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# THE DUTY OF THE GOVERNMENT TO MAKE THE LAW KNOWN

JOSEPH E. MURPHY\*

## INTRODUCTION

**I**n a democracy it is accepted that the public should have full access to the lawmaking process.<sup>1</sup> It generally has gone unnoticed, however, that governmental bodies, which may now be required to remain open to the public for their deliberations, may nevertheless adopt laws and regulations with little or no publicity being given to those enactments.<sup>2</sup> Under an ancient Anglo-American common-law doctrine, a law may take effect from the moment it is signed, or an administrative rule may penalize conduct immediately after it is voted on, with no obligation on the lawmakers to publicize or promulgate their enactments.<sup>3</sup> If a citizen acts in unavoidable ignorance of such an unpublicized enactment and runs afoul of the new law, his ignorance may offer him no legal defense.<sup>4</sup>

The method by which laws are made known to the public has been a subject of little interest to the legal profession. Moreover, there

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1. Opening the lawmaking process to the public, known as government in the sunshine, has been a focus of reform during the past two decades. This can be seen in the proliferation of laws requiring government councils to deliberate in public. *See, e.g.*, Act of June 5, 1967, Pub. L. No. 90-23, 81 Stat. 54; Ariz. Rev. Stat. Ann. §§ 38-431.01-.08 (Supp. 1981); Me. Rev. Stat. Ann. tit. 1, §§ 401-410 (1979 & Supp. 1982-1983); Pa. Stat. Ann. tit. 65, §§ 261-269 (Purdon Supp. 1982-1983).

2. One court has stated that "[t]here was never any suggestion that the effectiveness of [a] bill was in any way dependent upon . . . publication." *United States v. Casson*, 434 F.2d 415, 420 n.17 (D.C. Cir. 1970).

3. A publication requirement *may* be imposed by legislation, *see, e.g.*, Administrative Procedure Act, § 3, 5 U.S.C. § 552(a) (1976 & Supp. IV 1980) (requiring agencies to publish rules, opinions, orders, records and proceedings in the Federal Register); Federal Register Act, § 5, 44 U.S.C. § 1505 (1976) (requiring publication of Executive orders, Presidential proclamations, and administrative rules in the Federal Register), but this generally has been held to be neither a constitutional nor a common-law requirement. Even such statutory provisions may require only an initial, pro forma publication in an official gazette in order for a law or rule to become and remain effective. In some cases, such as New Jersey's statutory requirement for the publication of administrative law, the legislature may direct that such publication occur but not specify that it is precondition for a regulation's effectiveness. *See N.J. Stat. Ann. § 52:14B-7(a)* (West Supp. 1982-1983).

4. It is well established that "[n]either ignorance of the law nor the fact that in the act complained of accused acted on the advice of counsel will relieve from liability. This may sometimes be a hard rule, but it is an inflexible one, and lies at the foundation of the administration of justice." 1 F. Wharton, *Wharton's Criminal Law* § 400, at 579-80 (1932) (footnotes omitted); *see United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971); *United States v. Moore*, 586 F.2d

appears to be a peculiar lack of interest within the legal profession as to what occurs between the time a law is signed and the point when it is implemented. As a result, probably very few attorneys could answer such basic questions as whether promulgation of new laws is required by the Constitution, or whether a person could be penalized under a newly enacted law that had not been publicized.<sup>5</sup>

The significance of promulgation issues and the need for sharper focus on these issues are explored in some detail in this Article. At this point, however, it should be noted that there are two trends which particularly justify a new examination of legal thought in this area. One of these, which was central to the emergence of the sunshine acts,<sup>6</sup> is the growth in the number of laws in modern life at both the legislative and the administrative levels.<sup>7</sup> This increased quantity and enhanced role of the law call for serious attention to how the law is made known. Along with the increased need for awareness of promulgation, prospects for distributing information about new laws have been enhanced as a result of the revolution in the communications and data distribution industry. The development of centralized legal data bases and the widespread availability of terminals to access this data have increased substantially the government's ability to provide immediate information on new laws.

To be considered in combination with these relatively recent trends are some well-established legal tenets. The possibility that laws may be enacted without notice to the public and that individuals may be held accountable for noncompliance with unknown and unknowable rules conflicts with the requirements of due process. That constitutional doctrine mandates that the government "promulgate" the law—make it publicly available and effectively announce its existence<sup>8</sup>—before it can take effect. Only then can the government im-

1029, 1033 (4th Cir. 1978); F.L. Bailey & H.B. Rothblatt, *Defending Business and White Collar Crimes* Federal and State § 114, at 130 (1969).

5. The dearth of analysis in this area has been described by one commentator as "A Legal 'Lacuna.'" Lavery, "*The Federal Register*"—*Official Publication for Administrative Regulations, etc.*, 7 F.R.D. 625, 628 (1948). Much of the literature that does exist originated with the movement in the 1930's to publicize administrative law. The only broad-based approach to the subject, Bailey, *The Promulgation of Law*, 35 Am. Pol. Sci. Rev. 1059 (1941), was also a product of that era. Bailey's analysis is essentially political, not legal. He assumes that promulgation is required, overlooking the legal authorities to the contrary.

6. See *supra* note 1 and accompanying text.

7. One source estimates that the number of new enactments by legislative bodies ranging from city councils to Congress is 150,000 per year. *Attorney General William French Smith's Remarks to District of Columbia Bar*, Antitrust & Trade Reg. Rep. (BNA) No. 1021, at H-1 (July 2, 1981); *Too Much Law?*, Newsweek, Jan. 10, 1977, at 43.

8. A classic definition of promulgation is "[t]he order given to cause a law to be executed, and to make it public; it differs from publication." Black's Law Dictionary 1380 (rev. 4th ed. 1968); 1 W. Blackstone, *Commentaries*\* 45; 2 J. Bouvier, *Law*

pose a duty of inquiry upon the public, and enforce the principle that ignorance of the law is no excuse.

The burden this standard would impose on the government varies according to the type of law involved and the constituencies affected. The available methods of promulgation offer sufficient flexibility in this regard. Although such requirements may prove to be inconvenient to the government and impose some additional, initial costs, these cannot outweigh the due process obligation.

Beyond the constitutionally fixed minimums, public policy dictates a more rigorous and imaginative approach to promulgation. The possible use of various forms of publication of the law should be subjected to cost-benefit analysis to determine effective means of making the law known beyond mere technical compliance with due process minimums.

### I. THE STATE OF THE LAW ON PROMULGATION

A few cases illustrate the anomalous nature of the existing legal approaches to promulgation. In 1970, the Court of Appeals for the District of Columbia was confronted in *United States v. Casson*<sup>9</sup> with a defendant who had been convicted and sentenced under new burglary and robbery statutes<sup>10</sup> for the District of Columbia.<sup>11</sup> The President had signed the bill, which amended prior laws on those crimes, in the afternoon of December 27, 1967, while at his ranch in Texas.<sup>12</sup> The defendant committed his criminal act after that time, but before news of the President's signature was released to the press that same day.<sup>13</sup> The trial court, in convicting the defendant, noted that it would have imposed the same punishment under either the prior statute or the new one.<sup>14</sup>

The appellate court, in upholding the defendant's conviction, was faced with the argument that the bill did not become law until its existence was made known.<sup>15</sup> To determine the act's effective date the court reviewed historical English practice concerning the effective

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Dictionary 2749 (3d rev. 8th ed. 1914). It denotes "the proclamation or announcement of the edict or statute as a preliminary to its acquiring the force and operation of law." Black's Law Dictionary 1396 (rev. 4th ed. 1968).

9. 434 F.2d 415 (D.C. Cir. 1970).

10. Act of Dec. 27, 1967, Pub. L. No. 90-226, 81 Stat. 736 (Burglary in the first degree) (current version at D.C. Code Ann. § 22-1801(a) (1981)); Act of Dec. 27, 1967, Pub. L. No. 90-226, 81 Stat. 737 (Robbery) (current version at D.C. Code Ann. § 22-2901 (1981)).

11. 434 F.2d at 416.

12. *Id.*

13. *Id.* at 416-17.

14. *Id.* at 417 n.9.

15. *Id.* at 417.

date of statutes. The court noted that prior to 1793 an act was considered effective as of the first day of the Parliament in which it was enacted. In 1793, Parliament corrected the retroactive effect of that common-law rule by enacting a statute making the date of enactment the effective date.<sup>16</sup> In the absence of a similar statute of Congress, the court announced the American rule by interpreting two early United States Supreme Court cases as deciding that acts take effect upon their approval by the President.<sup>17</sup> Reference was also made<sup>18</sup> to a statement by the Supreme Court in the 1873 case of *Lapeyre v. United States*<sup>19</sup> to the same effect. The court did note a conflicting precedent, *The Cotton Planter*,<sup>20</sup> but distinguished that case on its facts.<sup>21</sup>

Concluding that the act took effect on the day when it was signed by the President, the court next examined the question of exactly when on that day it became effective. The court reviewed conflicting precedents on this point, but concluded that the 1878 Supreme Court decision of *Burgess v. Salmon*<sup>22</sup> was controlling, and that the bill became law upon the act of signing.<sup>23</sup> Finally, addressing the defendant's argument that lack of notice was tantamount to ex post facto imposition of a penalty, the court stressed the publicity given to congressional action on the bill prior to its signing by the President.<sup>24</sup> The court also cited to Lord Coke, who purportedly stated that the proclamation of statutes was not necessary because the public was presumed to know what Parliament enacted.<sup>25</sup> The precedential support cited by the *Casson* court is impressive and, although there is room for substantial challenge to its theoretical and historical underpinnings,<sup>26</sup> it would probably be taken by most American courts as an accurate exposition of the law.

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16. *Id.* at 418-19. The court noted that the effect of the statute of 1793 was to "correct [the] 'great and manifest injustice' " of the common law. *Id.* at 419.

17. *Id.* at 419 & n.15. (relying on *Gardner v. Collector*, 73 U.S. (6 Wall.) 499 (1867) and *Matthews v. Zane*, 20 U.S. (7 Wheat.) 164 (1822)). The *Casson* court stated this proposition as being "held" in *Gardner*, although that case only dealt with the year in which an act became effective.

18. 434 F.2d at 419 n.15.

19. 84 U.S. (17 Wall.) 191 (1873).

20. 6 F. Cas. 620 (C.C.D.N.Y. 1810) (No. 3,270).

21. 434 F.2d at 419 n.15.

22. 97 U.S. 381 (1878).

23. 434 F.2d at 419; *see* *United States v. Will*, 449 U.S. 200, 225 n.29 (1980) (applying *Burgess* to determine the time of day when a statute affecting federal executive and judicial pay increases took effect).

24. 434 F.2d at 420-22.

25. *Id.* at 418-20 & n.17. Actually this idea was not Coke's; he was merely quoting a statement in an earlier case without expressing any approval of that statement. *See* 4 E. Coke, *The Institutes of the Laws* 26 (5th ed. 1671).

26. The theory and precedents actually date back to the 1365 English case of *Rex v. Bishop of Chichester*, Y.B. Pasch. 7, 39 Edw. 3 (1365), summarized in 4 E. Coke, *supra* note 25, at 26. That case is generally accepted as stating the law, although a

The *Casson* court's approach contrasts sharply with a more recent decision in the Northern District of Oklahoma. In the 1977 case of *Armstrong v. Maple Leaf Apartments, Ltd.*,<sup>27</sup> that court dealt with an action by an Indian seller of land seeking to void a deed that had not complied with the requirements of a 1947 federal statute.<sup>28</sup> The statute in question had never been codified in the United States Code, although it had been published when it was passed and was mentioned in a footnote to the Code.<sup>29</sup> The court held that publication at passage in 1947 was not sufficient notice of the act's continued existence in 1965, the time of the land transaction.<sup>30</sup> Citing the Supreme Court's landmark opinion in *Mullane v. Central Hanover Bank & Trust Co.*,<sup>31</sup> the court stated that notice was a primary element of due process and that taking the defendants' property on the basis of that statute would violate their due process rights under the fifth amendment.<sup>32</sup>

The conflict between these two cases finds its origin in two American cases that were decided more than a century and a half before *Casson*. In 1810, Circuit Justice Livingston addressed the need for publication of congressional enactments in the case of *The Cotton Planter*.<sup>33</sup> The district court in New York had condemned the ship "The Cotton Planter" as forfeited to the United States.<sup>34</sup> The ship had been cleared from a Georgia port on January 15, 1808, by the port collector. It sailed to Antigua and then returned with a new cargo to the port of New York. An act laying an embargo on such shipments had been passed on December 22, 1807,<sup>35</sup> and a supplementary act was passed on January 9, 1808.<sup>36</sup> Defendants established at trial that the port collector in Georgia had not received a copy of the law until after the ship had sailed, and that they themselves were ignorant of the acts.<sup>37</sup> The acts were silent as to their effective date.<sup>38</sup>

The government argued that ignorance was no excuse and, apparently relying on prior English doctrine,<sup>39</sup> insisted that the ship's opera-

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line of cases, epitomized by *The Cotton Planter*, 6 F. Cas. 620 (C.C.D.N.Y. 1810) (No. 3,270), challenges that ancient foundation.

