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On November 20, 1974, a uniformed crossing guard motioned for the school children to cross the street. Five-year-olds Carrilyn Christakos and George Kech started running across the street—neither reached the other side. Carrilyn was struck by an auto that skidded through the intersection. She was thrown eighty feet and died the following day. After being caught under the same auto and dragged fifty feet, George died almost instantly.[1]

The minor driver, John M. Vitale, was issued a traffic citation for failing to reduce speed.[2] After waiving his right to a jury trail and pleading not guilty to the charge, Vitale was tried, found guilty, and fined fifteen dollars.[3] The next day a petition for adjudication of wardship was filed in which Vitale was charged with involuntary manslaughter for the deaths of the two children.[4] The petition was dismissed on Vitale's motion that the conviction and fine for failing to reduce speed precluded his again being placed in jeopardy for the same offense.[5]

The State of Illinois appealed and the Appellate Court of Illinois affirmed for reasons other than double jeopardy.[6] On ap-

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1. Police Traffic Accident Report of the Department of Police, Village of South Holland, Illinois, *reprinted in* Brief and Argument for Petitioner, Appendix at 21-26, Illinois v. Vitale, 447 U.S. 410 (1980).

2. Illinois v. Vitale, 447 U.S. 410, 411 (1980).

3. The trial was held on December 23, 1974, in the Circuit Court of Cook County, Illionis. 447 U.S. at 412. The maximum punishment for failing to reduce speed to avoid an accident is 30 days in jail or a fine of five hundred dollars. *Id.* at 412 n.3; Illinois Vehicle Code § 16-104, ILL. REV. STAT. ch. 95½, § 16-104(a) (1973); Unified Code of Corrections §§ 5-9-1, -8-3, ILL. REV. STAT. ch. 38, §§ 1005-9-1, -8-3 (1973).

4. The petition was filed in the Juvenile Division of the Circuit Court of Cook County, Illinois. 447 U.S. at 412-13. Vitale was charged with two counts of involuntary manslaughter pursuant to the provisions of the Criminal Code of 1961, ILL. REV. STAT. ch. 38, § 9-3 (1973). 447 U.S. at 413 n.4.

5. Specifically, the motion was based on the grounds that the prosecution was violative of statutory and constitutional double jeopardy. The Juvenile Court did not reach the constitutional question. It held that the prosecution was prohibited by Illinois' compulsory joinder statute. 447 U.S. at 413-14 n.5.

6. *In re* Vitale, 44 Ill. App. 3d 1030, 1035-38, 358 N.E.2d 1288, 1292-93 (1976). The court affirmed based on Illinois' compulsory joinder requirements.

peal to the Illinois Supreme Court, the dismissal order was affirmed on the basis of the "more compelling" grounds of the double jeopardy clause of the Federal Constitution.[7]

After the Illinois Supreme Court certified that its decision was based on federal constitutional grounds, the United States Supreme Court granted certiorari.[8] The Court held that "[i]f, as a matter of Illinois law, a careless failure to slow is always a necessary element of manslaughter by automobile, then the two offenses are the 'same' . . . and Vitale's trial on the latter charges would constitute double jeopardy . . . ."[9] The Court then vacated the judgment of the Illinois Supreme Court and remanded the case for clarification of Illinois law and a determination of what act or acts the state would rely upon to prove involuntary manslaughter.[10]

The double jeopardy clause of the fifth amendment states: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."[11] The proper understanding and application of this clause depends upon what constitutes the "same offense." Although many approaches have been used to determine what constitutes the "same offense,"[12] the Court's current test was articulated in *Brown v. Ohio*.[13] This test is a variation of the "same evidence" test that was first enunciated in *The King v. Vandercomb & Abbott*.[14] The indictment in *Vandercomb* charged a nocturnal breaking followed by larceny. At trial it was discovered that the larceny had occurred the day before the nocturnal breaking. The rigid common-law pleading rules then applicable required that the defendants be acquitted because of this error in the order of the offenses. To correct this apparent miscarriage of justice, the court decided that "unless the first indictment were such as the prisoner might

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7. *In re* Vitale, 71 Ill. 2d 229, 235, 375 N.E.2d 87, 89 (1978).

