practice of pharmacy. In addition, the five required pharmacists must have been engaged in at least five consecutive years of practice as pharmacists immediately preceding appointment to the Board. *See* MINN. STAT. § 151.02 (1976).

36. *See* Cassell v. State, 55 Ala. App. 502, 507-08, 317 So. 2d 348, 354-55 (1975); People v. Avery, 67 Ill. 2d 182, 186-87, 367 N.E.2d 79, 80-81 (1977); People v. Uriel, 76 Mich. App. 102, 105-08, 255 N.W.2d 788, 791 (1977); State v. Lisk, 21 N.C. App. 474, 477, 204 S.E.2d 868, 870, *cert. denied*, 285 N.C. 666, 207 S.E.2d 759 (1974); State v. Brown, 576 P.2d 776, 777-78 (Okla. Crim. App. 1978); Hilton v. State, 503 S.W.2d 951, 954 (Tenn. 1973); Threlkeld v. State, 558 S.W.2d 472, 474 (Tex. Crim. App. 1977).

37. *See* 257 N.W.2d at 697. The equivalent federal law, the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801-966 (1976), has been challenged on the same ground. Cases resolving the issue have held that Congress made a proper delegation of discretion to the Attorney General. *See, e.g.*, United States v. Davis, 564 F.2d 840, 843-44 (9th Cir. 1977) (federal act contains sufficient guidelines and standards), *cert. denied*, 434 U.S. 1015 (1978); United States v. Pastor, 557 F.2d 930, 939-41 (2d Cir. 1977) (regulation controlling phentermine and phendimetrazine upheld because delegation made pursuant to clearly expressed statement of congressional policy and governed by precise standards rooted in that policy); United States v. Piatti, 416 F. Supp. 1202, 1205-06 (E.D.N.Y. 1976) (same for regulation controlling methaqualone).

38. *See* 257 N.W.2d at 695, 697.

39. *See* 257 N.W.2d at 697; note 36 *supra*.

40. *See, e.g.*, 257 N.W.2d at 695. Board rules are promulgated in compliance with requirements of the Administrative Procedure Act. *See* MINN. STAT. §§ 15.01-.52 (1976 & Supp. 1977), *as amended by* Act of Mar. 14, 1978, ch. 480, § 1, 1978 Minn. Laws 84, *as amended by* Act of Mar. 28, 1978, ch. 592, 1978 Minn. Laws 327, *as amended by* Act of Mar. 28, 1978, ch. 674, §§ 2-3, 1978 Minn. Laws 494, *as amended by* Act of Apr. 5, 1978, ch. 790, 1978 Minn. Laws 1155.

41. *See* 257 N.W.2d at 697.

42. The fact that the Minnesota Act deals with a difficult and controversial area of the law may be viewed as a significant factor for its constitutionality being upheld. The

The second issue in *King* related to the due process requirement of notice.[43] The defendant contended that she had been denied due process because phentermine was not specifically listed as a controlled substance in the Minnesota Act at the time the charges were filed.[44] The court rejected this contention, holding that the defendant was charged

supreme court stated it would "view legislative delegations liberally in order to facilitate the administration of laws which, like drug control, are complex in their application." 257 N.W.2d at 697.