27. 436 F. Supp. 1125 (N.D. Okla. 1977), *aff'd on other grounds*, 622 F.2d 466 (10th Cir. 1979), *cert. denied*, 449 U.S. 901 (1980).

28. Act of Aug. 4, 1947, ch. 458, 61 Stat. 731.

29. 436 F. Supp. at 1145.

30. *Id.* at 1145-46.

31. 339 U.S. 306 (1950).

32. 436 F. Supp. at 1146. This was just one of several alternative holdings in favor of defendants.

33. 6 F. Cas. 620 (C.C.D.N.Y. 1810) (No. 3,270).

34. *Id.* at 620.

35. Act of Dec. 22, 1807, ch. 5, 2 Stat. 451 (repealed 1809).

36. Act of Jan. 9, 1808, ch. 8, 2 Stat. 453 (repealed 1809).

37. 6 F. Cas. at 620.

38. *Id.* at 621.

39. *Id.*

tors were presumed to know the law. Justice Livingston, in a strongly worded opinion, rejected the government's arguments, noting that this position was at least inconsistent with the ex post facto provision in the federal Constitution.<sup>40</sup> He emphasized the government's invariable past practice of notifying each port's collector of the enactment of any new law affecting seagoing commerce.<sup>41</sup> At least in dealing with the laws of trade, actual practice and principles of justice and humanity convinced Justice Livingston "that such laws should begin to operate in the different districts only from the times they are respectively received"<sup>42</sup> unless the person charged with their violation was actually aware of them. Accordingly, he reversed the district court's judgment.<sup>43</sup>

Two years after *The Cotton Planter*, Circuit Justice Story was faced with a case presenting similar questions under the same embargo acts. In *The Ann*,<sup>44</sup> the facts of the brig Ann's comings and goings were more complicated than were those in *The Cotton Planter*; it was established that the ship's operators knew of the first embargo act before they sailed, but were ignorant of the second act, under which they were charged. Although Justice Story noted that the operators "were acting manifestly in violation of the original act, laying an embargo,"<sup>45</sup> he proceeded to analyze the case in disregard of that fact in applying the second embargo act.<sup>46</sup>

Justice Story found appealing the operators' argument that the embargo act had to be duly promulgated, observing that "[i]t would seem founded in the principles of good sense, and natural equity."<sup>47</sup> In examining the English authorities, however, he relied<sup>48</sup> particularly on the ancient case of *Rex v. Bishop of Chichester*,<sup>49</sup> which held that proclamation is not necessary for a law to become effective.<sup>50</sup> He also considered English cases which held that statutes operated from the first day of a Parliamentary session,<sup>51</sup> as well as the statute enacted by Parliament in 1793, which made the effective date of statutes their

40. *Id.*

41. *Id.* at 622.

42. *Id.* at 621.

43. *Id.* at 623.

44. 1 F. Cas. 926 (C.C.D. Mass. 1812) (No. 397).

45. *Id.* at 927.

46. *Id.*

47. *Id.*

48. *Id.*

49. Y.B. Pasch. 7, 39 Edw. 3 (1365), summarized in 4 E. Coke, *supra* note 25, at 26.

50. *Id.*

51. 1 F. Cas. at 927. For cases demonstrating the English practice prior to 1793, see *The King v. Thurston*, 83 Eng. Rep. 312 (B.R.), followed in *Pantor v. Attorney General*, 2 Eng. Rep. 1217 (H.L. 1772), which imposed a duty retroactively, and *Latless v. Holmes*, 100 Eng. Rep. 1230 (K.B. 1792), which retroactively voided an annuity.

date of enactment.<sup>52</sup> Although finding great difficulty with the reasoning of the English principles, he felt compelled to yield to their dictates, noting also that he could not find a single opposing authority.<sup>53</sup> With that conclusion, he affirmed the district court's decree for the government.<sup>54</sup> Three years after *The Ann*, writing for the Supreme Court, Justice Story restated his conclusion in *Arnold v. United States*,<sup>55</sup> essentially ensuring the establishment in American law of the principle that laws need not be published to take effect or to remain binding.

This view was restated in 1873 in *Lapeyre v. United States*,<sup>56</sup> another of the cases cited by the *Casson* court. In *Lapeyre*, the question was whether a Presidential proclamation recognizing the end of the Civil War took effect on the day the President signed it, or the day it was published, three days later. The government argued for the later date, to permit imposition of wartime duty for the three-day period. The Court, voting 5 to 4, held that the proclamation took effect when it was signed, and refused to require publication as a prerequisite.<sup>57</sup> According to the Court, since it could not be expected even after publication that all parts of the country would learn of a statute or proclamation at the same time, this rule was the only one that would guard against variations in the effective date.<sup>58</sup>

The Sixteenth Century treatise on English law, Saint Germain's *Doctor and Student Dialogues*,<sup>59</sup> concluded that publication of laws was done by the government as a mere "favour" to the people.<sup>60</sup> The school of thought that followed from the *The Ann* to *Casson* adheres to that view. This view, however, is inconsistent with American constitutional law and is unsupportable in its policy implications.

A better approach is illustrated by an innovative and ambitious project established by the New Jersey Truth-in-Renting Act.<sup>61</sup> Under that act, the New Jersey Department of Community Affairs is required to prepare, distribute and update annually a statement of established rights and responsibilities of residential landlords and tenants in that state.<sup>62</sup> Landlords must then provide a copy of that statement to each tenant and post a copy on the property.<sup>63</sup>

52. 1 F. Cas. at 927 (construing the effect of Stat. 33 Geo. III. c. 13).

53. *Id.* at 928. Notably, however, Justice Story made no reference to *The Cotton Planter*.

54. *Id.*

55. 13 U.S. (9 Cranch) 103 (1815).

56. 84 U.S. (17 Wall.) 191 (1873).

57. *Id.* at 197-200.

58. *Id.* at 199.

59. Saint Germain, *Doctor and Student Dialogues* (W. Muchall ed. 1874).

60. *Id.* at 249.

61. N.J. Stat. Ann. §§ 46:8-43 to -49 (West Supp. 1982-1983).

62. *Id.* § 46:8-45.

63. *Id.* § 46:8-46.



Public hearings were held to prepare the original statement, with input received from both landlords and tenants. No appropriation had been provided for the statement, so the end result was confined to one page, a 14-1/2 inch by 23 inch sheet. Subsequent to its distribution, the sheet was submitted to an educational testing service to determine its readability; the service concluded that it met a seventh grade reading level.<sup>64</sup> The statement contains a disclaimer that it is neither exhaustive nor detailed and advises landlords and tenants to consult with an appropriate agency, organization or counsel if they intend to take action in accordance with the statement. The scope of the statement is impressive, covering such areas as rent increases, discrimination, crime insurance, eviction, condition of the rental premises and rent withholding remedies. The Truth-in-Renting statement offers an example of what can be done to advance knowledge and awareness of the law.

## II. THE CONSTITUTION AND PROMULGATION

If the United States Constitution set a date or listed preconditions for the effectiveness of a law, much of this review of the basic promulgation question in American law could end at this point. The Constitution, however, has no such specificity. The court in *United States v. Casson* was able to draw an "inescapable conclusion" from article I, section 7, that bills become law when signed by the President,<sup>65</sup> but no such conclusion is actually dictated. Article I, section 7, simply does not say that a bill is a law upon signature, notwithstanding the ease with which that could have been specified.

### A. *The Ex Post Facto Provisions*

The parts of the Constitution that do address the English theories on legislation and effective dates are the ex post facto provisions.<sup>66</sup> At least as to penal legislation, they effectively abolish the English common-law rule on the effective date of statutes. The ex post facto provisions are intended to prevent criminalization of those actions that were not punishable at the time they were committed.<sup>67</sup> The rationale is that before a law is passed it is not possible for a person to know that his actions are criminal.<sup>68</sup> Similarly, before an act's exist-

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64. Telephone interviews with Cynthia Wilk, Program Development Specialist, New Jersey Department of Community Affairs (Mar. 16, 1977) (Nov. 22, 1978). Ms. Wilk was the author of the first draft of the Statement.

65. 434 F.2d at 418.

66. U.S. Const. art. 1, § 9, cl. 3; *id.* art. 1, § 10, cl. 1.

67. A statute violates the ex post facto provisions when it "imposes a criminal penalty for past conduct that was lawful when performed." J.E. Nowack, R.D. Rotunda & J.N. Young, *Constitutional Law* 434 (1978).

68. *See* L. Tribe, *American Constitutional Law* 477-82 (1978).

tence is made known, it is not possible for a person to know that his actions are punishable.<sup>69</sup> Therefore, the ex post facto provisions arguably require by analogy at least some form of pre-enactment notification for all penal legislation.

The ex post facto argument was addressed by the *Casson* court, which concluded that pre-enactment publicity eliminated the problem.<sup>70</sup> A bill, however, is not a law; it has no legal effect until the time of signature and anyone who guides his conduct in accordance with pending bills will quickly discover that simple truth. Certainly, the mere fact that a bill received publicity from the date of its introduction in Congress would not mean it could be used to punish behavior as of that introduction date if it received Presidential approval some time in the future. The ex post facto provisions were never thought to contain an exception for well-publicized bills. On this point, then, *Casson* gives us uncertain guidance, and no other case fully addresses the issue in the context of criminal legislation.

### B. *The Due Process Clause*

To suppose that a statute, an administrative rule or an executive proclamation could penalize a person's conduct when it was impossible for the person to know of the law raises an elementary issue of fairness. If a citizen cannot be tried and convicted without first being notified of the allegations against him, can he be convicted of an offense committed with no prior notice of the applicable law? If the due process provisions of the Constitution<sup>71</sup> prohibit the former, would they permit the latter?

The Supreme Court has stated that certain requirements of notice are inherent in the nature of due process.<sup>72</sup> Before one can be deprived of life, liberty or property by adjudication, there must be notice and an opportunity to be heard appropriate to the case.<sup>73</sup> In *Mullane v. Central Hanover Bank & Trust Co.*,<sup>74</sup> the Court discussed the question of notice in the context of a civil proceeding. In that case, the only notice given was by publication in a local newspaper. The Court advised that notice of an adjudication must reasonably be calculated

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69. See *The Cotton Planter*, 6 F. Cas. 620, 621 (C.C.D.N.Y. 1810) (No. 3,270); Hall & Seligman, *Mistake of Law and Mens Rea*, 8 U. Chi. L. Rev. 641, 658 (1941); Lanham, *Delegated Legislation and Publication*, 37 Mod. L. Rev. 510, 514 (1974).

70. 434 F.2d at 419-22.

71. U.S. Const. amend. V; *id.* amend. XIV, § 1.

72. E.g., *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *Lambert v. California*, 355 U.S. 225, 228 (1957); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

73. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

74. 339 U.S. 306 (1950).

to apprise interested parties of the proceeding and afford them an opportunity to be heard. In the absence of a method that would produce a reasonable certainty of informing all those affected, the Court stated that the method chosen must not be "substantially less likely to bring home notice than other of the feasible and customary substitutes."<sup>75</sup> In *Mullane*, the notice was held inadequate as to those with a known interest, because it was "not reasonably calculated to reach those who could easily be informed by other means at hand."<sup>76</sup>

The question is whether these same due process standards apply to notice of the passage of a law. At least one Supreme Court decision, predating *Mullane*, upheld the constitutionality of an act's taking immediate effect against a claim that this was unreasonable or arbitrary. In *Jacob Ruppert Corp. v. Caffey*,<sup>77</sup> the Court concluded that the Volstead Act had taken immediate effect.<sup>78</sup> No issue of notice or promulgation was considered in that case, however, and the Court stressed the emergency nature of the measure.<sup>79</sup>

After *Mullane*, the question was explicitly put to the Court in *Lambert v. California*.<sup>80</sup> In that case the Court reversed a defendant's conviction for failure to register as a convicted person with the municipality in which she had resided for seven years.<sup>81</sup> Justice Douglas, writing for a divided Court, acknowledged the doctrine that ignorance of the law is no excuse, but concluded that the due process clause limits that concept, and that "[e]ngrained in our concept of due process is the requirement of notice."<sup>82</sup> The Court cited *Mullane* as one of the cases illustrating this point.<sup>83</sup> The conclusion of the Court was that either actual knowledge of the registration requirement, or proof of the probability of such knowledge, was necessary to obtain a conviction.<sup>84</sup> A similar conclusion was reached by the district court in the 1977 decision, *Armstrong v. Maple Leaf Apartments, Ltd.*<sup>85</sup>

In both *Lambert* and *Armstrong* the parties had ample opportunity to learn of the law; in *Lambert*, seven years,<sup>86</sup> in *Armstrong*, eight-

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75. *Id.* at 315.