8. The State of Illinois petitioned the United States Supreme Court for a writ of certiorari, which was granted on November 27, 1978. 447 U.S. at 415. In the order granting the writ, the Court vacated the judgment of the Illinois Supreme Court and remanded the case for a determination of whether the judgment was based on federal or state constitutional grounds. *Id.* On March 22, 1979, the Illinois Supreme Court certified that its judgment was based on federal constitutional grounds. The Court again granted a writ of certiorari on October 1, 1979. Illinois v. Vitale, 444 U.S. 823 (1979).

9. 447 U.S. at 419-20. This was a five-to-four decision.

10. *Id.* at 421

11. U.S. CONST. amend. V.

12. *See* 75 YALE L.J. 262, 267-77 (1965).

13. 432 U.S. 161 (1977).

14. 168 Eng. Rep. 455 (C.C.R. 1796).

have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second."[15]

A modified "same evidence" test was first applied in the United States in *Morey v. Commonwealth.*[16] In *Morey* a conviction for the sale of intoxicating liquors was held "to bar prosecution for a single sale of such liquors within the same time, upon the ground that the lesser offense . . . is merged in the greater offense."[17] The modified rule stated: "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."[18]

The *Morey* version of the "same evidence" rule was adopted by the Supreme Court in *Gavieres v. United States.*[19] This version was relied on when the Court recited the currently acknowledged rule in *Blockburger v. United States.*[20] The critical issue, as defined in *Blockburger,* is "whether each [statutory] provision requires proof of an additional fact which the other does not."[21]

In clarifying the *Blockburger* test, the Court in *Brown v. Ohio*[22] stated that "the greater offense is . . . by definition the 'same' for purposes of double jeopardy as any lesser offense included in it."[23] The Court added that "the sequence [of the greater and lesser offenses] is immaterial."[24]

The *Brown* Court also emphasized its role in the interpretation of state law. Quoting from *Garner v. Louisiana,*[25] it noted that the state courts "have final authority to interpret . . . that state's legislation."[26] The Court further pointed out that the freedom of the legislature to "define crimes and fix punishments" is unrestrained by the double jeopardy clause.[27] Once the legislature has acted, "courts may not impose more than one

15. *Id.* at 461.
16. 108 Mass. 433 (1871).
17. *Id.* at 435.
18. *Id.* at 434.
19. 220 U.S. 338, 342-43 (1911).
20. 284 U.S. 299 (1932).
21. *Id.* at 304.
22. 432 U.S. 161 (1977).
23. *Id.* at 168.
24. *Id.*
25. 368 U.S. 157 (1961).
26. 432 U.S. at 167.
27. *Id.* at 165.

punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial."[28]

Subsequent to *Brown* the "same evidence" test was applied in *Harris v. Oklahoma*.[29] The *Harris* Court held that robbery was a lesser-included offense of felony murder since " 'proof of the underlying felony [here robbery with firearms] is needed to prove the intent for a felony murder conviction.' "[30] The Court's next application of the "same evidence" test occured in the instant case.

In the instant case the Court acknowledged *Brown* and its application of *Blockburger* as the "principal test" to determine what constitutes the "same offense" for double jeopardy.[31] The Court recognized that application of the *Blockburger* test relies on the abstract proof necessary to establish the statutory elements, rather than on the actual proof to be presented at trial.[32] The Court also noted the Illinois Supreme Court's reliance on *Brown*[33] and acknowledged the propriety of the state supreme court defining the statutory elements of the two crimes.[34] The Court was uncertain, however, whether the Illinois Supreme Court properly applied *Brown* to the facts in the instant case.[35]

This uncertainty centered on the Court's determination that *Brown* requires a two-pronged test for the lesser-included offense.[36] The first prong is the traditional *Blockburger* test that requires that every element of the lesser-included offense also be an element of the greater offense.[37] The second prong requires

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28. *Id.*

29. 433 U.S. 682 (1977).