43. *See id.* at 697-98. The due process issue has been discussed in other jurisdictions which have adopted the Uniform Act. *See* State v. Gula, 320 A.2d 752, 757-58 (Del. 1974) (failure to publish regulations as required by statute did not invalidate indictment); People v. Avery, 67 Ill. 2d 182, 188, 367 N.E.2d 79, 81 (1977) (statute as it existed before amendment invalid for failure to require due process); Samson v. State, 27 Md. App. 326, 333-35, 341 A.2d 817, 823 (1975) (raised due process issue, but involved 30-day provision for incorporation of federal rules and regulations; ignorance of the law is no excuse); Hilton v. State, 503 S.W.2d 951, 954-55 (Tenn. 1973) (statute upheld); State v. Dougall, 89 Wash. 2d 118, 121-22, 570 P.2d 135, 137-38 (1977) (30-day provision found unconstitutional because lack of due process); *cf.* Cassell v. State, 55 Ala. App. 502, 507-08, 317 So. 2d 348, 354-55 (1975) (statute requires that rules be published in newspaper of general circulation). Courts have ruled that widespread publication of a regulation constitutes sufficient notice to avoid a due process objection. *See, e.g.*, Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384-85 (1947) (publication in the Federal Register is constructive notice to all persons); State v. Gula, 320 A.2d 752, 757 (Del. 1974) (noting widespread news media publicity of those who have been prosecuted under the regulation); Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 WM. & MARY L. REV. 671, 699 n.163 (1976) (publication in the *Code of Federal Regulations* gives sufficient notice of what regulation prohibits) (citing United States v. Freeman, No. 75-2183 (4th Cir. Mar. 4, 1976)). *But see* Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 387 (1947) (Jackson, J., dissenting) ("[I]t is an absurdity to hold that every farmer who insures his crops knows what the Federal Register contains . . . . If he were to peruse this voluminous and dull publication . . . he would never need crop insurance, for he would never get time to plant any crops."). The issue may have been rendered moot in Minnesota because of subsequent amendment to the Administrative Procedure Act, applicable to the Minnesota Act through MINN. STAT. § 152.02(12) (1976). Legislation enacted in 1974 requires that administrative regulations be published in the State Register, thus eliminating the notice objection. *See* Act of Mar. 28, 1974, ch. 344, §§ 4-7, 1974 Minn. Laws 577, *as amended by* Act of June 4, 1975, ch. 380, § 2, 1975 Minn. Laws 1288 (amending MINN. STAT. § 15.0413 (1) (1974)). However, the amendment was not effective until July 1, 1976, *see* Act of June 4, 1975, ch. 380, § 2, 1975 Minn. Laws 1288 (amending MINN. STAT. § 15.0413(1) (1974)), after charges had been filed against the defendant. *See* 257 N.W.2d at 695. Legislative intent regarding applicability of amendments to the Administrative Procedure Act is confusing because of reference in the Minnesota Act to the 1969 and 1971 versions of the Administrative Procedure Act. *See* MINN. STAT. § 152.02(12) (1976). Thus, under rules of construction, *see id.* § 645.31(2) (where act adopts another law by reference, it also adopts subsequent amendments to that law, unless there is clear contrary legislative intent), publication in the State Register may not be required by the Minnesota Act because specific mention of the 1969 and 1971 statutes may be considered an indication of legislative intent not to adopt subsequent amendments to the Administrative Procedure Act. Although controlled substance regulations have been published in the state register, *see* 7 M.C.A.R. § 8.051(D) (1978) (rules of the Board of Pharmacy), some revision of the Minnesota Act is sorely needed to clarify this situation.

44. 257 N.W.2d at 697-98; *see* note 18 *supra* and accompanying text.

with knowledge of the duly promulgated Board regulation that prohibited possession of the substance.[45] Furthermore, phentermine had been controlled under federal law.[46] In a dissenting opinion, Justice Otis argued that the statutory procedures set out in the Minnesota Act did not constitute notice "in practical effect."[47] He reasoned that it was unrealistic to expect laymen to discover regulations in such obscure places as the offices of the Secretary of State and the Commissioner of Administration.[48] However, the majority did not recognize the defendant's claim that such lack of notice, and therefore ignorance of a valid regulation, would excuse her violation of the law.[49]

The doctrine *ignorantia juris non excusat*[50] is deeply entrenched in our legal tradition.[51] Although the doctrine does not presume that all have read the law, it does hold all citizens responsible for knowledge of basic principles which are held to convey adequate warning that certain conduct is illegal.[52] While its origins are obscure,[53] the maxim remains quite durable.[54] Developed in an era that had yet to conceive of government

45. *See id.* at 697-98. The fact that the regulation was not published and widely circulated did not affect the court's reasoning. *See id.* at 698 (Otis, J., dissenting). However, as Professor Davis has observed, unpublished regulations are often difficult to find due to uncooperative clerks and inadequate filing and indexing systems in many offices of secretaries of state. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6.11, at 400 (1958).