76. *Id.* at 319.

77. 251 U.S. 264 (1920).

78. *Id.* at 301-02.

79. *Id.*

80. 355 U.S. 225 (1957).

81. *Id.* at 229-30.

82. *Id.* at 228.

83. *Id.*

84. *Id.* at 229.

85. 436 F. Supp. 1125, 1146 (N.D. Okla. 1977) (required actual notice or knowledge), *aff'd on other grounds*, 622 F.2d 466 (10th Cir. 1979), *cert. denied*, 449 U.S. 901 (1980).

86. 355 U.S. at 226.

een.<sup>87</sup> The factual bases for these cases may therefore be challenged,<sup>88</sup> and certainly more compelling cases could be imagined, but the basis has been established for the application of *Mullane*. If the due process clause prevents one from being punished or losing property in litigation without prior notice, and prevents the operation of an injunction before notice of the order is provided,<sup>89</sup> would it not also require notice before the effective date of the very law on which the later adjudication is based? It is difficult to dispute the proposition that the opportunity to conform one's behavior to the law is at least as fundamental an entitlement as the opportunity to defend one's behavior after the fact.

In addition to the teachings of *Mullane* and the analogy of required notice in the litigation context, due process notions require that "persons have a right to fair warning of that conduct which will give rise to criminal penalties."<sup>90</sup> This "fair warning" concept bars judicial action that would have an ex post facto effect<sup>91</sup> and also bars criminal statutes that are too vague to be understood by men of common intelligence.<sup>92</sup> If, as the Supreme Court said in *Marks v. United States*,<sup>93</sup> the fair warning notion is "fundamental to our concept of constitutional liberty,"<sup>94</sup> then one could readily conclude that due process requires some warning before new laws, or at least new criminal statutes, take effect. It would indeed be anomalous if due process prohibited statutes from being so vague that one would have to guess at their meaning while permitting laws to be effective before one could guess that they existed.

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87. 436 F. Supp. at 1128.

88. Under *Mullane*, one would expect the analysis to turn on the reasonableness of the notice provided under the circumstances. A determinative factor in both cases was probably the otherwise innocuous conduct of the parties claiming ignorance. As the Court noted subsequently in commenting on *Lambert*, "[b]eing in Los Angeles is not *per se* blameworthy." *United States v. Freed*, 401 U.S. 601, 608 (1971).

89. *See United States v. Baker*, 641 F.2d 1311 (9th Cir. 1981). The *Baker* court admonished district courts issuing broad injunctions to consider suggestions for notification and specify the procedures to be followed. *Id.* at 1317 & n.8. The court's logic applies equally well to newly enacted laws.

90. *Marks v. United States*, 430 U.S. 188, 191 (1977).

91. *Id.*; *State v. Moyer*, 387 A.2d 194, 197 (Del. 1978). Applying *Marks*, it should be expected that any promulgation duty would extend to judicial decisions to at least the same extent that the prohibition against judicial determinations having an ex post facto effect applies.

92. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 Wm. & Mary L. Rev. 671, 674, 680 (1976).

93. 430 U.S. 188 (1977).

94. *Id.* at 191.

### C. What Notice Is Required?

Assuming that notice of a law's existence is required, the standard necessary to satisfy this requirement must be ascertained. A reading of *Mullane* suggests that simply presuming knowledge or notice at the moment of a law's enactment<sup>95</sup> is not sufficient. In *Mullane*, although there was at least some publication, it was held insufficient. The *Mullane* Court's approach is to balance the interests of the state against those of the individuals involved.<sup>96</sup> In Part III of this Article, those competing interests are examined more closely, but at this stage it is assumed that the interests of the citizens are substantial enough to place at least some weight in the balance.

The possibility of claiming constructive notice based on theoretical concepts has been further eroded by the logic of the Supreme Court's decision in *Shaffer v. Heitner*,<sup>97</sup> in which the Court held that assertions of state jurisdiction based on the *in rem* or *quasi in rem* presence of the defendant must be measured by the minimum contacts standard.<sup>98</sup> This suggests that the mere presence of one's property is not synonymous with the presence of one's person. This attention to reality seriously erodes the notion that one's vote for a congressman makes him present at the signing of a bill or the issuance of an administrative rule.<sup>99</sup>

Even more inconsistent with the use of presumptions of knowledge than *Shaffer* is the implication of *Miranda v. Arizona*.<sup>100</sup> The Constitution is the most fundamental law of the United States, yet in *Miranda* the Court specifically required that criminal defendants be advised of their constitutional rights.<sup>101</sup> The Court rejected inquiries into the knowledge of individual defendants in individual cases; all defendants had to be educated in this fundamental law. If every criminal defendant, no matter what his actual knowledge and experience, is presumed not to know of rights established by the adoption of the Bill of Rights,<sup>102</sup> that same defendant cannot be presumed conclu-

95. This presumption has been a theoretical underpinning for the nonpromulgation position since the first case on the subject, *Rex v. Bishop of Chichester*, Y.B. Pasch. 7, 39 Edw. 3 (1365), summarized in 4 E. Coke, *supra* note 25, at 26.

96. 339 U.S. at 313-14.

97. 433 U.S. 186 (1977).

98. *Id.* at 207-12.

99. See *id.* at 217-18. Justice Stevens concurred in the decision because the state statute at issue created "an unacceptable risk of judgment without notice." *Id.* at 218.

100. 384 U.S. 436 (1966).

101. *Id.* at 467-79.

102. An earlier Ninth Circuit decision had held that a defendant is presumed to know of his right to counsel. *Harpin v. Johnston*, 109 F.2d 434 (9th Cir.), cert. denied, 310 U.S. 624 (1940). The District of Columbia Circuit, two years later, specifically rejected *Harpin* and this presumption, stating that "[t]here is no more

sively to know of an unpublished statute that was signed just hours before he violated it. Both *Miranda* and *Shaffer* may be read to suggest that the use of such presumptions will not survive constitutional scrutiny in the absence of a strong, countervailing state interest when serious rights and interests of citizens are impinged.

From this review of the constitutional elements of the promulgation question, it can be concluded that the Constitution offers no imprimatur on the nonpromulgation position. Both the ex post facto provisions and the due process clauses present barriers to the immediate effectiveness of a law prior to promulgation. That the idea of unpublished law is so uncharacteristic of Anglo-American law, however, raises one additional question. If this does offend notions of fairness and due process, why is it not specified in the Constitution? The best answer to this may be that it was so basic that it was not thought necessary to spell out.<sup>103</sup>

When the word "law" was used in the Constitution, it was incorporated with all of its historic baggage. Notwithstanding the negative pronouncements of English and American legal theory on the subject of promulgation, in actual historic practice English and American laws have usually been published and made available.<sup>104</sup> Thus, it may have been thought no more necessary to spell this out than it would have been to add to article III a definition of the word "court." Although there is no constitutional provision giving a court the specific power to control proceedings before it, such control simply inheres in the nature of a court.<sup>105</sup> Seen in this analogous light, the mere use of the word "law" includes the requirement of promulgation in the lawmaking process.

basis for such a presumption than for one that a defendant understands the rules governing the sufficiency of indictments, the admissibility of evidence, and the burdens of proof, or other rules . . . of law." *Evans v. Rives*, 126 F.2d 633, 639 (D.C. Cir. 1942).

103. See L. Fuller, *Anatomy of the Law* 60-62 (1968).

104. See, e.g., 1 W. Blackstone, *Commentaries* \*45-46 (noting the ways English law was promulgated, including the observation that notification "by writing, printing, or the like . . . is the general course taken with all our acts of parliament"); U. Lavery, *Federal Administrative Law, Its Practice and Application* 403 (1952) (observing the converse of this observation, that "[t]here is no evidence of history, either in England or America, of a studied governmental effort to keep the laws from the people"); Record Commission, *An Historical Survey of Ancient English Statutes*, in 2 *Select Essays in Anglo-American Legal History* 202-05 (1908) [hereinafter cited as *Record Commission*]. On American law, see the Act of Sept. 15, 1789, ch. 14, § 2, 1 Stat. 68, passed in the first session of Congress, which required newspaper publication of new laws.

105. See Comment, *State Court Assertion of Power to Determine and Demand Its Own Budget*, 120 U. Pa. L. Rev. 1187, 1191, 1197 & nn. 70-73 (1972).

### III. WEIGHING THE BENEFITS OF PROMULGATION

Whether we are applying due process standards, or attempting to discern on a prospective basis the best approaches to lawmaking, the next step in this analysis of promulgation is the balancing of competing interests.

#### A. Certainty

One key objective of those favoring immediate effectiveness for new laws is certainty. The state and its citizens have a strong interest in setting an exact time when a new law takes effect, and in having a provable record of that exact time. To the *Lapeyre* Court, the only such time was when the President signed his name.<sup>106</sup> While there can be no disagreement with the need for certainty, analysis of the *Lapeyre* Court's result suggests that the rule adopted there creates more, not less, uncertainty.

The first issue raised by the *Lapeyre* approach is when, in fact, was a statute or order actually signed. In *Lapeyre*, the Court rejected a publication requirement because "[i]t would make the time of taking effect depend upon extraneous evidence."<sup>107</sup> Yet five years before *Lapeyre*, in *Gardner v. Collector*,<sup>108</sup> the Court had already opened the door to using any such extraneous evidence that might be necessary to determine when a statute took effect.<sup>109</sup> *Lapeyre* in effect turned attention away from the publication date, which by its nature would be a matter of public knowledge, to the potentially less provable moment when one individual signed the document in question.

Beyond this point, however, *Lapeyre* introduced a much more serious element of uncertainty: How does society know whether a particular law ever existed if promulgation is not required? The potential problems, and the value of promulgation, are illustrated by the facts of two cases. In the early case of *Pallas v. Hill*,<sup>110</sup> the Virginia Supreme Court had to determine whether a manuscript law from 1691 had in fact been enacted. The central records had previously been destroyed, but because the custom had been to distribute copies of the laws to the various clerks of the counties, enough copies remained extant to verify the status of the law. Without such publication, there would have been no lasting record of the law.<sup>111</sup>

106. *Lapeyre v. United States*, 84 U.S. (17 Wall.) 191, 198 (1873).

107. *Id.* at 199.

108. 73 U.S. (6 Wall.) 499 (1868).

109. *Id.* at 511. According to *Gardner*, if the record of a statute is lost or destroyed, a judge can take notice of the statute by any means available.

110. 12 Va. (2 Hen. & M.) 149 (1807).

111. *Id.* at 150; see *In re D'Addario v. McNab*, 32 N.Y.2d 84, 89, 295 N.E.2d 792, 794, 343 N.Y.S.2d 124, 128 (1973) (emphasizing the importance of publication and notice, not for the purpose of informing the public, but to record significant political events in a publicly accessible place).

A more serious risk is presented by the facts of *Street v. United States*,<sup>112</sup> decided by the Court of Claims in 1889. In that case the court was asked to consider whether a document produced from the files of the War Department, which purported to be an order of the President signed by the Secretary of War on December 31, 1870, but entitled "General Orders 000," dated "December 000, 1870," was in fact an effective order. The court rejected the document and relied on a subsequent order that had been duly promulgated and carried into effect.<sup>113</sup> Thus, the problems presented by nonpromulgation are obvious. If promulgation is not required, what prevents the "finding" after the fact of an "order," or even a signed statute, with an earlier date? Promulgation assures society that there will be a lasting, certain record of the law, and that the only laws in effect are those in the public domain.