30. *Id.* (brackets in original) (quoting Harris v. State, 555 P.2d 76, 80-81 (Okla. 1976)).

31. 447 U.S. at 416.

32. *Id.*

33. The Court stated: "The Illinois court relied upon our holding in Brown v. Ohio, 432 U.S. 161 (1977), that a conviction for a lesser-included offense precludes later prosecution for the greater offense." *Id.* at 417.

34. The Court conceded: "We accept, as we must, the Supreme Court of Illinois' identification of the elements of the offenses involved here." *Id.* at 416.

35. *Id.* at 416-19.

36. The Court analyzed Brown v. Ohio, 432 U.S. 161 (1977), as follows: "The Ohio courts had held that every element of the joyriding 'is also an element of the crime of auto theft,' . . . we also noted that 'the prosecutor who has established auto theft necessarily has established joyriding as well.' " 447 U.S. at 417. The Court continued its analysis by pointing out that "[b]oth observations were essential to the *Brown* holding . . . if proof of the auto theft had not necessarily involved proof of joyriding . . ." the offenses would not have been the same for double jeopardy purposes. *Id.* at 417.

37. *See* Blockburger v. United States, 284 U.S. 299, 304 (1932).

that the establishment of the greater offense necessarily establish the lesser offense.[38]

The Court observed that the first prong was clearly met in the instant case,[39] but was uncertain whether the second prong was satisfied. In the Court's view the Illinois Supreme Court was "cryptic" in its analysis because it failed to address the contention that under Illinois law the establishment of involuntary manslaughter by means of a motor vehicle necessarily establishes the offense of failing to reduce speed.[40] Although the Court recognized the role of the state supreme court in interpreting Illinois law, it concluded that under Illinois law failing to reduce speed may not necessarily be established when involuntary manslaughter by means of a motor vehicle is established. If it is not, the *Blockburger* test (as now defined with the two prongs) was not satisfied.[41]

The Court then offered another approach to double jeopardy protection. This new application of the *Blockburger* test focused on the actual proof to be presented at trial rather than the abstract proof necessary to establish the statutory elements.[42] Under this new approach the Court concluded that Vitale would have a "substantial" double jeopardy claim if the state plans to prove that failing to reduce speed is the reckless act required to establish the manslaughter offense.[43]

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38. Illinois v. Vitale, 447 U.S. at 418.

39. *Id.*

40. *Id.* The Court stated:

> The Illinois Supreme Court did not expressly address the contentions that manslaughter by automobile could be proved without also proving a careless failure to reduce speed and we are reluctant to accept its rather cryptic remarks about the relationship between the two offenses involved here as an authoritative holding that under Illinois law proof of manslaughter by automobile would always involve a careless failure to reduce speed to avoid a collision.

Id. at 419.

41. *Id.* at 419.

42. This approach was presented after the Court had already arrived at its holding in the instant case. *Id.* at 420-21. It is different, however, from the approach taken in Blockburger v. United States, 284 U.S. 299 (1932). Referring to Brown v. Ohio, 432 U.S. 161 (1977), the *Vitale* Court noted: "We recognized that the *Blockburger* test focuses on the proof necessary to prove the statutory elements of each offense, *rather than on the actual evidence to be presented at trial.*" 447 U.S. at 416 (emphasis added).

43. As authority for this proposition the Court cited Brown v. Ohio, 432 U.S. 161 (1977) and Harris v. Oklahoma, 433 U.S. 682 (1977). 447 U.S. at 420. In *Harris* the Court "treated a killing in the course of a robbery as itself a separate statutory offense, and the robbery as a species of lesser-included offense." *Id.* After noting that "the state conceded that the robbery . . . was in fact the underlying felony, *all elements of which had been proved in the murder prosecution,*" the Court concluded that the offenses were the

In ultimately deciding to vacate the judgment and remand the case to the Illinois Supreme Court, the Court emphasized two points.[44] First, the Court was unable to determine whether under the *Blockburger* test the two offenses are the "same" for double jeopardy purposes because the relationship under Illinois law between the offenses of failing to reduce speed and involuntary manslaughter by means of a motor vehicle was unclear. Secondly, the Court was uncertain what actual proof would be used at trial to establish the offense of involuntary manslaughter by means of a motor vehicle.[45]

The individual desire for justice might be satisfied by a decision that allows further prosecution of one who carelessly caused the deaths of two five-year-old children and whose only penalty was a fifteen dollar fine.[46] The individual desire for justice, however, must be tempered by the Court's duty to effect uniform justice and to provide sound precedent.