46. *See* 257 N.W.2d at 698; 38 Fed. Reg. 18,013 (1973).

47. 257 N.W.2d at 698 (Otis, J., dissenting).

48. *See id.* The Legislature acknowledged a notice defect in the procedure for controlling drugs when it added phentermine to the statutory schedule, after the drug was already controlled in an administrative regulation, for the purpose of simplifying police enforcement by locating the schedule in a single source. Interview with David E. Holmstrom, Executive Secretary of the Minnesota Board of Pharmacy, in St. Paul (Dec. 22, 1978).

49. *See* 257 N.W.2d at 697-98.

50. "[I]gnorance of the law excuses not." BLACK'S LAW DICTIONARY 881 (rev. 4th ed. 1968).

51. *See* O'Connor, *Mistake and Ignorance in Criminal Cases*, 39 MOD. L. REV. 644 (1976). *See also* 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 46 (1765) ("[I]f ignorance, of what he *might* know, were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity.") (emphasis in original).

52. *See, e.g.*, State v. McCorvey, 262 Minn. 361, 365-66, 114 N.W.2d 703, 706 (1962) (statute will not fail for indefiniteness if "person of common intelligence could determine its meaning with reasonable certainty"); Powers v. Owen, 419 P.2d 277, 279 (Okla. Crim. App. 1966) (while ignorance is no excuse, our concept of due process does not expect citizens to employ counsel to search applicable laws in varying localities to determine if certain conduct is unlawful); Hilton v. State, 503 S.W.2d 951, 954 (Tenn. 1973) (persons of common intelligence and understanding should comprehend that it is unlawful to sell controlled substances such as L.S.D.); State v. Dougall, 89 Wash. 2d 118, 121-22, 570 P.2d 135, 137-38 (1977) (unreasonable to expect average person to continually research Federal Register to learn what substances are controlled); Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 91 (1908) (presumption that all know the law is "absurd").

53. No single case can be pointed to which directly established the maxim. *See* O'Connor, *supra* note 51, at 646.

54. *See, e.g.*, United States v. International Minerals & Chem. Corp., 402 U.S. 558, 563

by agency, the maxim has not been modified in recent times to take into account the distinctions between the passage of a statute and the promulgation of an administrative regulation.[55] Recent commentary has

(1971) (general rule upheld); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 68 (1910) ("ignorance of the law will not excuse"); *cf.* Lambert v. California, 355 U.S. 225, 228 (1957) (due process requirement of notice limits application of the doctrine).