Promulgation also helps assure the legitimacy of a law. In at least one case, the Supreme Court refused to accept as the true language of a statute the words of a manuscript statute that had been "disinterred from the lumber room of obsolete documents,"<sup>114</sup> relying instead on the version that had been published for thirty years.<sup>115</sup> Once published, a statute is open to review by legislators who can object to any inaccuracies in the published version. Also, the new law is thereby made subject to popular review.

### B. Expense

A second policy argument in support of nonpromulgation is cost—a promulgation requirement is expensive. This has appeal because inaction reduces expenses, at least on a first cost basis. That view of costs, however, is open to serious dispute. The relatively small initial expense of publication will help to avoid the much more burdensome costs of subsequent litigation that result when the public acts in ignorance of the law. Providing information about the law to those whose conduct is regulated by that law should increase the efficiency of the regulation and decrease administrative and enforcement costs.<sup>116</sup>

In addition to administrative savings, another cost element must be considered. Ignorance of the law causes greater societal cost and inconvenience because the policy behind the law is not put into effect immediately. If something is important enough to be made into law, then it is important enough to be made known. For example, one would have to weigh the cost of publication of a safety regulation

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112. 24 Ct. Cl. 230 (1889), *aff'd*, 133 U.S. 299 (1890).

113. *Id.* at 249-50.

114. *Pease v. Peck*, 59 U.S. (18 How.) 595, 599 (1856).

115. *Id.*

116. See 1 F. Cooper, *State Administrative Law* 236-37 (1965); Gifford, *Report on Administrative Law to the Tennessee Law Revision Commission*, 20 Vand. L. Rev. 777, 813 (1967).



against the loss to society from accidents resulting from ignorance of the regulation. Of course, not all laws merit the same degree of publicity; there should be a rational relationship between the nature of the law and the degree of publicity required.<sup>117</sup>

### C. Ignorantia Legis Neminem Excusat

In addition to the certainty and expense arguments, the policies behind the doctrine that ignorance of the law is no excuse (*ignorantia legis neminem excusat*, hereinafter "*ignorantia legis*"), arguably support the nonpromulgation position. The first policy objective would be to avoid difficult issues of proof, either as to an individual's knowledge of the law<sup>118</sup> or as to the adequacy of the promulgation. The second objective of the *ignorantia legis* maxim is to encourage citizens' knowledge of the law by putting the burden on them to find it.<sup>119</sup>

As to the first point, a consideration of the promulgation alternatives is required. If a law is placed on the public record for a set number of days, its status is easier to prove than if it were locked away in the President's desk. Certainly the burden of proof would be no greater than trying to determine the day or year of the President's signature on a statute. If an effective requirement of promulgation were imposed, there would then be no justification for a plea of ignorance of the law, and no occasion to examine the mental state of individual parties.

Additionally, the *ignorantia legis* maxim cannot encourage knowledge of the law when the law is not made available to the public. If knowledge is to be encouraged, the opportunity to obtain that knowledge must first be provided. Until there is at least some initial publicity, the public will not know enough to inquire about the law. Again, the key to the policy issue is one of alternatives. Requiring the government to educate every citizen on every element of the law would conflict with the philosophy of *ignorantia legis*. On the other hand, the *ignorantia legis* maxim may serve a rational purpose once the public is given notice of the existence of the law. Only at that point could a duty of further inquiry be placed on the citizenry.

### D. Broad Publication

It may be asserted that an increased emphasis on publication would serve no useful purpose because most people do not follow develop-

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117. The range of alternatives is substantial, and can be tailored to the class of those regulated and the importance of the regulation. See *infra* pt. IV. A requirement imposing publication costs that are so high as to prohibit the enactment of needed legislation suffers from a lack of thoughtful analysis of the need for publication in particular cases.

118. 1 J. Austin, *Jurisprudence* 342 (3d ed. 1869).

119. O. Holmes, *The Common Law* 48 (1881).

ments in the law, and therefore, will not read publications of statutes and rules. This same criticism, however, can be addressed toward the whole idea of democracy. Regardless of whether most citizens refrain from voting or from keeping abreast of the law, they should be given the opportunity to make that decision, and not have it made for them. Concededly, the idea of publishing every statute and administrative rule in a general circulation newspaper or on television has little or no appeal. Alternatives, however, can be formulated for the specific publication needs of each category of law.

Obviously, the average citizen is not interested in most areas of the law. Just as obvious, however, is that each area of the law has its own constituency, which may show a high degree of concern for those laws that affect its interests. It is too facile to assume that anyone who has an interest in a law will find out about it, because in the absence of a promulgation requirement, the affected constituency, or at least the unorganized parts of that constituency, may not even have notice of the existence of a new law until they have been harmed by their ignorance.

#### IV. APPROACHES TO PROMULGATION IN CURRENT USE

Apparent from a review of the history of promulgation is that a variety of approaches to promulgation are in use. These approaches offer a spectrum of choices, ranging from a lack of concern for promulgation to an open-ended publication standard, and beyond even that to the requirement that every person affected must be advised individually of the law. The following analysis will survey these alternatives and evaluate some of their strengths and weaknesses.

##### A. *Nonpromulgation*

The first pole of the spectrum is the nonpromulgation position. From this perspective, a law may take effect even before it is enacted and certainly at any time thereafter. Neither promulgation nor availability of the law is required. Despite the questions raised by this position, its limited applicability in certain cases may still be appropriate. If a law is universally known, such as one reflecting common-law mores, additional promulgation may serve no purpose. Also, if a law is enacted which benefits the public at the expense of the government, there may be reason to give the enactment immediate effect, although subsequent publicity is still essential.

##### B. *Pre-Enactment Publicity*

A step removed from this polar position is the concept of pre-enactment publicity. Under this approach, the necessary promulgation occurs during the lawmakers' public deliberations prior to enactment. This argument was used by the *Casson* court to reject a

constitutional challenge based on the ex post facto provision.<sup>120</sup> This approach does show a concern for fairness and recognizes the value of publication. Also, it may be argued that legislative consideration of proposed acts invites and permits the participation of the public, which therefore could be held to notice of what the legislature was considering.

Pre-enactment publicity, however, is only a partial substitute for effective promulgation. The first objection to relying on this approach is that not all lawmaking is public; executive lawmaking, for example, may be done completely without prior notice. Administrative lawmaking, in the absence of statutorily dictated hearing requirements, is subject to the same defect. Even legislative lawmaking may take place too rapidly for the generation of any meaningful publicity.<sup>121</sup>

Even when lawmaking is public, the publicity generated is not directed toward educating the public. No uniform and conscious standard is devised for the publicizing of the proceedings; the public information generated is haphazard and an incidental byproduct of the political process. Moreover, because a legislative proposal is not an official act of the government, the publicity is always unofficial.

The key weakness of the pre-enactment publicity approach, however, is that a bill or a proposed rule has no legal effect until it is passed. It is difficult enough for the public to keep up with the numerous laws enacted each year; no one could be held accountable for the even greater number of bills and proposed rules.<sup>122</sup> Also, more than one bill is frequently proposed on any given subject, and the bill that happens to be passed may be transformed by the amendment process. When published proposals are not adopted, pre-enactment publicity will have distributed erroneous information to the public. In fact, it may well be argued that the greater the pre-enactment publicity, the greater the need for post-enactment promulgation efforts to clarify the state of the law. Even if a person does have knowledge of a bill, in the absence of a promulgation requirement he has no way of knowing if or when it is signed. In fact, notice provided by pre-enactment publicity is oriented not towards educating the public of the end result of the process, but rather towards providing an opportunity to participate in the lawmaking process.<sup>123</sup>

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120. *United States v. Casson*, 434 F.2d 415, 419-22 (D.C. Cir. 1970).

121. Comment, *Administrative Orders—Publication and Notice to Defendant—The Regulations Acts of Manitoba and Ontario*, 24 Can. Bar Rev. 149, 150 (1946).

122. See Geronazzo & Jonsson, *Promulgation of Statutory Orders at Common Law*, 2 U. Brit. Colum. Legal Notes 603, 608 (1958) (challenging the premise that the publicity afforded a statute before enactment will be substantial). The authors note that only relatively few statutes receive enough publicity to reach the average person, and this publicity may be inaccurate and incomplete. *Id.*

123. This distinction is recognized in the Administrative Procedure Act, which requires both pre-enactment publicity and post-enactment publication in the Federal Register. *Rowell v. Andrus*, 631 F.2d 699, 699-704 (10th Cir. 1980).

Although pre-enactment publicity is not promulgation, it nevertheless can aid in the promulgation process. Moreover, in limited circumstances it may serve the same purposes. In those cases in which enactment is by direct popular vote, such as a constitutional amendment enacted by referendum, a far more compelling case exists that promulgation occurs before enactment. Usually such referenda are "yes/no" propositions, causing less uncertainty than would be the case in the legislative process. When the people participate directly, all that may be needed is publication of the election result.

### C. Formal Rules

The next position in the spectrum of promulgation choices comprises what may be called formal rules. Under this rubric are three categories: 1) the fixed wait; 2) record deposit; and 3) record publication. Each one serves at least some aspect of the need for promulgation. Combinations of these three have been used in some systems.<sup>124</sup> They are characterized by the use of fixed, objectively discernible standards, dictated by constitutional law or by statute. They are also "formal" in the sense that they do not call for the exercise of discretion on the part of the promulgators.

#### 1. The Fixed Wait Approach

The first of these standards is the fixed wait. This requires the lapse of a defined period of time before an act takes effect, and is a common device used by states.<sup>125</sup> The setting of a fixed wait is characteristically imposed by a state's constitution<sup>126</sup> or by statute.<sup>127</sup> Requirements set by state constitutions vary both in the length of the time lapse required<sup>128</sup> and in the starting point for calculating that lapse.<sup>129</sup> The simplest approach is probably that of the Alaska and West Virginia Constitutions, which require a ninety-day wait from the date of enactment.<sup>130</sup> A more common reference point is the date of adjourn-

124. *E.g.*, La. Const. art. III, § 19 (record publication and fixed wait approach); Conn. Gen. Stat. § 2-32 (1958) (fixed wait approach); *id.* § 4-172(b) (Supp. 1981) (record deposit approach).

125. *E.g.*, Fla. Const. art. III, § 9; Me. Const. art. IV, pt. 3, § 16 (1819, amended 1975); Mich. Const. art. IV, § 27; Ohio Const. art. II, § 1(c).

126. *E.g.*, Fla. Const. art. III, § 9; La. Const. art. III, § 19; Mich. Const. art. IV, § 27.

127. *E.g.*, Conn. Gen. Stat. § 2-32 (1958); Mass. Ann. Laws ch. 4, § 2 (Michie/Law. Co-op. 1980); Pa. Cons. Stat. Ann. tit. 1, § 1701(a)(5) (Purdon Supp. 1981).

128. *Compare* Iowa Const. art. III, § 26 (1857, amended 1966) (first day of July next following the date of passage) *with* S.D. Const. art. III, § 22 (90 days after the adjournment of the legislative session in which the bill was passed).

129. *Compare* Tex. Const. art. III, § 39 (from the adjournment of the legislative session) *with* W. Va. Const. art. VI, § 30 (from the date of passage).

130. Alaska Const. art. II, § 18; W. Va. Const. art. VI, § 30.

ment of a legislative session, allowing laws passed at that session to take effect sixty or ninety days later.<sup>131</sup> A time lapse may also be established by a statute applicable either to legislation<sup>132</sup> or to administrative rules.<sup>133</sup> The Administrative Procedure Act requires a thirty-day waiting period,<sup>134</sup> and similar waiting periods are imposed on state administrative agencies.<sup>135</sup>

Time lapse provisions are rarely, if ever, absolute. Some operate only in the absence of a specified date in a bill or allow for an override by a two-thirds vote of the legislature.<sup>136</sup> Other statutes make time lapse provisions inapplicable only in certain specific circumstances, usually emergencies and appropriations.<sup>137</sup> A convincing case can be made for an emergency exception, but additional analysis should be applied to determine the scope of the exception. While some states except the time lapse requirement entirely,<sup>138</sup> it is in fact more likely that public notice would be needed in an emergency; the exception need only curtail the amount of time required for public notice. The better approach is exemplified by the Iowa Constitution, which per-

131. Fla. Const. art. III, § 9; La. Const. art. III, § 19; Mich. Const. art. IV, § 27; Mo. Const. art. III, § 29 (1945, repealed and superseded 1969); Utah Const. art. VI, § 25 (1896, amended 1972). There are additional variations, such as the California Constitution which permits acts to take effect on January 1 next following a ninety-day period from the date of enactment, art. IV, § 8 (1966, amended 1976), and the Iowa Constitution which sets the date as July 1 after the passage of a law at a regular session, art. 3, § 26 (1857, amended 1966).