In the instant case, the Court's opinion fails to balance the individual desire for justice with the far-reaching impact of the decision. Without addressing the impact of its opinion, the Court severely limited the constitutional guarantees against double jeopardy. The extension of *Brown* limited these guarantees in three ways. First, the Court expanded the traditional *Blockburger* test by adding a second prong that severely narrows the category of offenses that may be considered the "same" for double jeopardy purposes. Secondly, the Court developed an alternative approach for determining the "same offense." The new approach relies on the actual proof to be presented at trial rather than the abstract proof required to establish the statutory elements. This approach complicates the "same offense" determination when the lesser offense is prosecuted first. Finally, the Court arguably involved itself in interpretation of state law for double jeopardy purposes. Traditionally, the Court has left interpretation of state law in this area to the state legislature and state courts.

"same" for double jeopardy purposes. *Id.* at 420-21 (emphasis added).

44. 447 U.S. at 421.

45. *Id.*

46. This fine was not the maximum punishment allowed by law. The maximum punishment allowed is 30 days in jail or a fine of five hundred dollars.

Adding a Second Prong to the Traditional Blockburger *Test*

The Court's decision in *Brown* clearly established the acceptance of the traditional *Blockburger* test: "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision *requires* proof of a fact that the other does not."[47] The key word in the traditional *Blockburger* test is "requires." The Court in *Gavieres v. United States*[48] illustrated the importance of the word "requires" by applying statutory requirements to find that two offenses were not the "same" for double jeopardy purposes. One of the offenses required proof that the conduct occurred in a public place, but did not necessarily require proof that a public official was insulted. The other offense required proof that a public official was insulted, but did not necessarily require proof that he was insulted in a public place. The offenses were determined not to be the "same" since each statute required proof that the other did not.[49]

In the instant case the *Blockburger* test, which is based on *Gavieres*, seemingly mandates a determination that the offenses are the "same" for double jeopardy purposes. Although Vitale could have been reckless in ways other than failing to reduce speed,[50] the statute does not require that the reckless action be something different from failing to reduce speed. Motor vehicle statutes only require that a reckless act occur in the operation of a motor vehicle for involuntary manslaughter to be established.[51] Clearly, failure to reduce speed is a lesser-included offense of involuntary manslaughter by a motor vehicle under the traditional *Blockburger* test.

The Court, however, was apparently not satisfied in the instant case with the result obtained by application of the traditional *Blockburger* test. The Court, to arrive at the desired result, interpreted *Brown* as adding a second prong to the

47. 432 U.S. 161, 166 (1977) (quoting Blockburger v. United States, 284 U.S. 299, 304 (1932)) (emphasis added).

48. 220 U.S. 338 (1911).

49. *Id.* at 342.

50. *See* 441 U.S. at 419.

51. Involuntary manslaughter by means of a motor vehicle requires among other things that "the acts which cause the death consist of the driving of a motor vehicle" and that the driver "performs them recklessly." Criminal Code of 1961, ILL. REV. STAT. ch. 38, § 9-3 (1973).

traditional test. This second prong requires that proof of the greater offense will necessarily establish the lesser offense.[52]

Waller v. Florida[53] illustrates the extent to which the Court's application of this two-pronged test varies from its application of the traditional *Blockburger* test in pre-*Brown* decisions. The petitioner in *Waller* was convicted of destruction of city property and was later charged with grand larceny. The Court considered the offenses the "same," and thus the trial for grand larceny was prohibited on double jeopardy grounds.[54] Interestingly, the Court accepted the assumption that the destruction of city property was a lesser-included offense of grand larceny.[55] Acceptance of this assumption under the traditional *Blockburger* test raises no questions. Under the new test, however, acceptance of this assumption would mean that the Court would either conclude that the offenses were not the "same" or acknowledge that a conviction for grand larceny would also necessarily establish the lesser offense of destruction of city property.