55. Apart from additional press coverage attendant upon the legislative process, the Minnesota Constitution establishes certain standards which the Legislature must follow in the conduct of its business. For examples relevant to due process notice requirements, *see* MINN. CONST. art. 4, § 14 (sessions open to the public); *id.* § 15 (publication of journals of proceedings of each house); *id.* § 16 (publication of voting results in respective journals); *id.* § 17 (laws may embrace only one subject, which must be expressed in their titles); *id.* § 19 (three reportings of a bill prior to passage in either house). In addition, the Legislature has provided for the publication and distribution of at least one copy of *Minnesota Laws* and *Minnesota Statutes* to every county in the state. *See* MINN. STAT. §§ 648.11, .14, .31-.37, .39 (1976 & Supp. 1977). Under the Minnesota Administrative Procedure Act, as it existed at the time of defendant's arrest, state agencies had authority to promulgate rules to the extent that power had been vested in an agency by statute. *See* Act of Apr. 27, 1957, ch. 806, § 2(1), 1957 Minn. Laws 1100 (current version at MINN. STAT. § 15.0412(1) (1976 & Supp. 1977)). Prior to adoption of a rule by an agency, the statute required a public hearing, with 30 days notice of the hearing to those individuals, groups, or association representatives who were registered with the Secretary of State for that purpose. *See* Act of Apr. 27, 1957, ch. 806, § 2(4), 1957 Minn. Laws 1100 (current version at MINN. STAT. § 15.0412(4) (1976 & Supp. 1977)). Amendment, suspension, or repeal of such regulations could follow this procedure; but if the agency chose not to hold a hearing, it was required to publish or circulate notice of its intended action and allow interested persons to submit data or views orally or in writing. *See* Act of Apr. 27, 1957, ch. 806, § 2(3), 1957 Minn. Laws 1100 (amended 1974). Under the statute, an agency was required to show need for the rule; and, upon adoption by an agency, the form and legality of the proposed regulation were subject to the approval or disapproval of the Attorney General. *See* Act of Apr. 27, 1957, ch. 806, § 2(4), 1957 Minn. Laws 1100 (current version at MINN. STAT. § 15.0412(4) (1976 & Supp. 1977)). Following hearing and approval by the agency and the Attorney General, such regulations were given the "force and effect of law" upon filing in the offices of the Secretary of State and the Commissioner of Administration. *See* Act of Apr. 27, 1957, ch. 806, § 3(1), 1957 Minn. Laws 1100, *as amended by* Act of May 22, 1963, ch. 822, § 1(1), 1963 Minn. Laws 1444 (current version at MINN. STAT. § 15.0413(1) (1976)). Annual publication and distribution of all rules and regulations were required of the Commissioner of Administration. *See* Act of May 22, 1963, ch. 822, § 1(5), 1963 Minn. Laws 1444 (repealed 1975). Thus, while the 1974 version of the Administrative Procedure Act provided for notice of promulgation of agency rules, such notice was effectively limited to parties who were registered with the Secretary of State or who were otherwise involved in agency proceedings. Modification of the statute in 1974, requiring publication of regulations promulgated after July 1, 1976 in a weekly state register, and elimination of the compulsory filing with the Commissioner of Administration, may have removed any potential notice problems in the rule-making process. *See* note 43 *supra*. Despite these differences, *ignorantia juris non excusat* has been widely applied without modification to both statutory enactments, *see, e.g.*, United States v. International Minerals & Chem. Corp., 402 U.S. 558, 563 (1971); Barlow v. United States, 32 U.S. (7 Pet.) 404, 411 (1833); State v. Armington, 25 Minn. 29, 38 (1878), and to regulations adopted by administrative bodies. *See, e.g.*, Doing v. District of Columbia, 67 A.2d 396, 398 (D.C. 1949) (presumption of knowledge of the law applies to traffic regulations promulgated by district commissioners); *cf.* City of Bloomington v. Munson, 300 Minn. 195, 200, 221 N.W.2d 787, 791 (1974)

questioned whether this historical development requires that the doctrine be viewed as a time-honored rule or simply as a trite adage.[56] Commentators have argued that such an irrebutable presumption is too unbending, hindering rather than advancing justice in some cases.[57] However, these critics do not offer a practical alternative.[58] Anything but rigid adherence to the principle may, in the end, work the most severe injustice.[59]

Despite endurance of the maxim, an equally time-honored concept—due process—places some constraints on the operation of the rule.[60] The due process doctrine of vagueness requires statutes to give

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(respondents charged with knowledge of provisions of city home rule charter); Labruce v. City of North Charleston, 268 S.C. 465, 467, 234 S.E.2d 866, 867 (1977) (knowledge of city ordinances presumed). *See also* People v. Avery, 67 Ill. 2d 182, 367 N.E.2d 79 (1977) (law providing no hearing or publication of regulations promulgated under the Uniform Act found unconstitutional). The court in *Avery* stated:

> [O]n legislative enactments, notice—as the term is ordinarily employed—is not required. But notice does in fact occur, for it is constitutionally required that "[a] bill shall be read by title on three different days in each house" (Ill. Const. 1970, art. IV, sec. 8(d)). . . . Under [the statute], no notice is required. A rule issued at noon on any given day could be enforced the same day. The legislature itself, had it not delegated the power, could not accomplish this result.

Id. at 188, 367 N.E.2d at 81.

56. *See, e.g.*, Cass, *supra* note 43; Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. PA. L. REV. 35 (1939).