132. In Pennsylvania, for example, it is determined by statute that all acts not containing a specified effective date and passed on or after June 6, 1969, take effect sixty days after enactment. Pa. Cons. Stat. Ann. tit. 1, § 1701(a)(5) (Supp. 1981). For acts passed before that date different standards apply. Connecticut also uses a statute for this purpose, setting the effective date for public acts (unless an act specifies otherwise) as the first day of October following the session in which they were passed. Conn. Gen. Stat. § 2-32 (1958).

133. *E.g.*, Colo. Rev. Stat. § 24-4-103(5) (Supp. 1979) (20 days after publication); Del. Code Ann. tit. 29, § 10118(b) (Supp. 1980) (30 days; may be earlier if reason is stated in the order and supported by agency's findings); Wis. Stat. Ann. § 227.026(1) (West 1982) (first day of month following publication in Wisconsin Administrative Register, unless statute under which rule was made sets another date, the agency sets a later date, there is an emergency, or publication is delayed).

134. 5 U.S.C. § 553(d)(3) (1976) (with certain exceptions, and "as otherwise provided by the agency for good cause found and published with the rule").

135. See *supra* note 133.

136. See, *e.g.*, Fla. Const. art. III, § 9 (60 days after adjournment or as provided in the act); La. Const. art. III, § 19 (60 days after adjournment; any bill may specify an earlier or later effective date); Utah Const. art. VI, § 25 (1896, amended 1972) (2/3 vote override).

137. *E.g.*, Cal. Const. art. IV, § 8 (1966, amended 1976).

138. See, *e.g.*, *id.*; Me. Const. art. IV, pt. 3, § 16 (1819, amended 1975); S.D. Const. art. III, § 22.

mits emergency legislation to take effect by publication in newspapers.<sup>139</sup> Because an emergency increases the public's need to know, the emphasis should be on the most expeditious and practical methods of promulgating the law under the circumstances.<sup>140</sup>

The fixed wait approach has distinct advantages that account for its popularity among the states. In some states it allows time for popular challenge by referendum before an act takes effect.<sup>141</sup> A time lapse also allows time for corrections by the lawmakers themselves.<sup>142</sup> For the public it provides time to learn of the new law and to adjust to it.<sup>143</sup> It satisfies the concerns of the *Lapeyre* Court by setting a uniform discernible time when laws take effect, and with appropriate exceptions it can deal with emergencies that require immediate action.

The fixed wait concept has great value,<sup>144</sup> but does not completely resolve the promulgation question. In fact, it is not, strictly speaking, a promulgation requirement; it facilitates promulgation but does not ensure that a law will be available or findable. Nor does the fixed wait requirement provide any incentive to publish a law and educate the public about its provisions. Thus, while the providing of time to learn of the law is valuable, the fixed wait approach does nothing to put the public on notice of the law or to ensure its accessibility.

## 2. The Record Deposit Approach

The second category of formal rules is the record deposit approach. Under this requirement, a law may need only to be filed and retained in one or more specified offices in order to become effective. The filing may be required at only one centralized location. This is the practice

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139. Iowa Const. art. 3, § 26 (1857, amended 1966). Only the legislature may determine when this is appropriate. *Scott v. Clark*, 1 Iowa 70 (1855).

140. This principle is applied under Delaware law for the proclamation of states of emergency, Del. Code Ann. tit. 20, § 3125(c) (1979) ("as much public notice as practical through the public press"), and in the German Constitution, Grundgesetz [GG] art. 115d (W. Ger.), translated in VI A.P. Blaustein & G.H. Flanz, *Constitutions of the Countries of the World* (1982) (in a state of defense, if time does not permit the usual procedure, laws are to be promulgated in another manner and subsequently printed in the Gazette as soon as circumstances permit).

141. *E.g.*, Mich. Const. art. II, § 9; Ohio Const. art. II, § 1c.

142. This is one of the concerns behind the 30-day lapse requirement in the Administrative Procedure Act. Hutton, *Public Information and Rule Making Provisions of the Administrative Procedure Act of 1946*, 33 Temp. L.Q. 58, 72 (1959).

143. *City of Roanoke v. Elliott*, 123 Va. 393, 401, 96 S.E. 819, 822 (1918).

144. It has been described as the fairest way to deal with ignorance of newly passed statutes. Hall & Seligman, *supra* note 69, at 659. Cooley has discerned that this has been "designed to secure, as far as possible, the public promulgation of the law." 1 T. Cooley, *Constitutional Limitations* 327 (8th ed. 1927).

followed by the United States federal government,<sup>145</sup> as well as by some of the states requiring such record deposits.<sup>146</sup>

A few systems also require a number of local filings.<sup>147</sup> The early English practice was to keep a centralized statute roll and to require local proclamation by the sheriffs.<sup>148</sup> Also under the English promulgation scheme, each county court kept a transcript of the acts for the public to read and copy.<sup>149</sup> Colonial Virginia had a similar practice of depositing the laws with each county clerk.<sup>150</sup> In neither the English nor the Virginia system is it clear that local filing was ever required for a law's effectiveness. In Indiana, however, the state's constitution specifically requires circulation of the law itself in the several counties by authority,<sup>151</sup> and laws do not take effect until officially filed in the county clerk's office.<sup>152</sup> Local filings are also required for some states' administrative laws.<sup>153</sup>

145. See 1 U.S.C. § 106a (1976) (laws to be received and preserved by the Administrator of General Services); Federal Register Act, Pub. L. No. 74-220, ch. 417, §§ 2, 7, 49 Stat. 500, 502 (codified at 44 U.S.C. §§ 1503, 1507 (1976)); 38 Op. Att'y Gen. 359 (1935). Under the original F.R.A., it appears that deposit in one central location put the world on constructive notice of administrative rules and regulations. This has since been changed, see 5 U.S.C. § 552(a) (1976 & Supp. IV 1980), although centralized filing remains a requirement.

146. New York has required record deposit, in addition to posting, for traffic regulations. See *People v. Cull*, 10 N.Y.2d 123, 176 N.E.2d 495, 218 N.Y.S.2d 38 (1961); accord Conn. Gen. Stat. Ann. § 4-172(b) (Supp. 1981) (administrative laws become effective upon filing in the office of the secretary of state). The requirement that administrative laws be filed is common among the states. 1 F. Cooper, *supra* note 116, at 209.

147. See, e.g., Alaska Stat. § 44-62.140 (1980); Cal. Gov't Code §§ 11,343.5, 11,344.2 (West 1981); N.D. Cent. Code § 28-32-03.2 (Supp. 1981).

148. C. Karraker, *The Seventeenth-Century Sheriff* 30 (1930); W. Morris, *The Medieval English Sheriff to 1300*, at 199, 218 (1927).

149. 4 E. Coke, *supra* note 25, at 26. This practice was later incorporated in a requirement that copies of acts be distributed to and kept by local officials such as sheriffs, town clerks and clerks of the peace. See Record Commission, *supra* note 104, at 205.

150. *Pallas v. Hill*, 12 Va. (2 Hen. & M.) 149, 160 (1807). A vestige of that practice can be seen in the promulgation system described in *Williams v. Commonwealth*, 190 Va. 280, 56 S.E.2d 537 (1949). Virginia's Alcoholic Beverage Control Act had required that regulations of the Alcoholic Beverage Control Board be published, that the Board certify copies to the clerks of all circuit and city courts of record with criminal jurisdiction, and that they be kept on file for public inspection. The court in *Williams* concluded that once the initial requirements were met, failure of a local clerk to keep the regulations on file for public inspection did not affect their validity. The clerk in that case had found the regulations in a book in his office safe.

151. Ind. Const. art. 4, § 28.

152. *Hendrickson v. Hendrickson*, 7 Ind. 13, 15 (1855).

153. E.g., Alaska Stat. § 44.62.140 (1980) (copies of the administrative code and register are to go to the clerk of each local governmental unit or his delegate); Cal. Gov't Code, §§ 11,343.5, 11,344.2 (West 1981) (copies of the administrative code and register to each county clerk or his delegate); N.D. Cent. Code § 28-32-03.2.1.e

The record deposit requirement can serve promulgation objectives only if the deposit locations are accessible to the public.<sup>154</sup> If this is so, a diligent person can at least find the law, examine it to assure himself of its validity, and determine its impact. Also, because a record deposit requirement brings at least one additional office into the process, it reduces the opportunities for abuse that exist when the lawmaker may keep the law solely to himself. At least in theory, a person could be forewarned of any new law by maintaining a presence at the secretary's or clerk's office.

Simply requiring the deposit of a law, however, does not fully serve the promulgation needs. No time is provided to learn of the law or to communicate information about its requirements to others. Additionally, because no public notice is given, the public is not alerted to seek copies from the filing office. The system remains subject to abuse, particularly when only a central filing is required. Traditionally, the custodian of the file is appointed by the same executive who has signed the law or proclamation,<sup>155</sup> and therefore, may lack the incentive to ensure publication.

The system is more appealing if local filings are required. The more people who participate in the process, the more widely known the law will be. Ideally, the local custodian should be required to take steps to publish the law. Even absent such a requirement, however, that result would be more likely to occur if local custodians, with local interests and constituents, are involved. Without an additional publication requirement, however, any record deposit system only marginally facilitates promulgation of the law.

### 3. The Record Publication Approach

The last category of formal rules is record publication. This method requires specific and formal publication of new laws by putting them in the public record. While this requirement is occasionally constitutionally imposed,<sup>156</sup> it is usually a legislative creation.<sup>157</sup> Generally,

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(Supp. 1981) (copies of the administrative code and supplements to each county auditor, for use of county officials and the public).

154. The Supreme Court in *Lapeyre v. United States*, 84 U.S. (17 Wall.) 191 (1873), explicitly assumed that the public would have access to and the right to procure copies of instruments from the Secretary of State. *Id.* at 199. Such ready accessibility may not always be the case, however. See *Williams v. Commonwealth*, 190 Va. 280, 56 S.E.2d 537 (1949).

155. On the federal level, for example, the custodian would be the Secretary of State who is appointed by the President. U.S. Const. art. II, § 2.

156. *E.g.*, La. Const. art. III, § 19.

157. See, *e.g.*, 1 U.S.C. § 112 (1976) (publication of United States Statutes at Large); *id.* §§ 201-213 (1976) (publication of United States and District of Columbia Codes); 44 U.S.C. § 1510 (1976) (publication of C.F.R.).



such requirements are prerequisites to a law's effectiveness, but there are instances when they are considered directory only.<sup>158</sup>

A number of alternative means have been used for this purpose. The English custom was to have an oral proclamation of the laws by the sheriff.<sup>159</sup> Closely akin to that practice is a requirement for the posting of laws, a method commonly used today for traffic regulations.<sup>160</sup> Clearly this is the appropriate method for traffic regulations, which vary with each passing mile.

A more permanent format is the use of official statutes and codes. Federal administrative regulations, for example, are required to be codified in the Code of Federal Regulations, while acts of Congress are printed in the Statutes at Large and codified in the United States Code. Each of these publications is mandated by statute.<sup>161</sup> Such compilations and codes are characteristic of existing English and American legal systems. Failure to include a statute within the official state compilations was held by the 1858 Pennsylvania Supreme Court not to affect a law's validity.<sup>162</sup> On the other hand, the district court decision in *Armstrong v. Maple Leaf Apartments, Ltd.*<sup>163</sup> would appear to require such inclusion for federal laws, although inclusion within an official compilation or code is usually not specified as a prerequisite to a law's initial effectiveness.

A mode of publication that is more timely than official compilations and generally more accessible and practical than posting is the use of public newspapers. This method was originally employed for acts of Congress,<sup>164</sup> and was required later to give notice of quarantine rules

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158. Compare *Armstrong v. Maple Leaf Apartments, Ltd.*, 436 F. Supp. 1125, 1145-46 (N.D. Okla. 1977) (federal statute not enforced because of failure to codify), *aff'd on other grounds*, 622 F.2d 466 (10th Cir. 1979), *cert. denied*, 449 U.S. 901 (1980) with *Peterman v. Huling*, 31 Pa. 432, 436 (1858) (state law's validity not affected by failure to be included in official compilation).

159. C. Karraker, *supra* note 148, at 30; W. Morris, *supra* note 148, at 199, 218.

160. See *People v. Corwin*, 304 N.Y. 362, 107 N.E.2d 490 (1952) (posting of speed signs); *Commonwealth v. Abramson*, 4 Pa. D. & C.3d 368 (Montour 1977) (duty of Commonwealth to make sure signs are understandable and observable); *cf. In re D'Addario v. McNab*, 32 N.Y.2d 84, 295 N.E.2d 792, 343 N.Y.S.2d 124 (1973) (failure to comply with posting requirement voided results of local election). *But see Ex parte Rody*, 348 Mo. 1, 152 S.W.2d 657 (1941) (failure to post prison rules, even if required by law, would not void the rules).

161. 1 U.S.C. § 112 (1976) (United States Statutes at Large); *id.* §§ 201-213 (1976) (United States and District of Columbia Codes); 44 U.S.C. § 1510 (1976) (C.F.R.).

162. *Peterman v. Huling*, 31 Pa. 432, 436 (1858).

163. 436 F. Supp. 1125, 1145-46 (N.D. Okla. 1977), *aff'd on other grounds*, 622 F.2d 466 (10th Cir. 1979), *cert. denied*, 449 U.S. 901 (1980).

164. Act of Aug. 26, 1842, ch. 202, § 21, 5 Stat. 527; Act of May 11, 1820, ch. 92, § 1, 3 Stat. 576; Act of Apr. 20, 1818, ch. 80, § 1, 3 Stat. 439; Act of Nov. 21, 1814, ch. 6, 3 Stat. 145; Act of Mar. 2, 1799, ch. 30, § 1, 1 Stat. 724; Act of Sept. 15, 1789, ch. 14, § 2, 1 Stat. 68.

and regulations under the Act of March 3, 1905.<sup>165</sup> Today newspapers are used most commonly for the publication of local ordinances. This has the advantage of reaching a substantial, general audience rapidly. For the promulgation of emergency laws and orders, newspaper publication is probably preferable to most other alternatives.<sup>166</sup> Its drawbacks, however, include the short-lived nature of newspapers and the absence of a systematic scheme to facilitate monitoring and researching the state of the law on a particular subject.

Probably the most universally employed form of record publication is the official gazette. The London Gazette is the forerunner of this device in Anglo-American law. In the United States, federal administrative law must first appear in the Federal Register.<sup>167</sup> Similar requirements for administrative laws are found in many states.<sup>168</sup> In one state, publication of all new legislation in the state's official journal is required by constitutional dictate.<sup>169</sup>

A gazette can have the advantage of immediacy without the ephemeral character of a newspaper. It provides one source to which citizens can refer to keep abreast of the law. If properly organized by subject, it allows those with particular interests to monitor activity in their field without reading pages of extraneous matter. On the negative side, the use of a gazette alone, without a periodic codification of past enactments, creates a system impractical for researching any but the most recent enactments. Also, a gazette does not provide the general broadcast available through newspapers, should a particular law be of interest to the public at large.

Of the three categories of formal rules, record publication comes closest to meeting the promulgation policy objectives discussed earlier. It creates the greatest likelihood of notice to the public and goes furthest toward making the law accessible. Having a law become effective upon publication in an official medium provides more certainty than using the day of enactment, since the publication is a part of the public record.

Record publication, however, does not provide a complete answer. Masses of published material, if not properly codified and indexed,

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165. See *United States v. Louisville & N.R. Co.*, 165 F. 936 (W.D. Ky. 1908).

166. In an emergency, electronic media would be most expedient, although they may be too transitory to establish a sufficient record of the governmental action at issue.

167. Federal Register Act, § 5, 44 U.S.C. § 1505 (1976).

168. See, e.g., Alaska Stat. § 44.62.130 (1980), *amended in part by* 1982 Alaska Sess. Laws ch. 59; Ga. Code Ann. § 3A-107 (Supp. 1982); Wis. Stat. Ann. § 227.025-.026 (West 1982).

169. La. Const. art. 3, § 19. This is also the approach taken by the Federal Republic of Germany. Grundgesetz [GG] art. 82 (W. Ger.), *translated in* VI A.P. Blaustein & G.H. Flanz, *Constitutions of the Countries of the World* (1982).

can render a promulgation system practically useless.<sup>170</sup> An official gazette may sink in a sea of volume and clutter.<sup>171</sup> If a law is effective immediately upon publication adequate notice may not be provided; there may not be enough time for the public to adjust to the new law or for news of its existence to reach beyond the recipients of the official publication.<sup>172</sup> Finally, reliance upon record publication may tend to be too rigid. Instead of pursuing educational efforts designed to meet the objectives of each new law, it will be easier to settle on compliance with the minimum requirements of official publication.

#### D. *The Open-Ended Publication Standard*

In contrast to the formal rules approaches is the open-ended publication standard. Under this standard, a new law takes effect upon publication or promulgation, but the specifics of such publication are left undefined. Examples of this can be seen in a section of the present Alabama Constitution dealing with criminal laws,<sup>173</sup> and in former provisions of the Wisconsin and Kansas Constitutions.<sup>174</sup>

This is the standard that the *Lapeyre* Court posited as the only alternative to its own nonpromulgation position.<sup>175</sup> Obviously, such an undefined standard would be troublesome in that it would require litigation to determine when publication was sufficient,<sup>176</sup> thereby introducing major uncertainty into the legal system. Difficult issues of proof would arise when the government attempted to enforce the law. Additionally, citizens would have to determine at their own peril, when a law took effect and would doubtless suffer for an erroneous determination.<sup>177</sup> To its credit, the open-ended standard would foster

170. See *Cervase v. Office of the Federal Register*, 580 F.2d 1166 (3d Cir. 1978); Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 Harv. L. Rev. 198, 211-12 (1934); Lavery, *supra* note 5, at 637.

171. See *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 387 (1947) (Jackson, J., dissenting); Lavery, *supra* note 5, at 626-27 (describing the bulk of the Federal Register as reaching alarming proportions).

172. See *Hall v. Chaltis*, 31 A.2d 699 (D.C. 1943).

173. Ala. Const. art. 1, § 8 (prohibiting punishment except by a law "established and promulgated prior to the offense").

174. Kan. Const. art. 2, § 19 (1859, amended 1974); Wis. Const. art. 7, § 21 (repealed 1977).

175. *Lapeyre v. United States*, 84 U.S. (17 Wall.) 191, 198-200 (1873).

176. See, e.g., *Pitts v. District of Opelika*, 79 Ala. 527 (1885).

177. See *Louisville & N.R. Co. v. Murphy*, 182 Ky. 136, 138-40, 206 S.W. 268, 268-69 (1918) (a railroad could not raise the existence of a quarantine as a defense against a claim based on its refusal to transport cattle, unless it alleged the facts of proper promulgation of the quarantine order); *Clark v. Janesville*, 10 Wis. 119, 145 (1859) (parties charged with knowledge that a law had not taken effect for lack of official publication).

increased interest in developing effective promulgation techniques. In order to avoid the risk of having a law held ineffective, the tendency would be to provide more publication than might otherwise be the case in applying a formal rule. This standard is probably most appropriate for emergency legislation or rules, when flexibility and rapid general publication are most valuable.

### E. *Abolition of Ignorantia Legis*

The furthest pole from the nonpromulgation position is a requirement that the law be promulgated until it is actually known by all. This would abolish the *ignorantia legis* rule and could require the state to prove that a defendant had or must have had actual knowledge of a law.<sup>178</sup>

Partial or complete abolition of the *ignorantia legis* maxim has been attempted in several federal statutes conferring rulemaking authority on administrative agencies. Under the Securities Exchange Act of 1934,<sup>179</sup> violators of rules issued under that Act are spared from imprisonment if they can prove their ignorance of the rules.<sup>180</sup> The Public Utility Holding Company Act of 1935<sup>181</sup> and the Investment Company Act of 1940<sup>182</sup> go one step further by barring any conviction

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178. A variant of this, advocated by one commentator, would permit a defense of ignorance in criminal cases except for persons whose ignorance was blameworthy. Cass, *supra* note 92, at 693, 696-97.

179. 15 U.S.C. §§ 78a-78kk (1976 & Supp. IV 1980).

180. *Id.* § 78ff(a) (1976 & Supp. IV 1980). The cases applying this provision are instructive on the judiciary's approach to such incursions against the *ignorantia legis* maxim. In *United States v. Lilley*, 291 F. Supp. 989 (S.D. Tex. 1968), the court made clear that this exception was to be read narrowly. *Id.* at 992-93. In that case, the court imputed to the defendants knowledge of the underlying statute, and thus knowledge of the parallel rule they were charged with violating. Moreover, the court found that the defendants had not proven their ignorance of the substance of the rule. Ignorance of the details of a rule (e.g., date of promulgation) was not determinative, nor did it matter whether the defendants knew their specific conduct was encompassed by the rule. *Id.* at 993-94. The placing of the burden of proof on the defendant was subsequently followed by the Ninth Circuit in *United States v. D'Honnau*, 459 F.2d 73, 75 (9th Cir.), *cert. denied*, 409 U.S. 861 (1972), also rejecting a defendant's arguments under this provision. In other cases, the Second Circuit has rejected defendants' assertions that they had been prosecuted under rules, and held that their convictions were based on the statute and therefore not subject to the ignorance exception. *United States v. Eucker*, 532 F.2d 249, 256 (2d Cir.), *cert. denied*, 429 U.S. 822 (1976); *United States v. Colasurdo*, 453 F.2d 585, 594 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972). The conclusion suggested by these cases is that such provisions may not be readily accepted by the courts as an expression of an important governmental policy, at least in a system in which the rules are regularly published and available under the Federal Register Act.

181. 15 U.S.C. §§ 79-79z(6) (1976 & Supp. IV 1980).

182. *Id.* §§ 80a(1)-80a(64).

for violation of any rule of which the defendant can prove ignorance.<sup>183</sup> The most advanced position along this line is found in the section of the Federal Trade Commission Act<sup>184</sup> permitting the Commission to seek damages against violators of its rules.<sup>185</sup> Under that Act an offender can be sued only if he had "actual knowledge or knowledge fairly implied on the basis of objective circumstances"<sup>186</sup> that his act was unfair or deceptive and barred by the rule. This formulation would appear to require the government to offer evidence of a defendant's knowledge in order to pursue the statutory penalty.

Abolition of the *ignorantia legis* maxim would not serve all of the purposes of promulgation. Proposals in that direction are oriented only toward the criminal law, yet the effects of unknown civil legislation can be far greater than potential criminal penalties. If ignorance of the law were a defense in civil litigation, it could convert such cases into collateral trials on promulgation questions. The result could be a dispute between two or more parties, each with a different knowledge of the law and each, in effect, governed by a different legal standard.

Even in the criminal context, negation of the *ignorantia legis* maxim is not a satisfactory answer to the need for promulgation. It focuses exclusively on the individual and his needs, and not on the establishment of rules of conduct for society. Under such an approach, the application of a law would differ depending on the degree of ignorance. This is antithetical to the policies of uniformity and equal protection of the law. Only those aware of the law would be subject to it; others would have the advantage of ignorance. The absence of the *ignorantia legis* maxim would thus provide a significant incentive to avoid legal knowledge. It would also introduce a substantial, subjective element of proof, much more difficult to determine than the fact of a law's promulgation.

The point of reexamining the maxim is well taken, however. It should at least be established that the maxim has no force in the absence of promulgation. Restricting the operation of the maxim is also appropriate in those cases in which no effective promulgation is possible.<sup>187</sup> The need for promulgation, however, is not met by this effort. The focus should be on the government and the affirmative need for promulgation to make the laws effective. Seeking to remedy those individual cases in which promulgation has failed is a worthy effort, but not an answer to the larger question.

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183. *Id.* § 79z(3) (1976); *id.* § 80a(48).

184. *Id.* §§ 41-77 (1976 & Supp. IV 1980).

185. *Id.* § 45(m) (1976).

186. *Id.*

187. *See, e.g.,* *Hotch v. United States*, 212 F.2d 280, 284 n.15 (9th Cir. 1954) (fishing regulations changed while fishermen were at sea).