Application of this second prong in the instant case led the Court to the conclusion that a failure to reduce speed is not a lesser-included offense of involuntary manslaughter by means of a motor vehicle;[56] thus, the state was allowed to prosecute Vitale on the charge of involuntary manslaughter. Although this conclusion may satisfy an individual's narrow concept of justice in the instant case, it is inconsistent with the Court's previous decision in *Harris v. Oklahoma*.[57]

Harris was decided *per curiam* subsequent to the *Brown* decision. In *Harris*, the Court found that robbery was a lesser-included offense of felony-murder.[58] The decision, on its face, contradicts the second prong of the test applied in the instant case. Felony-murder under Oklahoma law could be established by proof of any underlying felony, not just robbery.[59] Applying the second prong, however, would require that robbery would have to necessarily be established when felony-murder is proven.

The *Vitale* Court sidestepped this inconsistency in its anal-

52. 447 U.S. at 418.
53. 397 U.S. 387 (1970).
54. *Id.* at 394-95.
55. *Id.* at 390.
56. *See* 447 U.S. at 419.
57. 433 U.S. 682 (1977).
58. *Id.*
59. OKLA. STAT. tit. 21, § 701(3) (1971).

ysis of *Harris* by making two significant changes from *Brown*. First, the Court involved itself in the interpretation of state law. The Oklahoma law upon which *Harris* was decided stated that homicide is murder "[w]hen perpetrated without any design to effect death by a person engaged in the commission of *any felony*."[60] The Court used its own definition of Oklahoma law to make *Harris* consistent with the application of the second prong in the instant case. In describing this redefinition the Court stated: "[W]e treated a killing in the course of a robbery as itself a separate statutory offense, and robbery as itself a species of lesser-included offense."[61] Although this redefinition was necessary for consistency with the second prong of the test, it nevertheless marked a significant change from the traditional approach of leaving definition of state law to the state.[62]

Secondly, the Court used actual proof presented at trial rather than the proof needed to establish the statutory elements in the abstract to analyze *Harris*. Under the traditional application of the *Blockburger* test, the Court would have analyzed *Harris* by looking to the proof required to meet the abstract statutory elements of the offense.[63] The Court instead justified its decision that the offenses were the "same" on the ground "[t]he State conceded that the robbery for which petitioner had been indicted was in fact the underlying felony, *all elements of which had been proved in the murder prosecution.*"[64] Although this use of actual proof supported the Court's finding that the offense was the "same" under the second prong, the use of such proof is contrary to the application of the *Blockburger* test as explained in *Brown*.[65]

The result in the instant case clearly demonstrates that the addition of the second prong to the test has severely narrowed the category of offenses that may be considered the "same" for double jeopardy purposes. For example, under the second prong, offenses such as felony-murder will never have lesser-included offenses. Since more than one underlying felony can be used to prove felony-murder, no particular underlying felony would be

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60. *Id.* (emphasis added).

61. 447 U.S. at 420.

62. *See* Brown v. Ohio, 432 U.S. 161, 167 (1977) (quoting Garner v. Louisiana, 368 U.S. 157, 169 (1961)).

63. *See* 447 U.S. at 416.

64. *Id.* at 420-21 (emphasis added).

65. *Id.* at 416. In Brown v. Ohio, 432 U.S. 161, 166 (1977), the test is "whether each [statutory] provision requires proof of a fact which the other does not . . . ."