57. *See* United States v. International Minerals & Chem. Corp., 402 U.S. 558, 565 (1971) (Stewart, J., dissenting) ("[I]nfliction of criminal punishment upon the unaware has long troubled the fair administration of justice."). However, commentators admit the maxim may occasionally work injustice. *See, e.g.*, Hall, *Ignorance and Mistake in Criminal Law*, 33 IND. L.J. 1, 36-38 (1957); Hall & Seligman, *Mistake of Law and* Mens Rea, 8 U. CHI. L. REV. 641, 648-51 (1941).

58. Professor Mueller has suggested that a "distinction should be made between excusable and unexcusable . . . unawareness of wrongfulness." *See* Mueller, *On Common Law Mens Rea*, 42 MINN. L. REV. 1043, 1104 (1958). Another commentator has suggested application of a rational connection test similar to that used to test the validity of an irrebuttable presumption. Failure to meet the standard would be a denial of due process. *See* Cass, *supra* note 43, at 691-92. For cases illustrating the rational connection test in the irrebuttable presumption context, see Leary v. United States, 395 U.S. 6, 36 (1969) (fact presumed by the law must be more likely than not to flow from proved fact on which it depends); Tot v. United States, 319 U.S. 463, 467 (1943) (validity of statutory presumption depends on a "rational connection between the facts proved and the ultimate fact presumed"). A more workable suggestion was made by Rollin M. Perkins who observed that, although logic indicates that the maxim should be eliminated, logic must sometimes give way to the practicalities involved in leaving the doctrine intact. *See* Perkins, *supra* note 56, at 40-41.

59. *See* People v. O'Brien, 96 Cal. 171, 176, 31 P. 45, 47 (1892) (if a person could shield himself behind a plea of ignorance, plea would be universally made and immunity would result); State v. O'Neill, 147 Iowa 513, 519, 126 N.W. 454, 456 (1910) ("One who is bound to obey the law should not be allowed to say that he was ignorant of it."); O.W. HOLMES, THE COMMON LAW 47-48 (1881) (allowing a defense of ignorance would encourage ignorance of the law).

60. The doctrine of vagueness may limit application of the maxim. *See* note 61 *infra*.

notice that the particular conduct engaged in is prohibited.[61] The United States Supreme Court has also ruled that in some instances actual knowledge of the law and subsequent failure to comply are necessary before a conviction will stand.[62] In cases of controlled substances, however, the courts have been less willing to apply due process as a limitation on application of the doctrine.[63] Persons that knowingly possess dangerous or deleterious substances consistently have been deemed aware of the great probability of regulation.[64]

Because, according to existing case law, the doctrine is especially viable in regulatory schemes involving drugs,[65] the threshold question in

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Due process requires actual notice of the law in cases of statutes prohibiting acts of omission. *See* note 62 *infra*. In addition, bona fide reliance on administrative decisions or advice, or on statutory or decisional law, and requirements of intent and knowing action may create exceptions to the rule. *See* Perkins, *supra* note 56, at 41-51.

61. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (vagrancy statute void for vagueness since one would have to guess at what conduct is forbidden); United States v. Harriss, 347 U.S. 612, 617 (1954) (there should not be criminal responsibility for conduct which one could not reasonably understand to be proscribed); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) ("All are entitled to be informed as to what the State commands or forbids."); Connally v. General 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 must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.").

62. *See* Lambert v. California, 355 U.S. 225, 229 (1957) (in the case of registration laws and other laws where an act of omission constitutes a criminal offense, due process requires notice so one may have an adequate opportunity to defend oneself); United States v. Mancuso, 420 F.2d 556, 558-59 (2d Cir. 1970) (citing *Lambert*; when applying law requiring registration for convicted drug users before going overseas, user's knowledge of law required; otherwise, no useful end served in punishing violators or incarcerating those who would obey if they knew of the law).

63. *See* United States v. Dotterweich, 320 U.S. 277, 280-81 (1943) (introducing adulterated drugs into commerce); United States v. Balint, 258 U.S. 250, 252-53 (1922) (case involving sale of drugs; "[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 . . . require the punishment of the negligent person though he be ignorant of the noxious character of what he sells.").