## V. THE NEED FOR A PROMULGATION REQUIREMENT

A. *Imposing a Duty on the Government*

Although the current approaches to promulgation may not be theoretically pure, it may be observed that they do work. It is likely that the existing system has been accepted because the nonpromulgation position stated in *The Ann* and *Casson* has generally not been applied in practice. There have been few reported cases of otherwise innocent individuals who were the victims of unpublished laws.<sup>188</sup> In *The Ann* and *Casson*, the ignorance involved was only of revisions to existing restrictions;<sup>189</sup> in *Lapeyre*, it was the government that lost revenue from the immediate effectiveness of a law.<sup>190</sup> But this does not provide any assurances for the future. Considering that this entire area of concern has received almost no comprehensive legal analysis, it is foreseeable that a court, faced with an unpublished statute or regulation and a defendant acting in true ignorance but in violation of the new law, will read the opinions of these three cases and conclude that the matter has already been decided against the ignorant transgressor.

In the existing system much reliance is placed on the private sector to publicize new legal developments.<sup>191</sup> Reliance on private publications and the news media to promulgate the law on their own initiative is unacceptable. One immediate problem with using these sources is that they are not official, and may not be acceptable in court. One could not expect a judge to accept an argument of counsel based on a news report of a new act of Congress.<sup>192</sup> Further, promulgation by

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188. Those taking the position that the nonpromulgation approach presents no problems may point out that in harsh cases, the possibility of executive clemency always exists. See *Branch Bank v. Murphy*, 8 Ala. 119, 120 (1845) (dicta in a civil case); *State v. Goodenow*, 65 Me. 30, 33 (1876); *The Charlotta*, 1 Dods. R. 387, 393 (Adm. 1814); *Rex v. Bailey*, 168 Eng. Rep. 651, 653 (Cr. Cas. Res. 1800). This raises the question why it would be easier for the executive to make such determinations if the judiciary cannot do so. To say that executive clemency shall be invoked in any case in which a defendant has acted in ignorance of an unpublished law is to establish a rule of law to be applied by the executive in place of the courts. Such a rule should be applied at the trial level in the first instance, when such issues of fact as the existence of promulgation of a law are appropriately determined. In any event, this option does not exist for civil cases, when the same problems of nonpromulgation can occur.

190. See *supra* note 57 and accompanying text.

191. In the legal profession, the periodical publications of Commerce Clearing House, the Bureau of National Affairs and Prentice-Hall, among others, are relied upon extensively to keep abreast of new laws and interpretations of laws. For the public, special interest group newsletters reach organized constituencies with news of legal developments that affect their interests.

192. See *Clark v. City of Janesville*, 10 Wis. 119, 142-44 (1859) (official publication required; court could not survey all the newspapers, and would not know if what appeared in a newspaper was actually the law); *Recent Cases*, 62 Harv. L. Rev. 691, 691 (1949) (Soviet court would not accept a radio broadcast as official

private publishers is purely discretionary. If only a small number of people is affected by a law, it may receive no attention. Finally, private entities may lack access to or notice of a new law, and promulgation would then depend upon the government's willingness to provide the new laws to private publishers.

The burden of promulgation should be placed on the government rather than on private publishers. The growth of government's role in everyday life has spawned the movement toward government in the sunshine.<sup>193</sup> This can be seen in the proliferation of laws requiring government councils to deliberate in public.<sup>194</sup> Similarly, the files of government agencies have been opened by such legislation as the Freedom of Information Act.<sup>195</sup> Opening up governmental processes benefits the public by reminding officials of the needs and demands of the people. Promulgation has value for lawmakers and promulgators as well. It can serve to increase the promulgator's awareness and understanding of the law. For example, one can view the implementation of *Miranda* as requiring individualized promulgation of certain elements of constitutional law. Intrinsic to the purpose of *Miranda*, however, is that the very act of communicating this information affects both the communicator and the recipient, in that it reminds the law enforcement agent of the law's protection of the defendant. The act of communicating and educating is often the best learning device for the educator. Widespread and immediate publication of a law also opens the law to criticism and scrutiny.<sup>196</sup> This increases the opportunity for feedback on the law's defects and for increased awareness of the need to improve a particular law.

One of the policies behind the *ignorantia legis* maxim is that it offers an incentive for citizens to seek knowledge of the law.<sup>197</sup> Once a law takes effect, the citizens have the substantial incentives of avoiding penalties and civil losses, and obtaining benefits available under the law. Many times, however, this focus on incentives fails to include a recognition of the human nature of the governors and lawmakers.

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promulgation of a new law because of the "possibility of inaccurate reception and recording"); cf. *Kelly v. Murphy*, 377 P.2d 177, 178 (Nev. 1963) (telephone directions from the Secretary of State were not a "promulgation of rules and regulations" as required by statute).

193. See *supra* note 1 and accompanying text.

194. See, e.g., Ariz. Rev. Stat. Ann. §§ 38-431.01-.08 (Supp. 1981); Me. Rev. Stat. Ann. tit. 1, §§ 401-410 (1979 & Supp. 1982-1983); Pa. Stat. Ann. tit. 65, §§ 261-269 (Purdon Supp. 1982-1983).

195. 5 U.S.C. § 552 (1976 & Supp. IV 1980).

196. This point has been observed in Rhodes, "Opinions of the Attorney General" Revived, 64 A.B.A.J. 1374, 1376 (1978), as one of the values of publishing Attorney General opinions.

197. See *infra* note 199 and accompanying text.

What is their incentive to make the law known in the absence of a constitutional provision or a statute requiring promulgation? As is recognized by the various sunshine acts, public officials often seek to avoid public attention in the lawmaking process. Also, there may be occasions when an agency or law enforcement official may use a citizen's ignorance to its or his own advantage.<sup>198</sup>

Requiring promulgation may also add an incentive to make laws more comprehensible and therefore explainable. If a law is too complex to entrust to the explanatory skills of government officials, it is unlikely to achieve its drafter's objectives without clarification. If a law's provisions are not readily communicable, the public cannot be expected to understand them.

In *Doctor and Student Dialogues*, Saint Germain states that proclamation of statutes "is but of the favour of the makers of the statute."<sup>199</sup> This statement does not comport well with the long history of promulgation efforts in English and American law; rational governments do not commit such resources to the doing of mere "favours." Publication is not just a courtesy and government officials must not view it as such. The government official who must set priorities for his time and resources, and who may have a personal interest in minimizing his burdens should have an incentive backed by the force of law so that he will see promulgation as his duty, and he must have usable guidelines for the implementation of that duty.<sup>200</sup>

### B. A New Perspective on Promulgation

This review of specific, alternative promulgation standards would not be complete without considering the possibility of a new, overall perspective on the promulgation question. That perspective accepts promulgation as an affirmative duty of the government. This is more

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198. One example of offensive enforcement conduct can be seen in *Hughes v. State*, 67 Tex. Crim. 333, 149 S.W. 173 (1912). In that case a defendant was convicted for refusing a sheriff access to records which, under a statute passed three months before and effective nine days before the sheriff's visit, the sheriff was entitled to examine. The defendant was not permitted to testify that he would have permitted the inspection had the sheriff told him about the law. He did, in fact, inquire of another person, and thereupon wrote to the sheriff on the next day saying he would allow the inspection. The report does not indicate why a prosecution was brought under such circumstances, or why the sheriff remained silent about the law. It is apparent, however, that in the absence of a duty to make the law known, he had insufficient motivation to advise the defendant about the new law.

199. Saint Germain, *supra* note 59, at 249.

200. In the absence of such an incentive, government officials acting in periods of budget reductions may be inclined to reduce such "unnecessary" expenditures as the publication of administrative bulletins and other innovative efforts to educate the public. See Budget Director Sets New Deadline in War on Publications, *Washington Post*, Oct. 15, 1981, at A27, col. 3.



than just setting a minimum constitutional or statutory standard—it would pervade the entire approach to the subject.

A government accepting such an affirmative duty would be committed not just to the initial promulgation prior to a law's effective date, but also to providing continuing education on existing laws. The idea of continuing promulgation is one that has remained outside the focus of the literature on this subject, although it is implicit in the Supreme Court's *Lambert*<sup>201</sup> decision and was at the heart of the *Armstrong*<sup>202</sup> case in Oklahoma. Even if the absence of continued promulgation does not defeat renewed application of a law,<sup>203</sup> the decision to retain a law should also justify an ongoing effort to keep the public aware of it.

### 1. Reasonableness and Innovation

The approach considered here starts with a set minimum standard, but looks beyond that to determine what effort is reasonable in each set of circumstances. This follows the due process formula of *Mullane*;<sup>204</sup> the means of promulgation should be reasonably certain to inform those affected, or at least be "not substantially less likely to bring home notice than other of the feasible and customary substitutes."<sup>205</sup> Both the government and its citizens would benefit from promulgating the laws to the maximum extent within reason.<sup>206</sup> This would ensure fulfillment of the law's purpose and protect citizens from surprise.

A reasonableness approach recognizes variations in the need for promulgation in different circumstances. In those instances in which conduct is *malum in se*,<sup>207</sup> or is likely to be regulated,<sup>208</sup> it may be

201. 355 U.S. 225 (1957).

202. 436 F. Supp. 1125, 1145-46 (N.D. Okla. 1977), *aff'd on other grounds*, 622 F.2d 466 (10th Cir. 1979), *cert. denied*, 449 U.S. 901 (1980). *But see In re Denison*, 38 F.2d 662, 664 (W.D. Okla.), *appeal dismissed*, 45 F.2d 585 (10th Cir. 1930) (those who "deal with the Indians . . . deal with full knowledge of the limitations which Congress has placed upon the alienation of their property").

203. The same result may be reached by invoking an argument of desuetude against an unenforced law, *see James v. Commonwealth*, 12 Serg. & Rawle 220, 227-28 (Pa. 1825). Ongoing promulgation efforts, even in the absence of enforcement litigation, should negate such an argument.

204. 339 U.S. 306 (1950).

205. *Id.* at 315.

206. *See Railroad Comm'n v. Kansas City S. Ry.*, 111 La. 134, 140, 35 So. 487, 490 (1903); 1 W. Blackstone, *supra* note 104, at \*46 ("in the most public and perspicuous manner").

207. *See, e.g., United States v. Casson*, 434 F.2d 415, 419 n.15 (D.C. Cir. 1970); *id.* at 423 (Robb, J., concurring).

208. *See, e.g., United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971); *United States v. Freed*, 401 U.S. 601, 607-10 (1971); *United States v. Moore*, 586 F.2d 1029, 1033 (4th Cir. 1978); *McIntosh v. Washington*, 395 A.2d 744, 756 (D.C. 1978).

reasonable to impose more of a duty of inquiry on the public than when otherwise proper conduct is proscribed by law.<sup>209</sup> In dealing with laws that bestow benefits and which are not intended to control or penalize conduct, greater flexibility in promulgation may be appropriate.<sup>210</sup>

The government should consider innovative notification programs and educational efforts. Some current practices demonstrate the direction that may be taken. One category of such efforts encompasses what may be called "adversary promulgation." By that device, a party whose interests conflict with those of another party is nevertheless required to advise that other party about the law affecting their relationship. Although the state may provide the form of notice, surrogates transmit the information.

The *Miranda* decision employed this format in the context of criminal arrest by requiring police officers to advise suspects of certain points of constitutional law. Examples in the civil law context can be seen in the requirement that door-to-door salesmen inform buyers of their legal right to cancel the transaction,<sup>211</sup> and that vendors of personal property under warranty post notices disclosing the legal remedies available to the customer, in accordance with the Magnuson-Moss Warranty Act.<sup>212</sup> A similar "adversary promulgation" requirement has been read into the Truth-in-Lending Act under certain circumstances.<sup>213</sup> The New Jersey Truth-in-Renting Act, discussed earlier,<sup>214</sup> is the most ambitious effort in this area. It is an experiment worth monitoring, particularly to determine what discernible impact it has on landlord and tenant relations in the state.

A reasonableness principle may also justify providing special notice to interested groups specifically affected by certain legislation. Would it not be reasonable, for example, for the government to notify businesses licensed by the state when a law affecting those businesses has been passed? That conclusion would certainly be in accord with the *Mullane*<sup>215</sup> Court's distinction between unknown beneficiaries who could be notified by newspaper, and those who are presently known and could be reached by mail. Agencies may provide subscription

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209. See, e.g., *The Cotton Planter*, 6 F. Cas. 620, 621 (C.C.D.N.Y. 1810) (No. 3270) (laws of trade).

210. See *Rodriguez v. Swank*, 318 F. Supp. 289, 296 (N.D. Ill. 1970), *aff'd mem.*, 403 U.S. 901 (1971).

211. E.g., Del. Code Ann. tit. 6, § 4404 (Supp. 1980); Mo. Ann. Stat. § 407.710 (Vernon 1979).

212. 15 U.S.C. § 2302(a)(9) (1976).

213. See *Cadmus v. Commercial Credit Plan, Inc.*, 437 F. Supp. 1018, 1020-21 (D. Del. 1977) (lender had to disclose limitations imposed by Delaware law on the coverage of after-acquired goods).

214. See *supra* notes 61-64 and accompanying text.

215. 339 U.S. at 317-18.

services, allowing those who are affected by such agencies' rules to be placed on their mailing list.<sup>216</sup> Those charged with administrative responsibilities under particular laws may work with the individuals or organizations regulated in an effort to promote awareness and knowledge of the laws involved.<sup>217</sup> The efforts of the Copyright Office to educate those interested in provisions of the new copyright law provide an example of this. Prior to the act's effective date, training was provided for the Office's employees, who in turn spread their new training to various parts of the country. Industry training sessions and workshops were also scheduled.<sup>218</sup>

Educational efforts can also be made on a broader scale, not directed toward particular interests or covering only one law. At least some fundamentals of the law should be incorporated into the educational activities of the public schools. Such an effort has been developing in the Philadelphia school system, in a cooperative effort with the Philadelphia Bar Association's Young Lawyers' Section. The program has produced a law-related curriculum guide for high schools and is working to provide teachers with attorney contacts so that law-related subjects may be introduced through social studies courses.<sup>219</sup>

## 2. Enhanced Prospects for Distributing Information

Recognition of the value of promulgation by the government requires responsiveness to developments in information technology. The

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216. This was required by statute in Colorado, prior to the establishment of a register. Colo. Rev. Stat. § 24-4-103(11)(k) (1973); 1 F. Cooper, *supra* note 116, at 237. Subscribers would be expected to cover the costs of such a service.

217. See, e.g., West Virginia Holds Competition Workshops to Brief Members of State Licensing Boards, [July-Dec.] Antitrust & Trade Reg. Rep. (BNA) No. 879, at D-1 (Aug. 31, 1978) (effort by state attorney general, after enactment of a new state antitrust law, to educate members of state licensing boards on the impact of the antitrust laws).

218. Copyright Office of the Library of Congress, Six-Month Status Report of the Revision Coordinating Committee on Implementation of the New Copyright Act of 1976, at 13 (July 1977).

Another innovative example of educational activities by a federal administrative agency can be seen in a 1979 consent agreement between the Federal Trade Commission and Westinghouse Credit Corporation. The FTC obtained Westinghouse's agreement to establish educational programs for its consumer credit employees and retail dealers to explain the Equal Credit Opportunity Act, Regulation B, and the Fair Credit Reporting Act, in settlement of alleged violations of these provisions. The corporation must conduct seminars, distribute copies of the ECOA and Regulation B to its officers and employees along with written educational materials, conduct annual refresher programs for five years, and file descriptions of this activity with the FTC. In effect, the FTC extended its own resources by forcing Westinghouse to promulgate an important portion of the law to its employees. See 44 Fed. Reg. 51,817 (1979).

219. *Young Lawyers and Students Get Smart*, The Legal Intelligencer, Jan. 25, 1978, The Retainer supplement, at 9 (Philadelphia); Committee of the Young Lawyers Section, Philadelphia Bar Association, *High School Law Course*.

future may see data terminals not just in the business community but in videotex systems available to most households. Individuals may be able to access updated information to meet their special needs in such subject areas as airline schedules and stock prices.<sup>220</sup> These systems could also provide timely access to local building code requirements or the latest restrictions on asbestos.

It can safely be assumed that private enterprise will create the necessary distribution systems. The government, in turn, should have a "record deposit" obligation and be required to establish and permit free access to data bases encompassing all laws, regulations and ordinances as a precondition to their effectiveness. Perhaps a dedicated information channel in local distribution systems could be made available to permit affirmative announcement of new, general interest enactments. Alternatively, special announcements could be printed out or stored for later retrieval at local terminals of those subscribing to special services in their areas of interest. Whatever the details may develop to be, lawmakers should view this as a significant opportunity to meet an important obligation.

### 3. Implementation

An overview of the history of promulgation, its policy considerations and its present state leads ineluctably to the conclusion that the subject should be brought into sharper focus. The full range of governmental and individual interests should be balanced, and reasoning applied that is more than just an unanalytical restatement of ancient cases. Satisfaction of the promulgation requirement should begin with the establishment of certain minimum standards to be met in all instances in which special circumstances do not require variations. When variations must occur, promulgation can be tailored to the particular circumstances of the case, but nevertheless be sufficient to satisfy the informational needs of society.

The most effective minimum standard would be an amalgam of the formal rules previously discussed. It should be required that laws be published in an official gazette or register, and not take effect until a set number of days after the gazette's publication date.<sup>221</sup> Copies of

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220. See *The Home Information Revolution*, Bus. Wk., June 29, 1981, at 74.

221. This combination of a publication and a fixed wait requirement is in effect under the Administrative Procedure Act, 5 U.S.C. § 553(d) (1976) (publication required 30 days before the effective date of a rule), and the Colorado equivalent, Colo. Rev. Stat. § 24-4-103(5) (Supp. 1973) (rules become effective 20 days after publication, or later as stated in the rule). A similar mix existed for statutes in Louisiana. Except for the location where the state's gazette was published, laws took effect thirty days after they appeared in the gazette. *State v. Ellis*, 12 La. Ann. 390, 393 (1857).

the gazette should be deposited in specified local repositories to ensure their availability to the public. The contents of the gazette should be contained in publicly accessible data bases wherever the demand exists. Laws, once so published, should thereafter be compiled, codified and indexed in a manner that ensures their discoverability. Other minimums should be applied as appropriate to accommodate special circumstances.

Minimal compliance with measures to meet the important promulgation objectives should not, however, be the goal; rather it should be the starting point, with additional measures taken when the need is perceived. Those in government should recognize this as a duty that applies to all participants in the lawmaking process: legislators, executives, administrators and judges. Each has an obligation to see that the law is made known, and to avoid imposing penalties on those who were not provided a reasonable means to ascertain the law. Recognition of a promulgation duty should lead to promulgation efforts sufficient to meet the special needs of various segments of society, and a willingness to innovate in finding ways to reach those who have the most at stake in particular fields of the law.

Given that an erroneous perception of the role of promulgation has survived for over six hundred years,<sup>222</sup> the question of how to implement fully a promulgation duty must be considered. In American law, the quickest and most far-reaching answer would be constitutional litigation. Were the courts to apply both the due process and the ex post facto clauses and the fair warning principle in dealing with unpromulgated laws, the principle would be settled on a basic level, although formulation of the details of implementation would remain. In those states with constitutional provisions relating to promulgation, a broad construction recognizing the vital role of promulgation can bring about the same result on the state level in the absence of a federal constitutional decision.

Short of invoking the Constitution, courts may employ their common-law power to reverse the line of precedent in American law that began with *The Ann*, and turn instead to the line represented by *The Cotton Planter*. Using the same process, the courts may also re-analyze the application of the *ignorantia legis* maxim in nonpromulgation cases and refuse to enforce the law against those who were kept from knowledge. As part of the common law, this maxim is also subject to the control of the judiciary.

In reaching promulgation issues, courts are usually not just engaged in applying the common law. Insofar as legislative and administrative law is concerned, courts are called upon to interpret the lawmakers'

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222. See *supra* note 26.

intent, and in this process the courts should also apply the promulgation duty.<sup>223</sup> As is true with retroactive legislation, the presumption against nonpromulgation should be strong, to be overcome only by a declaration that is "clear, strong and imperative."<sup>224</sup> In this light, interpreting the word "law" to include a degree of promulgation as part of its intrinsic meaning is a key step in the interpretation process.

Recognition of the promulgation duty in the courts may, nevertheless, not be self-executing throughout the other branches of the government. To achieve effective implementation, remedies must be provided in appropriate cases. Once a promulgation duty is established, a writ of mandamus is one available device familiar to courts. Failure to promulgate should be as subject to this remedy as any other official failure to perform a ministerial function, at least to the point of requiring a minimal level of performance.<sup>225</sup> Consideration may also be given to imposing civil liability upon the government or its officers for willful or reckless disregard of a citizen's need to have the law made available.<sup>226</sup> Failure to publish a safety regulation would be one obvious circumstance calling for the invocation of such a remedy. Courts may also recognize the applicability of the inherent power doctrine in the area of promulgation. They could recognize and en-

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223. Unfortunately, courts have at times taken the opposite position, removing all substantive meaning from otherwise clear statutory language. See *ASG Indus. v. United States*, 467 F. Supp. 1200, 1241-45 (Cust. Ct. 1979) (interpreting the words "after the date of publication of the court decision" in the Tariff Act of 1930, 19 U.S.C. § 1516(g), to mean nothing more than the day following the entry of the court's order, notwithstanding the availability of the weekly Customs Bulletin for publication purposes); *Jones v. State*, 336 So. 2d 59, 62 (La. Ct. App.) (interpreting the word "promulgated" in the Civil Code, art. 4, to mean filing with the Secretary of State), *writ denied*, 336 So. 2d 515 (La. 1976).

224. See *Shwab v. Doyle*, 258 U.S. 529, 535 (1922).

225. See *Cervase v. Office of the Federal Register*, 580 F.2d 1166 (3d Cir. 1978); *State ex rel. Browning v. Blankenship*, 154 W. Va. 253, 175 S.E.2d 172 (1970); *Capito v. Topping*, 65 W. Va. 587, 64 S.E. 845 (1909); *State ex rel. Martin v. Zimmerman*, 233 Wis. 16, 288 N.W. 454 (1939). *But see State ex rel. Crescent City Water Works Co. v. Deslonde*, 27 La. Ann. 71, 73 (1875) (concluding that courts have no power to promulgate laws or to order others to promulgate them). This last case was not clear cut, however, because of the uncertain status of the act in question.

226. *Cf. Bradley v. Knutson*, 62 Wis. 2d 432, 215 N.W.2d 369 (1974). In *Bradley*, an action was brought against the publisher of the Wisconsin State Journal for willful or reckless disregard of the plaintiff's rights by failing to publish a new law in a timely manner. The law would have increased plaintiff's recovery in a wrongful death action. Under the Wisconsin Constitution, however, the law was ineffective until published. The complaint was dismissed because the negligent delay would not have affected plaintiff's recovery; the act would have taken effect too late to aid the plaintiff no matter how quickly the Journal published it.

Of course, any action against a government and its officers may be limited or barred in some jurisdictions by the doctrine of sovereign immunity.

force the authority of any lawmaking body to take at least those steps necessary to achieve minimal promulgation of its rules and laws.<sup>227</sup>

In addition to the judicial arena, the promulgation principle can be implemented by positive legislative and constitutional commands. Minimal standards and a general statement on the policy of promulgation should be part of a state's fundamental law. Legislatures may require promulgation through state gazettes, and direct that new statutes take effect sometime after their publication. Acts modeled after the Administrative Procedure Act and the Federal Register Act may be used to impose these same requirements on administrative lawmakers. In the ongoing legislative process each new bill could be evaluated in terms of its promulgation needs, with appropriate provisions added when more than standard treatment is indicated.

In the executive and administrative branches, the objectives of promulgation can be achieved, in part, by delaying enforcement of a new law that has not yet been published. The executive and administrative branches have the greatest daily contact with the public, and they therefore have the greatest opportunity to advance the public's education in the law. They may direct information about the existence of new laws to those who may be affected, even without enabling legislation or constitutional mandate.

#### CONCLUSION

The importance of making laws known to the public has generally not been a subject of serious review by the American legal community. In a democratic system that values public participation in the governing process, it is an aberration that the need for promulgation has received so little acknowledgment. The public's right to be advised of the law and the concomitant duty of the government to make the law known are essential to a democratic society. Fulfillment of these fundamental objectives should be sought by all branches of government through the vigorous implementation of promulgation standards throughout the legal system.

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227. If a branch of government has the power to make law, and if it is accepted that promulgation is inherent in the concept of law, then it follows logically that the lawmaking power includes the power to promulgate, either in conjunction with another branch or alone. It is fairly certain, for example, that the courts would have the power to publish their own rules and opinions, even in the absence of legislative authorization, at least to the extent necessary to preserve the effectiveness of the judiciary. See generally Comment, *State Court Assertion of Power to Determine and Demand Its Own Budget*, 120 U. Pa. L. Rev. 1187, 1190-94 (1972).