"necessarily" established when a felony-murder is proved. Although this narrowing of double jeopardy protection is extremely important, the Court's opinion does not discuss the matter.[66]

Use of Actual Proof to be Presented at Trial

In its analysis of *Harris* the Court developed a new approach that focused on the actual evidence to be presented at trial. The offenses were determined to be the "same" since "all elements [of the robbery] . . . had been proved in the murder prosecution."[67] This approach differs from the traditional *Blockburger* test that "focuses on the proof necessary to prove the statutory elements of each offense, rather than the actual evidence to be presented at trial."[68] Although the Court was willing to modify the traditional *Blockburger* test, its opinion unfortunately did not address the weaknesses of this new approach.[69]

A primary weakness in the approach is that whereas the abstract statutory elements of an offense are definable with some certainty before the case is prosecuted, the actual evidence to be presented at trial is uncertain.[70] The statutory elements of the

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66. This narrowing could be avoided by redefining all offenses such as felony-murder so that they are composed of one and only one underlying offense. Thus, a general felony-murder statute could be replaced by separate statutes for rape-murder, robbery-murder, burglary-murder, and so forth. The redefinition of such offenses would necessarily be comprehensive rather than selective in its scope, otherwise the second prong could still lead to arbitrary application of double jeopardy protections.

67. 447 U.S. at 420-21.

68. *Id.* at 416.

69. The dissenting opinion in the instant case exposed one weakness of this new approach:

> Throughout the five years that this case has been in litigation, the State has apparently not seen fit to reveal the basis of its homicide prosecution. The Court does not view this omission as an important one. On the contrary, its opinion implies that the State may proceed to trial before a determination is made on [Vitale's] double jeopardy claim. But surely such a procedure is inconsistent with the Double Jeopardy Clause, which was specifically designed to protect the citizen from multiple trials.
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> . . . Since the State has not provided [Vitale] with notice of any basis for prosecution that does not depend on proving, for the second time, a careless failure to reduce speed, I would not require [Vitale] to stand trial again."

Id. at 426-28 (Stevens, J., dissenting).

70. The Court observed that "the reckless act or acts the State will rely on to prove the manslaughter are still unknown . . . ." *Id.* at 421. Note that the instant case was decided June 19, 1980. The petition for adjudication of wardship based on the involuntary manslaughter charge was filed December 24, 1974. Although the petition was filed over five years before this case was decided, the state had not made known to Vitale the reckless act or acts that it would rely on to support the involuntary manslaughter charge.

offense are not controlled by either of the parties involved in the action. The actual evidence presented at trial is, on the other hand, subject to the prosecutor's discretion.

Total certainty as to what will be presented at trial is not possible until trial. If the Court requires total certainty, the new approach will only be useable in cases where the greater offense is prosecuted before the lesser offense. When the lesser offense is prosecuted first, for example, one of the several alternative elements of the greater offense may be proved without any indication of which of these alternative elements will be presented to prove the greater offense. If, on the other hand, the Court will accept less than total certainty, standards must be developed to determine before the fact what is to be presented in the prosecution. Along with these standards sanctions must be provided to ensure that the standards are followed. These standards must not be so cumbersome that compliance with them will defeat the value of the double jeopardy guarantees. For example, if compliance in effect compels the defendant to substantially prepare for trial, he will have already lost those rights that the double jeopardy clause was intended to protect.[71]

The Court's decision not only imposes substantial and expensive pre-trial preparation on the defendant, it also erodes the policies underlying double jeopardy protection in other ways. The purpose of the double jeopardy prohibition is to prevent "the state with all its resources and power" from subjecting the individual "to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . ."[72] By neither knowing whether the state would prosecute nor what evidence its case would rest on, Vitale and others in similar situations suffer embarrassment, anxiety, and insecurity along with the expense and ordeal of a second prosecution.

The dissent contended that this failure to timely apprise Vitale of the prosecution theory should bar the second trial. *Id.* at 423.

71. "The specific purposes of the [double jeopardy] protection are the avoidance of unnecessary harrassment, the avoidance of social stigma, the economy of time and money, and the interest in psychological security." J. SIGLER, DOUBLE JEOPARDY 156 (1969).

72. Green v. United States, 355 U.S. 184, 187-88 (1957).

The Role of the United States Supreme Court in Defining State Law for Double Jeopardy Purposes

In *Garner v. Louisiana*[73] the Court expressed its position on the role of state courts in the interpretation of state law. The Court recognized "that Louisiana courts have *the final authority* to interpret and, *where they see fit*, to reinterpret that state's legislation."[74] Accordingly, the Court was reluctant to interfere with a state court's settled interpretation of Louisiana law.[75]

This traditional reluctance was reiterated in *Brown*. After paraphrasing the above quote from *Garner*, the Court stated that "the Ohio Court of Appeals has authoritatively defined the elements of the two Ohio crimes . . . ."[76] Based on the state court's authoritative definition of Ohio law, the Court applied the traditional *Blockburger* test. The Court's discussion of the effect a different definition of Ohio law would have had on the decision further illustrates its reluctance to deviate from its traditional role. The Court emphasized that either the legislature could have written the law differently or the state courts could have construed the law differently. Specifically, the Court stated that the state would have prevailed if the legislature had worded the Ohio statute or the state courts had interpreted it to make joyriding "a separate offense for each day in which a motor vehicle is operated without the owner's consent."[77] The Court, however, refrained from making that interpretation itself.

By contrast, in the instant case the Court did interpret state law as it analyzed *Harris*.[78] In applying the second prong of the test the Court wrote:

> The Oklahoma felony murder statute on its face did not require proof of a robbery to establish felony murder; other felonies could underlie a felony murder prosecution. But for the purposes of the Double Jeopardy Clause, we did not consider a crime generally described as felony murder as a separate offense distinct from its various elements. Rather, we treated a killing in the course of a robbery as itself a separate statutory offense, and the robbery as a species of lesser-included

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73. 368 U.S. 157 (1961).

74. *Id.* at 169 (emphasis added).

75. *Id.*

76. 432 U.S. 161, 167 (1977).

77. *Id.* at 169-70 n.8. The Ohio state courts had never interpreted joyriding as a separate offense for each day.

78. *See* 447 U.S. at 420.

offense.[79]

The Court's departure from its traditional approach was required to harmonize its application of the second prong of the test in *Harris* with the instant case. The Court's unprincipled departure from precedent raises the question of what role the Court will play in the future in the interpretation of state law. Traditionally, interpretation of state law has been based on an analysis of legislative history and a review of pertinent state court decisions. These state court decisions have applied state law in a variety of settings, not just the double jeopardy context. The Court's consideration of these laws as they relate only to double jeopardy claims will necessarily be less extensive than the traditional approaches that state legislatures and state courts have taken. Additionally, there is concern that the Court may, as it has done in the instant case, change its established rules and look principally at the apparent justice of the case before it. Such an approach would diminish the important protections that the double jeopardy clause currently guarantees.

Prior to *Vitale* the United States Supreme Court consistently applied the well settled *Blockburger* test for determining what is the "same offense" for double jeopardy purposes. Concerned, apparently, with the outcome that the traditional *Blockburger* test would have mandated in the instant case, the Court drastically modified the *Blockburger* test and its application.

The traditional test considers offenses the "same" when the lesser offense does not require proof of any facts in addition to those required to establish the greater offense. The modified test considers offenses the "same" only when the lesser offense must necessarily be established when the greater offense is established. This modification narrows the number of offenses that will be considered the "same" by the Court.

Traditionally, the test was applied by leaving to the state the definition of the statutory elements of the offenses. In the instant case the Court modified this approach by defining the statutory elements itself. The Court also modified the traditional approach by considering the actual proof to be presented at trial to establish the offense, rather than the abstract proof necessary to prove the statutory elements. These approach modifications allow the Court to be arbitrary in what statutory elements will be considered. Additionally, the defendant may lose

79. *Id.*

important double jeopardy protection simply because he is unsure as to what actual proof will be presented at trial and thus whether or not the prosecution will be barred on double jeopardy grounds.

The Court should retreat to the traditional *Blockburger* test and its application in order to keep intact our important double jeopardy guarantees.

David G. Harlow