64. *See* United States v. International Mineral & Chem. Corp., 402 U.S. 558, 565 (1971) (sulfuric acid; where dangerous products or obnoxious waste materials are being shipped, probability of regulation so great that anyone in possession of them must be deemed aware of regulation). *See also* United States v. Freed, 401 U.S. 601, 609-10 (1971) (hand grenades); United States v. Dotterweich, 320 U.S. 277, 280-81 (1943) (introducing adulterated drugs into commerce); United States v. Balint, 258 U.S. 250, 252-53 (1922) (drugs); United States v. Weiler, 458 F.2d 474, 477-80 (3d Cir. 1972) (statute prohibiting convicted felons from transporting firearms upheld; distinguished from Lambert v. California, 355 U.S. 225 (1957) and likened to *Balint*); United States v. Crow, 439 F.2d 1193, 1195-96 (9th Cir. 1971) (registration requirement for firearms distinguished from *Lambert*); United States v. Corbin Farm Serv., 444 F. Supp. 510, 519-20 (E.D. Cal. 1978) (pesticides).

65. In United States v. Balint, 258 U.S. 250, 251-53 (1922), the Court dealt with a taxing statute which outlawed the sale of certain drugs. The Court observed that in the case of some regulatory schemes designed to promote social betterment, individuals have the burden of finding out what the law is at the peril of punishment. *See id.* at 252-53. This doctrine has recently been expanded beyond drugs. *See* note 64 *supra*.

King was whether a person of reasonable intelligence could determine that the Minnesota Act conveyed a sufficiently definite warning that phentermine was controlled. Although a reading of the schedules of prohibited drugs in the Minnesota Act easily could have confused and misled the defendant as to the status of phentermine,[66] the court has held that the statutes should be read as a whole to determine their meaning and effect.[67] Two methods for controlling drugs are provided by the Minnesota Act: upon amendment of the statute by the Legislature after Board recommendation[68] or by action of the Board itself.[69] The Minnesota Act expressly gives notice of the grant of power to the Board to add substances to the schedules.[70] It also refers to the Administrative Procedure Act,[71] which states the place where regulations adopted by administrative agencies must be filed.[72] Thus, had the defendant looked at the Minnesota Act as a whole, she would have been advised that the Board's lists of controlled substances were required to be filed in the Secretary of State's office in accordance with the Administrative Procedure Act.[73] Because the Minnesota Act indicates that the substances

66. *See* 257 N.W.2d at 698 (Otis, J., dissenting) (defendant would have been "thoroughly misled . . . had she looked for guidelines in our statutes" because the statute had been amended to add phentermine on the day before the defendant was charged, effective several months hence, making it unreasonable to expect defendant to search for the regulation operative at the time of her arrest).

67. *See, e.g.*, State v. McCorvey, 262 Minn. 361, 365, 114 N.W.2d 703, 706 (1962) (statute should be read as a whole to determine legislative intent); Governmental Research Bureau, Inc. v. St. Louis County, 258 Minn. 350, 353-54, 104 N.W.2d 411, 413 (1960) ("The words of a statute are not to be isolated, and their meaning must be found in the context and purpose of the statute as a whole."); Kollodge v. F. & L. Appliances, Inc., 248 Minn. 357, 360, 80 N.W.2d 62, 64 (1956) (provision of statute cannot be taken out of context but must be read with related provisions to determine its meaning); Merrill, Cowles & Co. v. Shaw, 5 Minn. 148, 150 (Gil. 113, 115) (1860) (all provisions of statute must be considered together and every provision in statute must be given its designed effect without abrogating effect of another controlling provision); MINN. STAT. § 645.17(2) (1976) ("The legislature intends the entire statute to be effective and certain.").

68. MINN. STAT. § 152.02(13) (1976).

69. *Id.* § 152.02(7)-(9), (12).

70. *See id.* § 152.02(7)-(9), (12)-(13).

