University of Baltimore Law Review

Volume 13
Issue 3 *Spring 1984*

Article 7

1984

Comments: Requiring Criminal Defendants to Prove Blue Sky Exemptions: A Question of Due Process

Anthony J. DiPaula
University of Baltimore School of Law

REQUIRING CRIMINAL DEFENDANTS TO PROVE BLUE SKY EXEMPTIONS: A QUESTION OF DUE PROCESS

The Uniform Securities Act, which has been adopted in nearly every state, places the burden of proving an exemption from its blue sky registration provisions on the person claiming the exemption. Although some courts have interpreted this to mean the defendant has only the burden of raising the issue of exemption, most courts have placed the entire burden of persuasion on the defendant. This comment examines both rules to determine whether they are constitutional in light of the Supreme Court decisions on shifting burdens.

I. INTRODUCTION

Section 402 of the Uniform Securities Act (Uniform Act) exempts from its registration provisions certain types of securities and securities transactions.[1] Prior to the approval of the Uniform Act by the National Conference of Commissioners on Uniform State Laws (National Conference),[2] the question of which party should bear the burden of proving exemption from blue sky registration provisions in criminal prosecutions had been raised by defendants and decided by the courts on numerous occasions. The law was clear that the burden of proof fell on the one who claimed the exemption. The drafters of the Uniform Act simply codified the decisional law in section 402(d).[3]

Criminal defendants charged with a registration violation have claimed that the absence of an exemption is an element of the offense to be proven by the state, and that section 402(d) unconstitutionally shifts upon them the burden of proving that element. Most courts have not squarely addressed the claim, and instead have relied on the mere presence of section 402(d) to justify allocating the entire burden of proof to defendants.

Some time after the adoption of the Uniform Act, and for reasons unrelated to it, a few courts began to lessen or alter the burden that the courts had consistently placed on criminal defendants. Rather than interpreting section 402(d) literally and placing the entire burden of proving an exemption on the defendant, these courts have required only that the defendant satisfy the burden of production by raising the claim

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1. The purpose of exemptions from securities registration is best described in the legislative history to the Securities Act of 1933 where Representative Sam Rayburn of the Committee on Interstate and Foreign Commerce, speaking on behalf of the House of Representatives, reported that "[i]t [H.R. 5480] carefully exempts from its application certain types of securities and securities transactions where there is no practical need for its application or where the public benefits are too remote." H.R. REP. NO. 85, 73d Cong., 1st Sess. 5 (1933).
2. The Uniform Act was originally approved by the National Conference on August 25, 1956, and was later amended in 1958. *See* UNIF. SEC. ACT, 7A U.L.A. 562 (1978).
3. *See* UNIF. SEC. ACT § 402(d), 7A U.L.A. 645 commissioners' note (1978).

of exemption at an appropriate time. Under this view, the ultimate burden of persuasion remained on the state, requiring it to prove the absence of an exemption once the issue was properly raised. These courts, however, have remained in the minority.

Because due process constraints on shifting burdens and presumptions have been revolutionized over the past fifteen years, the time has come to evaluate the constitutionality of section 402(d) of the Uniform Act. This comment analyzes that provision in light of recent Supreme Court decisions to determine whether it meets the requirements of due process.

II. BACKGROUND

A. The Evolution and Development of Section 402(d) of the Uniform Act

1. Pre-Uniform Act

From the beginning of blue sky regulation, courts overwhelmingly agreed that the burden of proving an exemption in a criminal case should fall on the one who claimed the benefit of the exemption.[4] When defendants challenged their convictions on the ground that the state should have been required to prove as an element of the offense that the transactions or securities were not exempt, the early courts were content either to rely on the presence of a statute similar to section 402(d) as authority for placing the burden on the defendant,[5] or to find other justifications for requiring defendants to prove their entitlement to an exemption.[6]

The pre-Uniform Act courts that had a statute on which to rely usually quoted the provision that placed the burden on the defendant, and then, sometimes expressly, deferred to the legislature.[7] The courts

4. People v. Murphy, 17 Cal. App. 2d 575, 587, 62 P.2d 592, 598 (1936); People v. Dean, 131 Cal. App. 228, 231, 21 P.2d 126, 128 (1933); People v. Wilson, 375 Ill. 506, 513-14, 31 N.E.2d 959, 962 (1941); People v. Smith, 315 Ill. App. 100, 104, 42 N.E.2d 119, 121 (1942); State v. Voorhies, 169 La. 626, 639, 125 So. 737, 742 (1929); Robbins v. State, 144 Neb. 43, 44-45, 12 N.W.2d 152, 153 (1943); Commonwealth v. Harrison, 137 Pa. Super. 279, 283, 8 A.2d 733, 735 (1939); Commonwealth v. Freed, 106 Pa. Super. 529, 542, 162 A. 679, 685 (1932); Kreutzer v. Westfahl, 187 Wis. 463, 478-79, 204 N.W. 595, 601 (1925).

5. *E.g.,* People v. Wilson, 375 Ill. 506, 513, 31 N.E.2d 959, 962 (1941); Robbins v. State, 144 Neb. 43, 45, 12 N.W.2d 152, 153 (1943); Kreutzer v. Westfahl, 187 Wis. 463, 478, 204 N.W. 595, 601 (1925).

6. *See* Commonwealth v. Johnson, 89 Pa. Super. 439 (1926) (accepting trial court's placement of the burden, without explanation); *see also infra* notes 8-11 and accompanying text (discussing other justifications); *cf.* State v. Voorhies, 169 La. 626, 639, 125 So. 737, 742 (1929) (without proof that the securities sold did not belong to the prohibited class, the court would not assume that they were within the exempted class).

7. See cases cited *supra* note 5. A prime example is Kreutzer v. Westfahl, 187 Wis. 463, 204 N.W. 595 (1925), where the Supreme Court of Wisconsin stated: "We have no doubt as to the authority of the legislature to place upon defendants,

that did not have an express statutory provision upon which to rely either analogized to similar cases under other regulatory schemes,[8] relied upon precedent,[9] or simply reasoned that the burden was properly placed on the defendant.[10] Of all the cases during this pre-Uniform Act period, only one directly analyzed the contention that non-exemption constituted part of the offense and thus should be proven by the prosecution.[11] In a straightforward manner, this court held that exemptions were not "affirmative matters necessary to constitute the crime [but were] matters of defense to a charge of unlawful sale of stock, which defenses may be made by the accused."[12]

The pre-Uniform Act courts thus held unanimously that the burden of proving an exemption should fall on the one who claims its benefit, the defendant. None of these courts, however, analyzed or even identified a policy concern justifying this allocation of the burden of proof. Furthermore, none questioned whether requiring a defendant to prove an exemption violated the due process clause of the fourteenth amendment.[13]

2. The Uniform Securities Act Section 402(d)

The National Conference adopted the Uniform Act in 1956.[14] Section 402(d) of the Uniform Act states: "In any proceeding under this act, the burden of proving an exemption or an exception from a defintion is upon the person claiming it."[15] According to a note accompanying section 402(d), that section simply codified what had already been decided by the courts.[16] The note does not list the individual de-

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accused of offenses under this statute, the burden of proving that sales made by them come within the exemptions on which they rely." *Id.* at 478, 204 N.W. at 601.

8. Commonwealth v. Freed, 106 Pa. Super. 529, 542, 162 A. 679, 685 (1932) (analogizing a prosecution for selling securities without a license to other cases involving licenses before declaring that the burden should be on the defendant to show his authorization, e.g., a license, for doing the act, rather than on the state to prove that he had no license).
9. Commonwealth v. Harrison, 137 Pa. Super. 279, 283, 8 A.2d 733, 735 (1939) (citing Commonwealth v. Johnson, 89 Pa. Super. 439, 445 (1926)).
10. People v. Dean, 131 Cal. App. 228, 231, 21 P.2d 126, 128 (1933) (one who sells securities has a duty to investigate whether he can do so lawfully, and based on this duty, should shoulder the burden of proving that his investigation was correct and that he was within the bounds of the law).
11. People v. Murphy, 17 Cal. App. 2d 575, 585, 62 P.2d 592, 598 (1936).
12. *Id.* at 586, 62 P.2d at 598. *Murphy* dealt with "exceptions" rather than "exemptions" that, as the note to section 402 indicates, differ only in their scope of protection. For purposes of this comment, however, the relevance of *Murphy* is not diminished in the least.
13. U.S. CONST. amend. XIV, § 1.
14. *See supra* note 2.
15. UNIF. SEC. ACT § 402(d), 7A U.L.A. 642 (1978).
16. The note states: "This codifies existing law. See the cases cited in Loss, Securities Regulation, (1951 & 1955 Supp.), p. 414, n. 365." UNIF. SEC. ACT § 402(d), 7A U.L.A. 645 commissioners' note (1978).

cisions codified in section 402(d), but cites a footnote in a treatise written by the draftsman of the Uniform Act, Professor Louis Loss.[17]

In that footnote, Professor Loss cites several of the pre-Uniform Act cases discussed above.[18] He also includes several civil decisions instituted by third persons attempting to recover funds from sellers who failed to register either themselves as broker-dealers or the securities they sold, and were claiming to be exempt.[19] Also cited is *SEC v. Ralston Purina Co.*,[20] a United States Supreme Court decision that briefly discussed the propriety of requiring defendants to prove their exempt status.[21] Because *Ralston Purina* arose out of an injunctive proceeding instituted by the Securities and Exchange Commission (SEC) rather than a criminal prosecution, and because the Court was mainly concerned with defining the scope of the private offering exemption under the Securities Act of 1933,[22] the case is not dispositive of the constitutional due process question of whether criminal defendants can be required to prove exemptions.[23] The civil decisions[24] cited by Professor Loss likewise do not dispose of the constitutional claim.

The only apparent support for applying section 402(d) in a criminal prosecution is the pre-Uniform Act decisions that failed to discuss the constitutional question. Once codified, these decisions strongly in-

17. L. Loss, Securities Regulation 414 n.365 (1951).
18. *Id.* (citing State v. Voorhies, 169 La. 626, 125 So. 737 (1929); Commonwealth v. Freed, 106 Pa. Super. 529, 162 A.2d 679 (1932); Commonwealth v. Johnson, 89 Pa. Super. 439 (1926)).
19. Campbell v. Degenther, 97 F. Supp. 975 (W.D. Pa. 1951); A.C. Frost & Co. v. Coeur D'Alene Mines Corp., 61 Idaho 21, 98 P.2d 965 (1939); Dobal v. Guardian Fin. Corp., 251 Ill. App. 220 (1929); Harvey v. Electric Refrigeration Corp., 246 Mich. 235, 224 N.W. 443 (1929).
20. 346 U.S. 119 (1953).
21. The Court devoted one sentence of its opinion to the burden of proof issue: "Keeping in mind the broadly remedial purposes of federal securities legislation, imposition of the burden of proof on an issuer who would plead the exemption seems to us fair and reasonable." *Id.* at 126.
22. *See* 15 U.S.C. § 77d (1982).
23. *See* Morrison v. California, 291 U.S. 82 (1934), where the Court unanimously invalidated a statutory scheme that required a defendant to prove American citizenship or entitlement thereto in a prosecution for violating California's Alien Land Law. Justice Cardozo wrote: "What has been written applies only to those provisions of the statute that prescribe the rule for criminal causes. Other considerations may or may not apply where the controversy is civil. We leave that question open." *Id.* at 96-97; *see also* Note, *Affirmative Defenses and Due Process: The Constitutionality of Placing a Burden of Persuasion on a Criminal Defendant,* 64 Geo. L.J. 871, 881-82 (1976), in which the commentator noted:
> The justification for placing the burden of persuasion on a civil defendant does not apply in a criminal proceeding . . . , [b]ecause society has no overriding need to promote the interests of either party in a civil action, [and] the risk that a litigant will be unable to satisfy his burden of persuasion does not threaten any social interest.

Id. (footnotes omitted).
24. *See supra* note 19. The language of section 402(d) was intended to apply "[i]n any proceeding under th[e] act," including civil actions. This explains why Professor Loss cited the civil cases.

fluenced the current trend that continues to require criminal defendants to prove their entitlement to blue sky exemptions.

3. Post-Uniform Act

Most cases decided after the adoption of the Uniform Act continue to place the burden of proving an exemption from registration upon criminal defendants. As in the cases that arose before the adoption of the Uniform Act, the defendants contended that the absence of an exemption was an element of the offense of selling unregistered securities or failing to register as a broker-dealer and should have been proven by the state. Most post-Uniform Act courts dismissed this claim on grounds identical to those relied upon by their predecessors, relying upon pre-Uniform Act cases as precedent.[25] Those courts in states that had adopted the Uniform Act based their decisions on statutory equivalents to section 402(d) as well as on precedent.[26] A few post-

25. State v. Goodman, 110 Ariz. 524, 526-27, 521 P.2d 611, 613 (1974); State v. Hoephner, 574 P.2d 1079, 1081 (Okla. Crim. App. 1978) (dictum); Sisson v. State, 404 P.2d 55, 58-59 (Okla. Crim. App. 1964) (per curiam); Nelson v. State, 355 P.2d 413, 419-20 (Okla. Crim. App. 1960); Commonwealth v. Bomersbach, 260 Pa. Super. 28, 33, 383 A.2d 995, 998 (1978).

26. *See* United States *ex rel.* Shott v. Tehan, 365 F.2d 191, 194-95 (6th Cir. 1966) (construing Ohio law), *cert. denied,* 385 U.S. 1012 (1967); State v. Barber, 133 Ariz. 572, 578, 653 P.2d 29, 35 (1982); State v. Baumann, 125 Ariz. 404, 412, 610 P.2d 38, 46 (1980); People v. Skelton, 109 Cal. App. 3d 691, 724, 167 Cal. Rptr. 636, 654 (1980); People v. Park, 87 Cal. App. 3d 550, 556-67, 151 Cal. Rptr. 146, 154-55 (1978); State v. Buchman, 361 So. 2d 692, 694-95 (Fla. 1978) (court quoted the statute, analyzed it to determine the elements of the offense, then, in a footnote, cited an old case standing for a rule of statutory construction); Worsley v. State, 162 Ind. App. 34, 37-38, 317 N.E.2d 908, 910-11 (1974) (court quoted statute to support placing the burden on the defendant, then cited a civil decision as precedent).

Forty-five states have adopted statutes with language similar to section 402(d). ALA. CODE § 8-6-11(b) (1975 & Supp. 1983); ALASKA STAT. § 45.55.140(c) (1980); ARIZ. REV. STAT. ANN. § 44-2033 (1967); ARK. STAT. ANN. § 67-1248(d) (1980); CAL. CORP. CODE § 25163 (West 1977); COLO. REV. STAT. § 11-51-113(5) (Supp. 1983); CONN. GEN. STAT. ANN. § 36-490(d) (West 1958); DEL. CODE ANN. tit. 6, § 7309(d) (1974); FLA. STAT. ANN. § 517.171 (West Supp. 1983); GA. CODE § 10-5-22(a) (1982); HAWAII REV. STAT. § 485-17 (1976); IDAHO CODE § 30-1456 (1980); ILL. ANN. STAT. ch. 121 1/2, § 137-15A (Smith-Hurd 1960 & Supp. 1984); IND. CODE ANN. § 23-2-1-16(j) (Burns 1984); IOWA CODE ANN. § 502.205 (West 1949 & Supp. 1983-1984); KAN. STAT. ANN. § 17-1272 (1981); KY. REV. STAT. ANN. § 292.420(1) (Baldwin 1981); LA. REV. STAT. ANN. § 51:712 (West 1965); MD. CORPS. & ASS'NS CODE ANN. § 11-604 (1975); MASS. GEN. LAWS ANN. ch. 110A, § 402(d) (West 1958 and Supp. 1983-1984); MICH. COMP. LAWS ANN. § 451.802(c) (West Supp. 1983-1984); MINN. STAT. ANN. § 80A.15 subd. 4 (West Supp. 1984); MISS. CODE ANN. § 75-71-207 (Supp. 1983); MO. ANN. STAT. § 409.402(f) (Vernon 1979); MONT. CODE ANN. § 30-10-106 (1983); NEB. REV. STAT. § 8-1121 (1977); NEV. REV. STAT. § 90.100 (1983); N.H. REV. STAT. ANN. § 421-B:17 V. (1983); N.J. STAT. ANN. § 49:3-50(d) (West 1970); N.M. STAT. ANN. § 58-13-44(A) (1978); N.C. GEN. STAT. § 78A-18(b) (1981); OHIO REV. CODE ANN. § 1707.45 (Page 1978); OKLA. STAT. ANN. tit. 71, § 401(e) (West 1965 & Supp. 1983-1984); OR. REV. STAT. § 59.275 (1981); PA. STAT. ANN. tit. 70, § 1-204(c) (Purdon 1965 & Supp. 1983-1984); S.C. CODE ANN. § 35-1-340

Uniform Act decisions, however, recognized a possible due process problem and accordingly analyzed the "element of the offense" argument in light of the constitutional law related to presumptions and shifting burdens.[27] All but one of these decisions expressly held that the burden of proving exemptions should rest on the defendant.[28]

While most post-Uniform Act courts reaffirmed the view of the early courts, other courts redefined and reduced the nature of the defendant's burden by holding that he need only satisfy the burden of production and not the entire burden of proving an exemption.[29] Under this minority view, the state was then required to disprove any claimed exemption.[30] What little federal law exists in this area appears to adopt the minority view.[31]

The rationales behind the decisions that adopt the minority view

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(Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 47-31-98 (1983); TEX. REV. CIV. STAT. ANN. arts. 581-587 (Vernon 1964); UTAH CODE ANN. § 61-1-14.5 (Supp. 1983); VT. STAT. ANN. tit. 9, § 4222 (1970); VA. CODE § 13.1-514(d) (1978 & Supp. 1983); WASH. REV. CODE ANN. § 21.20.540 (1978); W. VA. CODE § 32-4-402(d) (1982); WIS. STAT. ANN. § 551.24(5) (West Supp. 1983); WYO. STAT. § 17-4-114(d) (1977).

27. United States *ex rel.* Shott v. Tehan, 365 F.2d 191, 195 (6th Cir. 1966), *cert. denied,* 385 U.S. 1012 (1967); State v. Goetz, 312 N.W.2d 1, 9-10 (N.D. 1981); State v. Frost, 57 Ohio St. 2d 121, 125-28, 387 N.E.2d 235, 238-39 (1979); State v. Fairchild, 298 S.E.2d 110, 121-22 (W. Va. 1982); *see infra* text accompanying notes 84-90 (discussing *Frost* and *Goetz*).

28. The only court that did not expressly sanction the placement of the burden on the defendant was the Supreme Court of Appeals of West Virginia in State v. Fairchild, 298 S.E.2d 110 (W. Va. 1982). Rather than reject the defendant's contention that the state should be required to prove exemptions, the *Fairchild* court assumed *arguendo* that the contention was correct since the state had sufficiently proved the absence of any exemption. Thus, the court found it unnecessary to decide the constitutionality of requiring defendants to prove exemption. *Id.* at 122.

29. Commonwealth v. David, 365 Mass. 47, 54-56, 309 N.E.2d 484, 488-90 (1974); People v. Dempster, 396 Mich. 700, 711-14, 242 N.W.2d 381, 387-88 (1976); Cox v. State, 523 S.W.2d 695, 699 (Tex. Crim. App. 1975); Dean v. State, 433 S.W.2d 173, 178 (Tex. Crim. App. 1968). The Court of Criminal Appeals of Texas impliedly overruled *Dean* and *Cox* in Koah v. State, 604 S.W.2d 156, 163 (Tex. Crim. App. 1980), and adopted the majority view that places the entire burden of proving exemption upon the defendant.

30. This minority view was defined by the Supreme Court of Michigan in People v. Dempster, 396 Mich. 700, 242 N.W.2d 381 (1976), where it stated:

> [O]nce the state establishes a prima facie case of statutory violation, the burden of going forward, i.e., of injecting some competent evidence of the exempt status of the securities, shifts to the defendant. However, once the defendant properly injects the issue, the State is obliged to establish the contrary beyond a reasonable doubt.

Id. at 714, 242 N.W.2d at 388 (citations omitted).

31. The federal view on proving blue sky exemptions is difficult to determine because of the paucity of decisions discussing the issue. *See* United States v. Dinneen, 463 F.2d 1036 (10th Cir. 1972), however, where the United States Court of Appeals for the Tenth Circuit stated: "Next, [the defendant] argues that the Government failed to prove that the [issued] stock was not within the exemptions from the requirements of § 5 of the Act. It was incumbent on the defendant, not the Government, to set up an exception and present proof raising such a defense." *Id.* at

are varied. One court offered no reason for limiting the defendant's burden.[32] Other courts analogized the exemption from blue sky registration to other affirmative criminal defenses, such as insanity, which the state was not required to disprove unless raised.[33] The most noteworthy case in this line of minority decisions is *People v. Dempster,*[34] a 1976 Supreme Court of Michigan decision. The *Dempster* court likened the sale of unregistered securities to carrying a handgun without a permit. Both offenses were governed by statutes containing similar language that placed the burden of proving excuse or exemption upon the defendant.[35] The court had previously construed the handgun statute to require the defendant merely to introduce the issue of license or exemption by offering some evidence thereof, thus obligating the state to prove the contrary beyond a reasonable doubt.[36] In *Dempster,* the court gave a similar construction to the blue sky provision.[37]

In sum, most post-Uniform Act courts deferred to the legislature and relied on the presence of a statute to reject the contention that the absence of an exemption should be proven by the state as an element of the offense. A few of the courts that relied upon section 402(d) recognized a potential due process problem, but found the statutory allocation of the burden acceptable. A minority of the post-Uniform Act courts, however, modified the burden imposed by section 402(d), requiring only that a defendant assert his entitlement to an exemption without having to prove that he was in fact exempt. These majority and minority approaches remain in conflict today.

B. Development of the Present Due Process Requirements

Before analyzing whether section 402(d) is constitutional under the due process clause of the fourteenth amendment,[38] it is necessary to define the requirements of due process. The test to be applied in analyzing whether defendants can be required to prove certain facts or circumstances to avoid conviction has developed through several Supreme Court decisions over a period of nearly half a century.

The first major Supreme Court decision to analyze whether the burden of proving certain facts could constitutionally be shifted from

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1041-42. The cases cited in *Dinneen* are even less helpful in determining the federal stance.

32. *See* Dean v. State, 433 S.W.2d 173 (Tex. Crim. App. 1968). In *Dean,* the Court of Criminal Appeals of Texas stated: "The burden rested with appellant to raise this exemption defense; then, if raised, the burden shifted to the State to disprove such defense beyond a reasonable doubt." *Id.* at 178, *quoted in* Cox v. State, 523 S.W.2d 695, 699 (Tex. Crim. App. 1975).
33. Commonwealth v. David, 365 Mass. 47, 54, 309 N.E.2d 484, 488-89 (1974).
34. 396 Mich. 700, 242 N.W.2d 381 (1976).
35. *Id.* at 712, 242 N.W.2d at 387.
36. *See* People v. Henderson, 391 Mich. 612, 218 N.W.2d 2 (1974).
37. *Dempster,* 396 Mich. at 713, 242 N.W.2d at 388; *see supra* note 30.
38. U.S. CONST. amend. XIV, § 1.

the prosecution to the defense was *Morrison v. California.*[39] In *Morrison,* the Court invalidated a California statute that made it a criminal offense for an alien to own land because the statute expressly required the defendant to prove his citizenship to exonerate himself.[40] Although holding that the state should have been required to prove the lack of citizenship, the Court conceded that "within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant."[41] The court proceeded to define those "limits" and found that the statute had clearly exceeded them.[42] One commentator has attributed to *Morrison* what has become known as the "comparative convenience" test for determining the validity of affirmative defenses.[43] This commentator and others acknowledge that later developments in the law have made this test an insufficient basis for shifting the entire burden of proof to a criminal defendant.[44]

In *Tot v. United States,*[45] the second major decision in this area, the Supreme Court defined the limits on the legislature's ability to shift the burden of proof onto criminal defendants. At issue in *Tot* was a statute that created a presumption that the defendant had to rebut to

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39. 291 U.S. 82 (1934). *Morrison* was not the first Supreme Court case to analyze the issue as indicated by the Court's partial reliance on McFarland v. American Sugar Ref. Co., 241 U.S. 79 (1916). Although *McFarland* recognized that the legislature cannot go beyond certain limits in shifting burdens of proof to a defendant, it did not discuss these limitations.
40. *Morrison*, 291 U.S. at 96-97.
41. *Id.* at 88.
42. Justice Cardozo, writing for the Court, stated:

> The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.

Id. at 88-89.

43. Osenbaugh, *The Constitutionality of Affirmative Defenses to Criminal Charges,* 29 ARK. L. REV. 429, 436-37 (1976).

The language from *Morrison* relied upon in formulating the comparative convenience test is as follows: "For a transfer of the burden [of proof] there must be in any event a manifest disparity in convenience of proof and opportunity for knowledge, as, for instance, where a general prohibition is applicable to everyone who is unable to bring himself within the range of an exception." *Morrison*, 291 U.S. at 91 (citation omitted). The American Law Institute has also incorporated this language into its definition of an affirmative defense: "A ground of defense is affirmative, within the meaning of Subsection (2)(a) of this Section, when: . . . it involves a matter of excuse or justification peculiarly within the knowledge of the defendant on which he can fairly be required to adduce supporting evidence." MODEL PENAL CODE § 1.12 (Proposed Official Draft 1962).

44. Osenbaugh, *supra* note 43, at 436-37, 455; Note, *supra* note 23, at 886. Later decisions have expressly held that mere convenience of proof or access to information will not justify shifting the burden of persuasion onto a criminal defendant. *See, e.g.,* Mullaney v. Wilbur, 421 U.S. 684, 702 (1975); Tot v. United States, 319 U.S. 463, 469 (1943).
45. 319 U.S. 463 (1943).

avoid conviction.[46] The *Tot* Court invalidated the statute, holding that the state cannot prove some facts and then presume the ultimate facts necessary to establish guilt unless there is some rational relationship between the facts proved and those presumed.[47] Otherwise the defendant would have "the obligation of exculpation."[48]

Perhaps the most influential decision in the area of shifting burdens of proof was *In re Winship,*[49] a 1970 Supreme Court decision. Although the primary issue in *Winship* was the definition of the appropriate standard of proof to be applied in juvenile delinquency proceedings,[50] the decision was invaluable in defining the requirements of due process. Speaking for the Court, Justice Brennan wrote: "[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt *of every fact necessary to constitute the crime with which he is charged.*"[51] This holding emphasized the important interests of the defendant that are at stake in a criminal prosecution, namely his liberty and his good name.[52] The Court also considered the importance of reducing the risk of erroneous convictions,[53] as well as maintaining public trust and confidence in the criminal justice system.[54] *Winship*'s definition, while invaluable, has been subject to conflicting interpretations. Some view it as mandating an elemental approach in determining what a defendant may be called upon to prove.[55] Others though hail the Court's use of the terminology "every fact necessary to constitute the crime,"[56] coupled with the absence of the word "element," as the "seeds for abandonment of the formalistic elements approach."[57]

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46. The statute made it a crime for a twice-convicted felon to receive a firearm or ammunition that had been shipped in interstate commerce. Upon proof of possession of the firearm by this person, and that he had twice been convicted of a crime of violence, it was presumed that the firearm was shipped in interstate commerce. *Id.* at 464.
47. *Id.* at 469.
48. *Id.*
49. 397 U.S. 358 (1970).
50. *Id.* at 359.
51. *Id.* at 364 (emphasis supplied).
52. *Id.* at 363-64.
53. *Id.* at 363.
54. *Id.* at 364.
55. *See* Note, *Burden of Proving Affirmative Defense Can Be Placed on Defendant,* 29 MERCER L. REV. 875, 877 (1978).
    The elemental approach represents more of a statutory development than a constitutional analysis. It is a formalistic approach that is used to distinguish elements of an offense from exceptions or exemptions strictly on the basis of whether the exception is included within the enacting clause of the statute. As a test for determining the constitutionality of a statutory scheme, this approach may be easily undermined by the state as the Court recognized in Mullaney v. Wilbur, 421 U.S. 684, 698-99 (1975). For a further discussion of the elemental approach, see Osenbaugh, *supra* note 43, at 437-41. For a blue sky decision applying the elemental approach analysis, *see* State v. Buchman, 361 So. 2d 692 (Fla. 1978).
56. *Winship,* 397 U.S. at 364.
57. Osenbaugh, *supra* note 43, at 442.

The full scope of *Winship* was not realized until the Supreme Court's 1975 decision in *Mullaney v. Wilbur.*[58] In *Mullaney,* the issue was whether the state could constitutionally punish all intentional killing as murder unless the defendant could disprove the presumption of malice by showing that the killing was the result of heat of passion on sudden provocation.[59] The prosecution contended that because absence of heat of passion, i.e., malice, was not a "fact necessary to constitute the crime,"[60] and was only related to the degree of punishment to be imposed, *Winship* was inapplicable.[61] The Court rejected this contention and extended the *Winship* due process requirement beyond the mere elements of the crime to all factors that affect the degree of culpability and the extent of punishment to be imposed.[62] To limit *Winship* to the facts that constitute a crime, reasoned the Court, would encourage states to simply redefine different crimes to circumvent its holding.[63]

In reaching its decision, the *Mullaney* Court emphasized the same interests of both society and the defendant that were the bases for the *Winship* holding. Among others, the Court emphasized society's interest in the reliability of jury verdicts, as well as the importance of reducing the risk of erroneous convictions.[64] The Court rejected the state's justification for shifting the burden to the defendant, i.e., the difficulty in proving a negative.[65]

One commentator has interpreted *Mullaney* as requiring a balancing of the interests involved in light of *Winship* to determine whether the fact at issue is "critical" and should thus be proven by the state.[66] Other commentators have either viewed the decision as a limited holding requiring state courts to reexamine affirmative defenses on a case-by-case basis,[67] or have criticized it for failing to enunciate a test for determining the substance of a crime.[68]

In *Patterson v. New York,*[69] decided two years after *Mullaney,* the Supreme Court redefined the test for determining whether the burden of proving certain facts could be placed upon a criminal defendant. On facts almost indistinguishable from *Mullaney,* the Court affirmed a second-degree murder conviction under a New York statute that required

58. 421 U.S. 684 (1975).
59. *Id.* at 691-92.
60. *Winship*, 397 U.S. at 364.
61. *Mullaney*, 421 U.S. at 696-97.
62. *Id.* at 697-98.
63. *Id.* at 698-99.
64. *Id.* at 699-701.
65. *Id.* at 701-02.
66. Osenbaugh, *supra* note 43, at 447.
67. Note, Mullaney v. Wilbur, 4 HOFSTRA L. REV. 493, 509 (1976).
68. Dutile, *The Burden of Proof in Criminal Cases: A Comment on The* Mullaney-Patterson *Doctrine,* 55 NOTRE DAME LAW. 380, 382 (1980) (criticizing both *Mullaney* and *Patterson* for failing to provide guidelines); Note, *supra* note 55, at 879.
69. 432 U.S. 197 (1977).

a defendant to prove affirmatively that he was acting under the influence of extreme emotional distress so as to reduce the crime to manslaughter.[70] By employing an elemental approach, something it had earlier eschewed as a means of undermining *Winship,*[71] the Court distinguished *Mullaney,* or at least limited it to its facts.[72] The important interests that were relied upon in *Winship* and *Mullaney* were no longer considered paramount in *Patterson.*

While recognizing the potential for legislative abuse, and even cautioning that it may sometimes be necessary to look beyond a statutory definition of a crime to ensure that the legislature has neither accidentally nor intentionally mislabeled an element of the offense, the Court made it clear that one cannot question the manner in which a state legislature chooses to define a criminal offense absent an obvious due process violation.[73] Furthermore, the Court held that a state need not disprove affirmative defenses[74] nor must it prove the nonexistence of mitigating circumstances "if in its judgment this would be too cumbersome, too expensive, and too inaccurate."[75] The rule derived from *Patterson* is essentially a restatement of *Winship* with some altered terminology to indicate the adoption of the elemental approach.[76]

Patterson may best be understood by viewing it in the broad context of federalism.[77] Like *Mullaney,* the decision has been criticized for its failure to formulate a workable test for distinguishing defenses from elements of the crime.[78] Some believe that in its desire to limit the broad scope that *Mullaney* had given to *Winship,* the *Patterson* Court simply went further than it intended.[79]

In summary, "[t]here is no black letter rule as to when it is proper to allocate the burden of proof to the accused."[80] *Patterson,* though,

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70. *Id.* at 216.
71. *See supra* note 63 and accompanying text.
72. *Patterson,* 432 U.S. at 215-16; *see also* Note, *supra* note 55, at 882 ("*Patterson* drained *Winship* of much of its vitality and virtually restricted *Mullaney* to a single specific set of facts."). For a suggestion that *Patterson* rejected *Mullaney, see* Note, *The Constitutionality of Affirmative Defenses After* Patterson v. New York, 78 COLUM. L. REV. 655, 665 (1978) [hereinafter cited as Note, *After* Patterson]; Note, Patterson v. New York, *Criminal Procedure—The Burden of Proof and Affirmative Defenses,* 9 U. TOL. L. REV. 524, 544 (1978) [hereinafter cited as Note, Patterson v. New York] ("*Patterson* provides the blueprint to sidestep the due process requirements of *Winship* and *Mullaney.*").
73. *Patterson,* 432 U.S. at 210.
74. *Id.*
75. *Id.* at 209.
76. The Court remarked: "[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the *elements included in the definition* of the offense of which the defendant is charged." *Id.* at 210 (emphasis supplied); *see supra* text accompanying note 51.
77. *See* Note, *After* Patterson, *supra* note 72, at 661; Note, Patterson v. New York, *supra* note 72, at 542; Note, *supra* note 55, at 881.
78. *See* Note, Patterson v. New York, *supra* note 72, at 544.
79. Note, *After* Patterson, *supra* note 72, at 678.
80. *Id.* at 655.

represents the most recent Supreme Court analysis on the constitutionality of affirmative defenses. In essence, the state is only required to prove the facts that constitute elements of the crime charged, i.e., those matters contained within the statutory provision. Although it may be necessary to question the manner in which a legislature has defined a particular offense, courts should do so only when it it obvious that the limits of due process have been exceeded. Otherwise, the legislature may constitutionally require a defendant to prove affirmatively facts not contained within the statutory definition of the offense, and the state need not prove the nonexistence of those facts.

III. AN ANALYSIS OF THE CONSTITUTIONALITY OF SECTION 402(d)

A. An Overview

Most state courts currently require defendants to prove exemption from a blue sky registration requirement. The following will trace the development of this requirement in the context of section 402(d).

A majority of courts during the early period of blue sky regulation relied on untested statutes in placing the burden of proof on defendants, or otherwise justified this placing of the burden.[81] None of the early courts questioned the due process implications of placing the burden on the accused rather than on the prosecution. These decisions were then codified in the Uniform Act,[82] and after the adoption of the Uniform Act, many state courts deferred to their respective legislatures and accepted the placement of the burden upon the defendant.[83] Current law, therefore, is founded upon a few old decisions that are of doubtful validity today.

This conclusion does not amount to a criticism of the early courts for their failure to consider the due process issue, because the Supreme Court had not yet outlined the due process limitations on the shifting of burdens of production and proof. The post-Uniform Act decisions, however, were made in a different constitutional environment, and mere reliance on the language of section 402(d) or the early decisions is questionable in light of later Supreme Court holdings. Equally questionable are the recent decisions that recognized the due process issue, but simply relied upon *Patterson v. New York*[84] and failed to analyze the question in a coherent fashion.

A decision that illustrates the failure to analyze a statute similar to section 402(d) in light of the present requirements of due process is *State v. Frost,*[85] decided in 1979 by the Supreme Court of Ohio. In

81. *See supra* notes 5-6.
82. *See supra* note 15.
83. *See supra* note 26.
84. 432 U.S. 197 (1977).
85. 57 Ohio St. 2d 121, 387 N.E.2d 235 (1979).

Frost, before proceeding to outline the major Supreme Court decisions discussed above,[86] the court seemingly assumed that exemptions were affirmative defenses. Relying upon *Patterson,* the court concluded that the state was not required to disprove these defenses.[87] The court did not discuss the elements of the offense until the end of its opinion,[88] and did not provide any further analysis.

A similar decision is *State v. Goetz,*[89] a 1981 decision by the Supreme Court of North Dakota. As in *Frost,* the court provided an excellent overview of the developments of the due process requirements.[90] After outlining the law, however, the court immediately concluded that "the state did offer proof of every essential element of the offense."[91] Although doing so would have proved fruitless, the court did not attempt to define the "essential elements" of the crime, thus leaving room to question how it reached its conclusion. The *Goetz* court did not engage in any further analysis.

As these recent decisions illustrate, *Patterson v. New York*[92] does not provide a bright-line test for determining the constitutional limits of burden-shifting. The most persuasive explanation for this shortcoming is that the Supreme Court wanted to emphasize the importance of leaving the administration of criminal law to the states,[93] and did not want to question the manner in which state legislatures define various crimes and defenses. Simply because the Supreme Court chose not to question state legislative decisions involving the definition of criminal offenses absent an obvious due process contravention is not a valid reason for state courts to adopt a similar position. Yet, as *Goetz* and *Frost* exemplify, some have done exactly that. Surely the Court did not intend for courts to adopt this position because it would leave state legislatures virtually unchecked.

A valid reason thus exists for questioning the manner in which courts have interpreted section 402(d) of the Uniform Act. A reasoned analysis is necessary to determine whether a defendant charged with violating a blue sky registration provision may constitutionally be re-

86. *Id.* at 124-28, 387 N.E.2d at 238-39; *see supra* notes 49-77.
87. *Frost,* 57 Ohio St. 2d at 127, 387 N.E.2d at 239.
88. The end of the opinion stated:

> It remains with the state to prove beyond a reasonable doubt the essential elements of the offense: (1) that the offense was committed in the county; (2) that the defendant was selling securities without having been licensed as a security dealer; and (3) that the defendant was selling unlicensed securities.

Id. at 128, 387 N.E.2d at 239. What the court characterized as one offense is actually two separate offenses. A person can be charged with selling securities without being licensed to do so, or simply selling unlicensed securities, or both as was Frost.
89. 312 N.W.2d 1 (N.D. 1981).
90. *Id.* at 9-10.
91. *Id.* at 10.
92. 432 U.S 197 (1977).
93. *See supra* note 76 and accompanying text.

quired to prove exemption from the Uniform Act. The following provides a suggested approach for resolving this issue.

B. A Suggested Analysis

1. The Elements of the Offense

As discussed above,[94] there are obvious infirmities in relying upon the elemental approach for determining whether an unconstitutional burden has been placed upon a defendant. The Supreme Court has recognized the ease with which this analysis can be undermined.[95] Despite its shortcomings, however, the elemental approach is a valuable touchstone in analyzing the constitutionality of section 402(d). In using this approach to analyze an offense, attention is focused upon the statutory definition of the offense to determine whether all of the essential elements are characterized as such and have not been either labeled affirmative defenses or disregarded totally. The logical starting point, therefore, is to see how the legislature has defined the particular offense.

Only two courts have expressly enumerated the elements of a blue sky registration violation.[96] Both decisions involved dual violations, i.e., the defendant failed to both register himself as a broker-dealer in securities and to register the securities in which he dealt.[97] This discussion though concerns only prosecutions for failing to register the securities that were issued. As listed by these courts, the offense of selling unregistered securities contains two elements: (1) that the offense occurred within the geographical jurisdiction of the court; and (2) that the securities sold were not registered.[98] Since the offense is statutory and is derived from the Uniform Act, other courts would presumably concur in this listing of the elements.

The above listing places no burden on the state to prove that the securities sold had to be registered, only that they were not registered. Interestingly, early blue sky regulation provided that the state was required to prove the additional element that the securities were of a class that had to be registered.[99] This requirement has inexplicably vanished

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94. *See supra* note 55.
95. *See supra* notes 63 and 72 and accompanying text.
96. United States *ex rel.* Shott v. Tehan, 365 F.2d 191, 196 (6th Cir. 1966), *cert. denied,* 385 U.S. 1012 (1967); State v. Frost, 57 Ohio St. 2d 121, 127-28, 387 N.E.2d 235, 239 (1979). *Frost* is discussed at *supra* text accompanying notes 85-87.
97. *See supra* note 87.
98. United States *ex rel.* Shott v. Tehan, 365 F.2d 191, 196 (6th Cir. 1966), *cert. denied,* 385 U.S. 1012 (1967); State v. Frost, 57 Ohio St. 2d 121, 127-28, 387 N.E.2d 235, 239 (1979).
99. *See* People v. Johnson, 355 Ill. 380, 388, 189 N.E. 271, 275 (1934) ("evidence must be produced by the people showing in what classes the securities belong in a prosecution under the act"), *relied upon in* People v. Baldwin, 289 Ill. App. 126, 134, 6 N.E.2d 904, 908 (1937) ("the burden is upon the people to prove beyond a reasonable doubt that the securities sold were Class D securities [i.e., ones that had to be registered]"). In People v. Wilson, 375 Ill. 506, 512, 31 N.E.2d 959, 961 (1941),

from the definition of the offense. If the state is only required to prove that the securities involved were unregistered, it is simply begging the question of whether they had to be registered before they could be offered and lawfully sold. What has occurred with the offense of selling unregistered securities may be an example of what the Supreme Court feared in *Mullaney,*[100] and what some believe *Patterson*[101] legitimized — the redefinition of an offense to ease the state's burden by transforming an element of the crime into an affirmative defense, thus requiring an accused to prove his innocence.

The only explanation for the absence of the third element of the offense is that it has been converted into a presumption to lessen the state's burden. Under this allocation, the state need only prove that the defendant issued unregistered securities within the jurisdiction of the court, and the law presumes that the securities were subject to registration, that is, were not exempt. It is then incumbent upon the defendant to rebut the presumption and affirmatively prove that he was not required to register the securities before selling them.

The constitutionality of shifting the burden in this fashion necessarily rests on the validity of the presumption employed.[102] The next step in the analysis, therefore, is to test the presumption.

2. The Validity of Presuming the Necessity of Registration

There are several ways to test the validity of a presumption, one of which is to apply the rational connection test.[103] Under this test, a presumption is only valid if the facts presumed bear some rational connection to the facts proved. In this case, the fact presumed is that the securities issued were required to be registered. The issue is whether this rationally follows from proof that unregistered securities were sold. Although a rational connection between the two is not readily apparent, this does not necessarily invalidate the presumption.

Since presumptions and affirmative defenses are closely related,[104] another method for determining the validity of the presumption is to apply the comparative convenience test.[105] This test is usually applied

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decided four years after *Baldwin,* the Supreme Court of Illinois clarified its earlier decision by holding that the state need not prove that the sale of the unregistered securities took place under circumstances that would make it exempt. This holding was reaffirmed by the Appellate Court of Illinois in People v. Smith, 315 Ill. App. 100, 104, 42 N.E.2d 119, 121 (1942).

100. Mullaney v. Wilbur, 421 U.S. 684 (1975); *see supra* note 63 and accompanying text.

101. Patterson v. New York, 432 U.S. 197 (1977); *see supra* note 72.

102. *See* Note, *supra* note 23, at 883.

103. *See supra* notes 45-48 and accompanying text. For a discussion of the rational connection test, see Osenbaugh, *supra* note 43, at 471-74.

104. Both concepts require a defendant to come forward and produce evidence on an issue. *See* Osenbaugh, *supra* note 43, at 472; Note, *supra* note 23, at 884.

105. *See supra* note 43.

to affirmative defenses. Originating in *Morrison v. California,*[106] the key to this test is whether there exists "a manifest disparity in convenience of proof and opportunity for knowledge" to justify relieving the state from having to produce evidence on an issue until it has been fairly raised by the defendant.[107] According to the *Morrison* Court, a "manifest disparity" exists "where a general prohibition is applicable to every one who is unable to bring himself within the range of an exception."[108] This is precisely analogous to the presumption created under the blue sky provisions that generally prohibit all sales of securities unless a person can show that he falls outside the prohibition and is therefore exempt from prosecution.

The creation of the presumption thus has a valid basis, and a defendant in a prosecution for selling unregistered securities can constitutionally be required to offer some proof of his claimed exemption from the provisions of the Uniform Act. Although this disposes of any objections to the minority view on shifting the burden of proving exemptions,[109] further analysis is necessary. The comparative convenience test justifies placing the burden of producing some evidence on the exemption issue, but it is not considered a sufficient ground for requiring a defendant to bear the entire burden of proof, including the risk of nonpersuasion.[110] Because most courts have interpreted statutes like section 402(d) to require a defendant in a blue sky prosecution to bear the entire burden of proving exemption,[111] it remains to be seen whether this practice is permissible within the limits of due process.

3. The Constitutionality of Placing the Burden of Persuasion on the Defendant

There are several arguments against placing the burden of persuasion on the defendant. Prior to discussing these arguments, however, the following will survey the arguments in favor of such a shift.

A common justification for requiring a defendant to bear the entire burden of proof is what has been termed the "greater includes the lesser" rationale.[112] It is believed that the Supreme Court, at least partially, relied upon this justification in *Patterson v. New York.*[113] This theory provides that if the legislature may criminalize certain conduct without providing for a particular defense, then allowing such a de-

106. 291 U.S. 82 (1934).
107. *Id.* at 91.
108. *Id.*
109. *See supra* notes 29-30 and accompanying text.
110. *See* Osenbaugh, *supra* note 43, at 437, 451 n.120; Note, *supra* note 23, at 882.
111. *See supra* notes 26-28 and accompanying text.
112. For a discussion of this theory, see Note, *After* Patterson, *supra* note 72, at 667. Defenses arising under this theory have been referred to as "fair compromise" defenses. *See* Osenbaugh, *supra* note 43, at 459-67.
113. 432 U.S. 197 (1977); *see* Dutile, *supra* note 68, at 382; Note, *After* Patterson, *supra* note 72, at 667.

fense is a gratuitous gesture on its part that justifies requiring a defendant to bear the entire burden of proving the defense. The corollary to this is that if a defense is constitutionally mandated, i.e., an element of the offense, then the defendant cannot be required to bear the burden of persuasion.[114] As applied in a blue sky registration context, since all sales of unregistered securities may be punished, permitting certain transactions involving a particular number or type of securities to be made on an exempt basis is arguably a bonus to the defendant that justifies requiring him to prove that his transaction falls within the exempted class. Although at first glance this reasoning seems appealing, a closer analysis suggests otherwise.

This rationale arguably tends to legitimize all affirmative defenses because of the difficulty in determining the elements of an offense.[115] In the present analysis it has been suggested that the necessity of registration prior to offering for sale is an element of the offense of selling unregistered securities.[116] It has further been suggested that the state has already been permitted to ease its burden in the prosecution of these cases by presuming the necessity of registration and requiring the defendant to offer some evidence to the contrary before it must discuss the exemption issue.[117] To shift upon the defendant the burden of persuasion as to this presumed element would relieve the state of its burden, something disallowed even under *Patterson.*[118]

Other asserted justifications for shifting the burden of persuasion to a defendant include the difficulty the state would have in proving a negative, i.e., that the transaction or the securities offered are not exempt, and that the facts required to prove the issue are peculiarly within the defendant's knowledge. It is fairly well settled that neither constitutes a sufficient ground for relieving the state of its burden.[119]

The arguments against shifting the burden of persuasion stem primarily from an emphasis on the important interests recognized by the Supreme Court in *Winship* and *Mullaney.*[120] If one accepts the view that *Patterson* was a decision based on federalism[121] then the previously recognized societal interests in reducing the risk of erroneous convictions and maintaining public confidence in the criminal justice system, as well as the defendant's interests in avoiding the stigma of a conviction and maintaining liberty,[122] still must be considered para-

114. Note, *After* Patterson, *supra* note 72, at 667-68. The corollary is actually an incorporation of *Winship* and *Patterson,* which held that the state must prove all of the elements of the offense. *See supra* note 75 and accompanying text.
115. Note, *After* Patterson, *supra* note 72, at 668.
116. *See supra* notes 99-101 and accompanying text.
117. *See supra* notes 103-08 and accompanying text.
118. For the test derived from *Patterson,* see *supra* note 75.
119. *See supra* notes 65 and 110 and accompanying text.
120. *See supra* notes 52-54 and 64 and accompanying text.
121. *See supra* note 76 and accompanying text.
122. *See supra* notes 52-54 and accompanying text.

mount. Indeed, all of the asserted justifications for shifting the entire burden of proof have been ruled insufficient to override these interests.[123]

One commentator has reasoned that the burden of persuasion should be on the prosecution because of the defendant's "fundamental right" to liberty, i.e., the right to be free from imprisonment.[124] By characterizing the defendant's right in this fashion, the state is required to show compelling reasons for infringing upon the right, and must prove "all issues relevant to guilt."[125] At least one other commentator has similarly placed this broad burden of persuasion on the state.[126]

The growing view today is that "the burden of persuasion [should] be shifted to the defendant only in the most exceptional circumstances."[127] Advocates of this view reason that any difficulties the state may encounter in proving an issue, because of a disparity in the abilities of the state and the defendant to gain access to certain facts, can be remedied by shifting only the burden of production.[128] It is further contended, quite persuasively, that shifting only this lesser burden protects the interests of both the state and the defendant since it relieves the defendant of the risk of nonpersuasion, and eases the state's burden in not having to disprove every possible affirmative defense until the defense is put in issue.[129] Accomodating the different interests in this fashion has no effect on trial procedure "since the facts necessary to disprove these defenses [such as exemptions] usually are the same facts introduced as evidence of the crime."[130]

Thus, it seems clear that the minority interpretation of section 402(d), as stated in *People v. Dempster,*[131] withstands constitutional challenge. The majority view, however, does not fare as well under this analysis.

IV. CONCLUSION

The history of section 402(d) of the Uniform Act indicates that its purpose was to codify decisional law. All of the early decisions held that it was proper to require a defendant to prove exemption from blue sky registration provisions, and none of the courts questioned the constitutionality of this requirement. By adopting the Uniform Act, state legislatures impliedly approved these decisions, and as later courts de-

123. *See supra* notes 65 and 110 and accompanying text.
124. Osenbaugh, *supra* note 43, at 474-77.
125. *Id.*
126. Note, *After* Patterson, *supra* note 72, at 678.
127. *Id.*; *accord* Osenbaugh, *supra* note 43, at 479; Note, *supra* note 23, at 893.
128. *See, e.g.,* Osenbaugh, *supra* note 43, at 451; Note, *supra* note 23, at 887-88.
129. Note, *supra* note 23, at 893.
130. *Id.* at 888. In proving an unlawful sale of securities the state would logically and necessarily introduce evidence of the types and number of securities issued and would therefore contradict most if not all of the possible exemptions.
131. 396 Mich. 700, 242 N.W.2d 381 (1976).

termined whether section 402(d) was constitutional, most simply deferred to legislative judgment.

The early view that placed upon the defendant the entire burden of proving blue sky exemption is still prevalent today, as most courts give statutes like section 402(d) a literal interpretation. Some of the more recent decisions have recognized a possible due process problem with interpreting the statute in this manner, but none has fully analyzed the constitutionality of shifting the entire burden of proving exemptions. By applying recent Supreme Court decisions that outline the due process requirements in the area of shifting burdens of proof and persuasion, and focusing on the important interests at stake in a criminal prosecution, there exists valid reason for questioning state court holdings that interpret section 402(d) as shifting the entire burden of proving exemptions onto the defendant in criminal prosecutions.

Although most courts that have analyzed the issue of blue sky exemption have placed the entire burden of proof on a defendant, a few courts have interpreted statutes similar to section 402(d) as requiring only that a defendant raise the issue of an exemption by offering some proof, thus leaving to the state the ultimate burden of proving that none is present. Analysis reveals that this limited shift in the burden of proof is not only constitutional, but satisfies the interests of both the state and the defendant.

The Supreme Court's most recent pronouncement[132] arguably leaves state legislative decisions regarding the burdens of proof and defining criminal offenses to the scrutiny of state courts. Until these courts either adopt the minority interpretation of section 402(d) or provide some reasoned analysis to support the statutory allocation of the entire burden of proving blue sky exemptions, the constitutionality of section 402(d), as literally interpreted, remains in doubt.

Anthony J. DiPaula

132. Patterson v. New York, 432 U.S. 197 (1977).