71. *Id.* §§ 15.01-.52 (1976 & Supp. 1977), *as amended by* Act of Mar. 14, 1978, ch. 480, § 1, 1978 Minn. Laws 84, *as amended by* Act of Mar. 28, 1978, ch. 592, 1978 Minn. Laws 327, *as amended by* Act of Mar. 28, 1978, ch. 674, §§ 2-3, 1978 Minn. Laws 494, *as amended by* Act of Apr. 5, 1978, ch. 790, 1978 Minn. Laws 1155. The reference in the Minnesota Act to the Administrative Procedure Act states: "In exercising the authority granted by Laws 1971, Chapter 937, the state board of pharmacy shall be subject to the provisions of Minnesota Statutes 1969, Chapter 15." MINN. STAT. § 152.02(12) (1976).

72. MINN. STAT. § 15.0413(1) (1976 & Supp. 1977) (rules or regulations filed with the Secretary of State and approved by the Attorney General have force and effect of law after publication in State Register).

73. *Id.* At the time the phentermine regulation was promulgated, regulations had to be filed in the Commissioner of Administration's office as well as the office of the Secretary of State. *See* Act of May 22, 1963, ch. 822, § 1, 1963 Minn. Laws 1444, *as amended by* Act of Mar. 28, 1974, ch. 344, § 4, 1974 Minn. Laws 578 (repealed 1975). However, when

listed in the schedules may not be the only drugs controlled, and directs citizens to where additional controlled substances are listed, the law provides sufficient notice of what conduct is prohibited.

Although the issues discussed by Justice Otis raise serious questions concerning the rigid application of *ignorantia juris non excusat* in the context of promulgation of rules and regulations by administrative agencies, it is doubtful that an effective and simple alternative could be found which would work less hardship than the original doctrine. The facts in *King* do not indicate that the defendant could not have received adequate notice of the proscribed conduct.[74] In fact, based on the law as previously applied,[75] and the defendant's own actions,[76] it would appear that she had notice that possession of phentermine was illegal.

In upholding the constitutionality of the Minnesota Act and declining to accept a defense based on non-publication of administrative regulations, the *King* court adhered to well-established principles of law. Simultaneously, the national legislative impetus designed to deal with the growing problems of drug abuse in a uniform manner was judicially approved in Minnesota.

Commercial Law—REVOCATION OF ACCEPTANCE UNDER U.C.C. § 2-608—*Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349 (Minn. 1977).

In recent years, the plight of the consumer purchaser of a defective product has improved steadily.[1] By abolishing the requirement of privity, some courts have permitted disappointed purchasers to sue parties in the sales chain of distribution other than the immediate seller for damages.[2] Courts also have permitted buyers to revoke acceptance of defective goods under section 2-608 of the Uniform Commercial Code (U.C.C.) and return the goods to their immediate sellers.[3] In *Durfee v.*

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the defendant was charged, the law simply required filing in the office of the Secretary of State. *See* MINN. STAT. § 15.0413(1) (1976 & Supp. 1977).

74. *See* text accompanying notes 43-73 *supra*.

75. *See* notes 50-73 *supra* and accompanying text.

76. *See* 257 N.W.2d at 698 n.4 (defendant may have shown culpability by concealing the drug in her undergarments).

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1. *See* Spannaus, Book Review, 4 WM. MITCHELL L. REV. 493, 493 (1978) (reviewing R. HAYDOCK, MINNESOTA CONSUMER LAW HANDBOOK (1977)).

2. *See, e.g.*, McCormack v. Hankscraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967); Beck v. Spindler, 256 Minn. 543, 558-62, 99 N.W.2d 670, 680-82 (1959); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 413, 161 A.2d 69, 99-100 (1960).

3. *See, e.g.*, Orange Motors of Coral Gables, Inc. v. Dade County Dairies, Inc., 258 So. 2d 319 (Fla. Dist. Ct. App.), *cert. denied*, 263 So. 2d 831 (Fla. 1972); Jacobs v. Metro Chrysler-Plymouth, Inc., 125 Ga. App. 462, 188 S.E.2d 250 (1972).

Section 2-608 of the Uniform Commercial Code (hereinafter cited as U.C.C.) provides: