CRIMINAL LAW—Courts Must Instruct on Lesser-Included Offenses That Fit Within the Elements of the Greater Charged Offense, Regardless of the Evidence—*State v. Jeffries*, 430 N.W.2d 728 (Iowa 1988).

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A group of prisoners rioted at the state penitentiary in Fort Madison, Iowa, on January 6, 1986.[1] The prisoners allegedly took several guards hostage.[2] They also allegedly beat other inmates before surrendering to the authorities.[3] The state later charged inmate James J. Jeffries with one count of insurrection,[4] one count of going armed with intent,[5] two counts of assault while participating in a felony,[6] three counts of assault with intent to inflict serious injury,[7] and seven counts of second-degree kidnapping in connection with the disturbance.[8]

Jeffries' jury trial commenced April 16, 1986.[9] Jeffries requested at trial that jury instructions be given on willful disturbance[10] and harassment of

1. Brief for Appellant at 2, State v. Jeffries, 430 N.W.2d 728 (Iowa 1988) (No. 86-917).
2. Application for Further Review for Appellee at 3-5, State v. Jeffries, 430 N.W.2d 728 (Iowa 1988).
3. *See id.* at 5; Brief for Appellant at 8, State v. Jeffries, 430 N.W.2d 728 (Iowa 1988) (No. 86-917).
4. IOWA CODE § 718.1 (1985).
5. IOWA CODE § 708.8 (1985).
6. IOWA CODE §§ 708.1, .3 (1985).
7. IOWA CODE §§ 708.1, .8 (1985).
8. IOWA CODE §§ 710.1, .3 (1985); *see* State v. Jeffries, 430 N.W.2d 728, 739 (Iowa 1988).
9. Brief for Appellant at 5, State v. Jeffries, 430 N.W.2d 728 (Iowa 1988) (No. 86-917).
10. IOWA CODE § 718.3 (1985).

public officers[11] as lesser-included offenses of insurrection.[12] The trial court refused to give the requested instructions.[13] The jury found Jeffries guilty of insurrection, second-degree kidnapping, and assault while participating in a felony.[14] Jeffries appealed his conviction, contending that the district court erred in refusing to instruct on the lesser-included offenses ("LIO").[15]

Traditionally, under the common law strict statutory test or *legal test*, an LIO is a lesser offense that is necessarily committed if the offense charged was committed.[16] The elements of an LIO include some, but not all, elements of the charged offense.[17] An LIO does not include elements not found in the greater charge.[18] It is impossible to commit the greater offense without first committing the lesser.[19] Thus, under the legal test, an LIO fits within the greater charge.[20] Courts typically utilize a *factual test* based on the record to determine whether to give the LIO instruction.[21] Under the factual test, the evidence must controvert one or more of the elevating elements of the greater charge before the judge will give an LIO instruction.[22]

The Iowa Supreme Court transferred Jeffries' case to the Iowa Court of Appeals.[23] The court of appeals held that in committing insurrection, a defendant also commits both willful disturbance and harassment of public officials and employees, thus meeting the legal test.[24] Sufficient evidence was in the record to support either charge, thus satisfying the factual test.[25] The court of appeals affirmed in part, reversed in part, and remanded.[26]

The state applied for further review to the Iowa Supreme Court.[27] First, the state maintained that it was possible to commit insurrection without also committing willful disturbance.[28] Therefore, the court of appeals misap-

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11. IOWA CODE § 718.4 (1985).
12. State v. Jeffries, 430 N.W.2d at 729.
13. *Id.*
14. *Id.* at 739.
15. *Id.* at 729.
16. Blair, *Constitutional Limitations on the Lesser Included Offense Doctrine*, 21 AM. CRIM. L. REV. 445, 447-48 (1984).
17. *Id.* at 447.
18. State v. Jeffries, 430 N.W.2d at 730.
19. *Id. See* Koenig, *The Many-Headed Hydra of Lesser Included Offenses: A Herculean Task for the Michigan Courts*, 1975 DET. C.L. REV. 41, 46-48 (discussing Iowa's approach to LIOs under the strict statutory common law approach).
20. *See* McColl, *Lesser, Included Offenses in Federal Court—Whose Prerogative?*, 44 TEX. BAR J. 308, 308 (1981) (quoting FED. R. CRIM. P. 31(c)).
21. State v. Jeffries, 430 N.W.2d at 733.
22. *Id.*
23. *Id.* at 729.
24. State v. Jeffries, No. 86-917, slip op. at 9 (Iowa Ct. App. Apr. 20, 1988).
25. *Id.* at 10.
26. *Id.* at 12.
27. Application for Further Review for Appellee, State v. Jeffries, 430 N.W.2d 728 (Iowa 1988).
28. State v. Jeffries, No. 86-917, slip op. at 7-11 (Iowa Ct. App. Apr. 20, 1988).

plied the legal test.[29] Second, for purposes of appeal, the state assumed, without conceding, that the lesser harassment charge met the legal test.[30] The state urged, however, that the evidence had not controverted the elevating element in the greater insurrection charge.[31] The factual test had not been met.[32] Thus, the state argued that the trial court was not required to instruct on harassment.[33]

The Iowa Supreme Court granted the state's application for further review to clarify the LIO issue.[34] The Iowa Supreme Court *held*, affirmed in part, reversed in part, and remanded with directions.[35] Trial courts must give LIO jury instructions if all the elements of the lesser offense fall within the statutory framework of the charged offense. The evidence need not controvert the elevating element. *State v. Jeffries*, 430 N.W.2d 728 (Iowa 1988).

While retaining the legal test for lesser-included offenses, the court abolished the factual test.[36] Prior to *Jeffries* the judge had assumed much of the fact-finding function of the jury.[37] The judge would review the record to determine whether sufficient evidence controverted the elevating element of the greater offense.[38] The LIO instruction would be given only if sufficient evidence controverted the dissimilar element.[39] After *Jeffries*, a not guilty plea automatically controverts all the elements of the charged offense.[40] The judge now must give the LIO instruction unless the defendant specifically stipulates to the elevating element.[41] The defendant logically will stipulate to the elevating element only where "the evidence is conclusive that no lesser-included offense was committed."[42] In such a case, arguing the lesser charge is a waste of time.

To outline the issues and the holding, the Iowa Supreme Court briefly reviewed the history and definition of LIOs.[43] Writing for the court, Justice Lavorato carefully analyzed the various theories on lesser-included offense

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29. *Id.* at 8-9.
30. *Id.* at 12.
31. *Id.* at 9-13; State v. Jeffries, 430 N.W.2d 728, 739 (Iowa 1988).
32. Application for Further Review for Appellee at 12-13.
33. *Id.*
34. *See* State v. Jeffries, 430 N.W.2d at 738.
35. *Id.* at 741. Additionally, the court reversed the willful disturbance charge since willful disturbance did not meet the legal test for insurrection. *Id.* at 740. The court affirmed the LIO instruction on the harassment charge because harassment did meet the legal test for insurrection. *Id.* at 740-41.
36. *Id.* at 736-38.
37. *Id.* at 738.
38. *Id.*
39. *Id.* at 736.
40. *Id.* at 738.
41. *Id.* at 737.
42. *Id.*
43. *Id.* at 730-32.

instructions.[44]

I. Defining a Lesser-Included Offense

A. *Historical Background*

Prosecutors historically sought lesser-included offense instructions when proof of one or more of the elements of the greater charge was weak.[45] The LIO included some, but not all, of the elements of the greater offense.[46] The common law LIO was necessarily committed if the overlying charge was committed.[47] In the modern era the defense rather than the prosecution typically seeks lesser-included offense instructions.[48] The LIO doctrine allows the jury to convict on the crime actually committed, rather than convicting on the greater charged offense simply because the jury believes the defendant is guilty of some crime.[49] The prosecution must prove the defendant guilty beyond a reasonable doubt *on the offense charged*, facilitating more accurate jury verdicts.[50]

B. *The Modern Era*

The announcement of Iowa's new rule came after years of confusion throughout both the state and federal court systems.[51] Well-reasoned judicial decisions on the subject were sadly lacking.[52] The courts, in general, simply referred to earlier cases in support of their own decisions, compounding the confusion.[53] Three divergent definitions had emerged as various courts attempted to define LIOs.[54]

First, the traditional common law definition utilized the strict statutory elements or legal test referred to above.[55] Under this test, the defendant must necessarily commit the LIO in committing the greater offense.[56] The LIO fits completely within the statutory framework of the greater charged

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44. *Id.* at 732-34.
45. Blair, *supra* note 16, at 445.
46. *Id.*; *see supra* notes 16-20 and accompanying text.
47. Blair, *supra* note 16, at 447.
48. *Id.* at 445.
49. *Id.* at 446; Comment, *The Lesser Included Offense Doctrine in Iowa: The Gordian Knot Untied*, 59 Iowa L. Rev. 684, 684 n.5 (1974).
50. Blair, *supra* note 16, at 462-63.
51. State v. Jeffries, 430 N.W.2d 728, 730-35 (Iowa 1988). *See also* Blair, *supra* note 16, at 445-46; Ettinger, *In Search of a Reasoned Approach to the Lesser Included Offense*, 50 Brooklyn L. Rev. 191, 193-98 (1984).
52. Ettinger, *supra* note 51, at 193.
53. *Id.* at 193 n.14.
54. State v. Jeffries, 430 N.W.2d at 730-32; Blair, *supra* note 16, at 447-51.
55. *See supra* notes 16-20 and accompanying text.
56. *Id.*

offense.[57] Iowa adopted the legal test approach in *Jeffries*,[58] relying heavily on a Michigan case, *People v. Beach*.[59] In *Beach* the Michigan court held that the defendant was entitled to instructions on *necessarily*-included lesser offenses—the strict statutory elements or legal test.[60]

Second, the "cognate pleadings" approach and the "cognate evidence" approach look at the surrounding circumstances to discern whether an LIO instruction is justified.[61] The cognate pleadings approach looks to the complaint itself to see if other offenses could be drawn from the facts alleged.[62] The cognate evidence approach reviews all the evidence presented at trial before determining whether to give an LIO instruction.[63] The Michigan court in *Beach* ruled that the judge must review the record under the cognate evidence approach if requested to do so by the defense.[64] A majority of jurisdictions have adopted the cognate pleadings and/or cognate evidence approach.[65]

Third, the Model Penal Code approach focuses only on the evidence presented at trial.[66] It does not consider pleadings or the legal elements of

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57. *Id.*

58. State v. Jeffries, 430 N.W.2d at 736, 741. *But see* State v. Royer, 436 N.W.2d 637 (Iowa 1989). In *Royer* two persons died in a fire that the defendant was convicted of purposely setting. *Id.* at 639. The trial judge refused to instruct on the lesser-included offense of reckless use of fire. *Id.* Consequently, he did not instruct on involuntary manslaughter, which would have followed from the lesser charge of reckless use of fire. *Id.* The defendant was convicted before the *State v. Jeffries* decision was handed down. *Id.* at 640. The defendant subsequently appealed. *Id.* In *State v. Royer*, handed down on February 22, 1989, the Iowa Supreme Court appeared to expand the limits of its legal test. *Id.* at 641. In that decision, the court held that to "cause" a fire (arson—IOWA CODE § 712.1 (1987)) and to "use" fire (reckless use of fire—IOWA CODE § 712.5 (1987)) were synonymous for the purposes of the LIO instruction. *Id.* The inclusion of reckless use of fire within arson mandated involuntary manslaughter LIO instructions in the first-degree felony murder charge. *Id.* at 642-44.

The opinion is indicative of the continuing problem of interpretation and instruction in this area. *Id.* at 639; *see also* State v. Jeffries, 430 N.W.2d at 730. The word "use" or "reckless" does not appear in the Iowa Code's definition of arson. *See* IOWA CODE § 712.1 (1987). Nor is reckless use of fire a statutorily mandated LIO, requiring the judge to apply the factual test. *See* State v. Jeffries, 430 N.W.2d at 737 (describing the exceptions to the strict statutory elements or legal approach). In fact, the court appears to apply a sort of cognate pleadings approach. *See* State v. Royer, 436 N.W.2d at 642; *see also* State v. Jeffries, 430 N.W.2d at 731; Koenig, *supra* note 19, at 43-46. Thus, the court is once again leaving open the question of when LIO instructions are appropriate. The durability of the rationale in *State v. Jeffries* remains to be seen.

59. People v. Beach, 429 Mich. 450, 418 N.W.2d 861 (1988).

60. State v. Jeffries, 430 N.W.2d at 736-37 (citing People v. Beach, 429 Mich. 450, 464-65, 418 N.W.2d 861, 868 (1988)).

61. Koenig, *supra* note 19, at 44-45.

62. State v. Jeffries, 430 N.W.2d at 731 (citing Blair, *supra* note 16, at 449).

63. *Id.*

64. *Id.* at 736-37 (citing People v. Beach, 429 Mich. 450, 464-65, 418 N.W.2d 861, 868 (1988)).

65. Koenig, *supra* note 19, at 43-44.

66. Blair, *supra* note 16, at 450-51.

the greater or lesser offenses.[67] The Model Penal Code approach is the broadest of the three tests and is sometimes called the "inherent relationship" test.[68] This test permits an LIO instruction if there is "an 'inherent' relationship between the greater and lesser offenses, i.e., they must relate to the protection of the same interests . . . ."[69] A defendant can conceivably demand LIO instructions on " 'every lesser offense arguably established by the evidence.' "[70] To forestall such abuse, some courts require some proof of any lesser offense as part of the evidence for the greater charge.[71]

While the strict statutory elements approach has been criticized as too narrow, both the cognate and the inherent relationship tests have been criticized as too broad and unpredictable.[72] Under the latter tests, the state must provide notice of the offenses charged but the defendant is under no such restraint.[73] The prosecutorial function of determining the charge may be usurped by the defense.[74] These wide-ranging tests can become counterproductive, making it impossible to formulate general judicial standards.[75] Some courts fear the end result is confusion of the jury and frustration of the judicial process.[76]

II. Jury Versus Court Function: Iowa's Factual Test

All three tests typically leave the giving of the lesser-included offense instruction to the discretion of the trial judge.[77] Critics contend that the judge usurps the jury's function.[78] In the factual test, the judge typically looks at the record to determine whether there is sufficient evidence to justify an LIO instruction.[79] If sufficient evidence controverts one or more of the elevating elements of the greater charge, the judge gives an LIO instruction.[80]

Before *Jeffries* was decided, the situation in Iowa was chaotic.[81] Iowa Rule of Criminal Procedure 21(3) provided for LIO convictions on any

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67. *Id.*
68. State v. Jeffries, 430 N.W.2d at 731-32.
69. *Id.* at 732 (quoting United States v. Whitaker, 447 F.2d 314, 319 (D.C. Cir. 1971)).
70. *Id.* (quoting United States v. Johnson, 637 F.2d 1224, 1239 (9th Cir. 1980)).
71. *Id.*; *see* Mascolo, *Procedural Due Process and the Lesser-Included Offense Doctrine*, 50 Alb. L. Rev. 263, 278-82 (1986).
72. Blair, *supra* note 16, at 451.
73. Mascolo, *supra* note 71, at 302.
74. State v. Jeffries, 430 N.W.2d at 732.
75. Mascolo, *supra* note 71, at 302.
76. *Id.* (citing Howard v. State, 578 S.W.2d 83, 84-85 (Tenn. 1979) (rejecting rule that defendant is entitled to instruction on any offense shown in evidence on main charge.)).
77. *See, e.g.*, Mascolo, *supra* note 71, at 278-82.
78. State v. Jeffries, 430 N.W.2d at 733-34 (citing Koenig, *supra* note 19, at 63-64).
79. *See supra* notes 21-22 and accompanying text.
80. State v. Jeffries, 430 N.W.2d at 733.
81. *See generally* Comment, *supra* note 49, at 686-89.

greater strict statutory offense.[82] However, defense counsel had to request the LIO instruction before the judge would review the record.[83] Therefore, defense counsel had to decide whether the available evidence warranted making the request.[84] Then it was up to the judge.[85] Judges lacked clear guidelines on when to give the LIO instruction.[86] The judges decisions to give or not give the instruction depended on their own instincts and legal understanding.[87] Some judges always gave the instruction.[88] Others rarely or never gave it.[89] Perhaps a judge liked the defendant, believed the defendant was innocent or guilty, or allowed some other extraneous reason to color his decision.[90] Because of this, the trial court's decision was often disputed by one side or the other, as in *Jeffries*.[91]

In *Jeffries* the Iowa Supreme Court made its greatest contribution to rationally delineating the LIO doctrine. No longer does the law in Iowa leave the decision to the discretion of the trial court.[92] Rather, the LIO instruction must automatically be given unless it is specifically waived by the defendant.[93] Such a waiver is usually tactical.[94] "Logically, in these rare cases, the evidence is conclusive that no lesser-included offense was committed."[95]

The obvious problems of judicial prejudice, uncertainty as to the evidence, or failure of counsel to request an LIO instruction are mitigated.[96] Counsel, however, is still required to object to the jury instructions or lack thereof to preserve the issue for appeal.[97] Additionally, exactly which offenses are LIOs remains an open question.[98]

III. Statutory Exceptions to the Legal Test

The Iowa Supreme Court pointed out statutory exceptions to the strict

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82. Iowa R. Crim. P. 21(3); State v. Jeffries, 430 N.W.2d at 736.
83. State v. Jeffries, 430 N.W.2d at 737.
84. *See* Koenig, *supra* note 19, at 67-68.
85. *Id.* at 63-67.
86. *Id.*; State v. Jeffries, 430 N.W.2d at 733-34.
87. *See* Koenig, *supra* note 19, at 63-68.
88. *Id.*
89. *Id.*
90. State v. Jeffries, 430 N.W.2d at 733-34 (citing Koenig, *supra* note 19, at 63-65).
91. *Id.* at 739.
92. *Id.* at 739-41.
93. *Id.* at 737.
94. *Id.*
95. *Id.*
96. *Id.* at 733-34.
97. *Id.* at 737.
98. *See* State v. Royer, 436 N.W.2d 637 (Iowa 1989). Utilizing what appears to be a cognate pleadings approach, the court in *Royer* found "recklessly" using fire sufficiently similar to intentionally "causing a fire" so as to make reckless use of fire a lesser-included offense of arson. *Id.*

legal test.[99] Certain offenses are statutorily defined as possible LIOs of crimes with dissimilar elements.[100] Thus, voluntary manslaughter can be an LIO of first- or second-degree murder.[101] Involuntary manslaughter can be an LIO of first- or second-degree murder, or voluntary manslaughter.[102] Operating a motor vehicle without the owner's consent can be an LIO of automobile theft.[103] In these and similar instances, the LIO instruction is not given automatically since the LIOs do not meet the legal test.[104] The trial judge must determine whether the evidence justifies the LIO instruction.[105]

IV. Constitutional Issues

LIOs implicate three separate constitutional issues: the right to notice of the charges, the prohibition against double jeopardy, and the due process right to an accurate verdict based on the evidence.[106]

A. *Notice*

Implicit in the LIO doctrine is the problem of adequate notice.[107] The sixth amendment of the United States Constitution requires that the defendant have notice of the charge(s) against him.[108] "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . ."[109] Generally, both the strict statutory elements or legal test and the cognate pleadings test provide the defendant with adequate notice.[110] Any possible lesser offenses are *necessarily* included in the main charge.[111] However, the broader cognate evidence test and inherent relationship test provide no such assurance of adequate notice.[112] The determination of the charges may not be made until after all the evidence has been presented.[113] The parties and the judge must review the record and only then is the defendant fully informed of the charges.[114]

The Iowa Supreme Court determined that the legal test best answered

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99. State v. Jeffries, 430 N.W.2d at 737.
100. *Id.*
101. Iowa Code § 707.4 (1987).
102. Iowa Code § 707.5 (1987).
103. Iowa Code § 714.7 (1987).
104. State v. Jeffries, 430 N.W.2d at 737.
105. *Id.*
106. *Id.* at 734-35.
107. *Id.* at 734.
108. U.S. Const. amend. VI.
109. *Id.*
110. State v. Jeffries, 430 N.W.2d at 734.
111. *Id.* at 738.
112. *Id.* at 737-38 (citing United States v. Schmuck, 840 F.2d 384, 389 (7th Cir. 1988), *aff'd*, 109 S. Ct. 1443, *reh'g denied*, 109 S. Ct. 2091 (1989)).
113. *Id.* at 738.
114. *Id.* at 734, 738.

the adequate notice requirement.[115] The lesser offenses would not have to be charged.[116] The greater charged offense would automatically give notice of the various LIOs included within its statutory framework.[117] The adequate notice defects and delays of the cognate evidence and inherent relationship tests are thus avoided.[118]

The legal test allows both the prosecution and the defense to prepare for trial cognizant of the potential LIOs.[119] The defendant is not unfairly surprised by an instruction on an offense shown in the evidence, but not legally included in the charged offense.[120] By the same token, the prosecution knows exactly which elements it must prove at trial.[121]

B. *Double Jeopardy*

Double jeopardy is always a concern in criminal cases. The fifth amendment to the United States Constitution provides, "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ."[122] The United States Supreme Court in *Ex parte Nielson*[123] barred an indictment for an LIO after a conviction on the greater charge.[124] Conversely, a conviction on an LIO bars prosecution for the greater offense.[125]

Determining what constitutes an LIO is a central concern in double jeopardy cases.[126] The LIO doctrine determines what constitutes the "same offense."[127] In *Blockburger v. United States*,[128] the United States Supreme Court defined the "same offense" for double jeopardy purposes: "[W]here 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 an additional fact which the other does not."[129] This is basically the strict statutory or legal test.[130] The LIO must fit within the elements of the greater charge, or it is not the same offense for double jeopardy purposes.

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115. *Id.* at 738.
116. *Id.*
117. *Id.*
118. *Id.*
119. Ettinger, *supra* note 51, at 198-201.
120. *Id.*
121. *Id.*; *cf.* Blair, *supra* note 16, at 452-55.
122. U.S. CONST. amend. V.
123. *Ex parte* Nielsen, 131 U.S. 176 (1889).
124. State v. Jeffries, 430 N.W.2d at 734 (citing *Ex parte* Nielsen, 131 U.S. at 188).
125. *Id.*
126. *Id.*
127. *Id.*
128. Blockburger v. United States, 284 U.S. 299 (1932).
129. State v. Jeffries, 430 N.W.2d at 735 (quoting Blockburger v. United States, 284 U.S. at 304).
130. *Id.*

In a later case, *Brown v. Ohio*, the United States Supreme Court arguably adopted a cognate evidence approach to double jeopardy.[131] However, commentators and courts have disagreed over exactly what position the Supreme Court took in that case.[132] Several courts, including Iowa, have not read *Brown v. Ohio* as requiring the cognate evidence approach to double jeopardy.[133] These courts instead have held that the strict statutory or legal test is adequate for double jeopardy purposes.[134]

The Iowa Supreme Court has not specifically defined the standards for double jeopardy in possible LIO prosecutions. However, it has indicated that it would follow the strict statutory elements approach.[135] If this choice proves incorrect, the court would use whatever test may be required in the future and retain the legal test for other aspects of LIOs.[136]

C. *Due Process*

The due process questions inherent in LIOs arise when evidence does not support the offense charged.[137] The fifth and fourteenth amendments secure due process rights: "No person shall . . . be deprived of life, liberty, or property without due process of law . . . ."[138] and "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."[139] If the trial court does not give the LIO instruction, the jury might convict on the offense charged simply because they feel the defendant is guilty of some crime.[140]

The United States Supreme Court addressed this issue in *Beck v. Alabama*.[141] In *Beck* the Court struck down a state statute that prohibited LIO instructions in capital murder cases regardless of the mitigating evidence.[142] The Court held that the mandatory exclusion of LIOs in such cases violates due process under the fourteenth amendment.[143]

The Iowa Supreme Court in *Jeffries* mandated that LIO instructions be given for all offenses meeting the legal test.[144] The jury can convict on the

131. Brown v. Ohio, 432 U.S. 161 (1977).
132. *See* Blair, *supra* note 16, at 457, 459.
133. State v. Jeffries, 430 N.W.2d at 735.
134. *Id.* at 735, 738-39; United States v. Schmuck, 840 F.2d 384, 390 (7th Cir. 1988), *aff'd*, 109 S. Ct. 1443 (1989).
135. State v. Jeffries, 430 N.W.2d at 735, 738-39; United States v. Schmuck, 840 F.2d at 390.
136. State v. Jeffries, 430 N.W.2d at 738-39.
137. *Id.* at 735.
138. U.S. CONST. amend. V.
139. U.S. CONST. amend. XIV.
140. State v. Jeffries, 430 N.W.2d at 735.
141. Beck v. Alabama, 447 U.S. 625, 637-38 (1980).
142. State v. Jeffries, 430 N.W.2d at 735 (citing Beck v. Alabama, 447 U.S. at 637-38).
143. *Id.*
144. *Id.* at 737.

level of offense supported by the evidence.[145] Great latitude is given to the jury's discretion.[146] The prosecution must carry the burden to convict beyond a reasonable doubt on the offense charged *or on the LIO*.[147] Because of this, the jury's verdict is more accurately attuned to the actual offense[148] and the shoals of the due process clause are avoided.[149]

The Iowa Supreme Court anticipated few due process questions.[150] LIO instructions are now mandatory.[151] Additionally, certain offenses in Iowa such as first-degree murder have statutorily defined LIOs, despite disparate elements.[152] Hopefully, problems like those in *Beck v. Alabama* will be avoided.[153]

V. Side-Stepping the Double Jeopardy Issue

The Iowa Supreme Court attempted to fashion a logical, fair, and simple policy on LIOs.[154] However, instead of proceeding boldly to the conclusion of its solid rationale, the court ducked the double jeopardy issue.[155] The decision began to lose its tightly woven consistency at that point.

The court had already provided for predictability of notice of the possible charges against the defendant.[156] It had required LIO jury instructions in all cases meeting the legal test.[157] The court then balked at finishing what it had started.[158] The fifth amendment demands the cognate evidence or inherent relationship test in double jeopardy cases.[159] The opinion made a brief allusion to this possibility,[160] then hastily disclaimed any necessity to make a decision based on the facts.[161] Yet the cognate evidence approach appears to be the most consistent and fair test for double jeopardy purposes.[162]

Res judicata and collateral estoppel are important double jeopardy considerations.[163] Collateral estoppel is already a rule of criminal procedure.[164]

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145. Mascolo, *supra* note 71, at 295.
146. *See id.* at 285-93.
147. *Id.* at 293.
148. *Id.* at 294-95.
149. Blair, *supra* note 16, at 462-75.
150. State v. Jeffries, 430 N.W.2d at 739.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 738.
155. *See id.*
156. *Id.* at 737-38.
157. *Id.* at 738.
158. *Id.*
159. U.S. Const. amend. V.
160. *See* State v. Jeffries, 430 N.W.2d at 738-39.
161. *Id.* at 734-35, 738-39.
162. *Id.* at 739.
163. *Cf. id.*; *see also* Blair, *supra* note 16, at 457-62.
164. Ettinger, *supra* note 51, at 218.

In *Ashe v. Swenson*[165] the United States Supreme Court ruled collateral estoppel "to be embodied in the double jeopardy clause and, thus, established collateral estoppel as a constitutionally protected safeguard."[166] While the "same offense" applies only to the charge and not to the general underlying act,[167] fairness dictates that charges for the same act should be brought at the same trial.[168]

A brief illustration may be helpful. The defendant is on trial. The prosecution has the facts. The prosecution elects to go forward with only one or two of the possible charges against the defendant. The prosecutor's reasoning: If he loses, he can simply bring other charges under the Supreme Court's decision in *Blockburger v. United States*.[169] The *Blockburger* rule is essentially the same as the strict element or legal approach.[170] The first charged offense must not fit the strict statutory legal framework of the later charge.[171] Conceivably, the prosecution could continue to bring charges arising out of the same act until the state obtained a conviction.[172]

The court in *Jeffries* essentially ignored the later litigation issue, thereby allowing subsequent litigation on the same act. This is incongruent with the court's otherwise sweeping holding.[173] The better view would be to simply adopt the res judicata/collateral estoppel rule for double jeopardy purposes.[174]

VI. Impact of *State v. Jeffries*

The impact of *State v. Jeffries* will undoubtedly be greatest in Iowa districts that did not regularly give LIO instructions.[175] Some of the uncertainty and confusion has been alleviated in the criminal justice system, which benefits both the prosecution and the defense.[176] The decision will also help standardize the Iowa model jury instructions. Uniformity of actual

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165. Ashe v. Swenson, 397 U.S. 436 (1970).

166. Ettinger, *supra* note 51, at 218 n.157 (citing Ashe v. Swenson, 397 U.S. at 456-57).

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

168. Ettinger, *supra* note 51, at 217-25.

169. Blockburger v. United States, 284 U.S. at 304. The "same offense" for double jeopardy is "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 an additional fact which the other does not." *Id.*

170. State v. Jeffries, 430 N.W.2d at 735.

171. *See* Ettinger, *supra* note 51, at 218-19.

172. *See id.*

173. *See, e.g.*, State v. Jeffries, 430 N.W.2d at 738.

174. *See* Ettinger, *supra* note 51, at 217-25.

175. Interview with Frederick Gay on March 23, 1989. Mr. Gay is a former assistant county attorney for Polk County, Iowa, and presently engaged in criminal defense work in Des Moines, Iowa. Mr. Gay is also a former Legal Aid staff attorney and is presently a part-time instructor at the Drake Law School Legal Clinic, Drake University, Des Moines, Iowa.

176. State v. Jeffries, 430 N.W.2d at 737-38 (quoting Ettinger, *supra* note 51, at 201).

courtroom criminal proceedings when giving LIO instructions is now the law.[177]

However, a more far-reaching impact of *State v. Jeffries* is already discernible. While other courts around the country have skirted the issue, the Iowa Supreme Court has taken a stand. The decision has been noted in the *National Law Journal*.[178] In defining its position, the Iowa Supreme Court produced a tight, well-reasoned opinion. This decision will be reviewed by other state courts and by the federal courts as they struggle to define the limits of LIO instructions.

The Iowa Supreme Court has provided clear-cut guidelines.[179] Trial courts can implement the decision with ease. The defendant is entitled to jury instructions on all LIOs under the strict statutory elements or legal test. The jury is the sole finder of fact and can render a verdict consistent with the evidence presented. To preserve error, the defense is still required to object if the court fails or refuses to give the proper LIO instruction.[180]

In *State v. Jeffries* the Iowa Supreme Court balanced the judicial need for uniformity and predictability with the defendant's constitutional rights. Although the court failed to deal logically and authoritatively with the double jeopardy issue, the opinion remains clear and strong. By adhering to a logical application of judicial philosophy, the court rendered a decision that should have marked effects on both criminal practice in Iowa and the development of criminal procedure across the nation.[181]

James Benzoni

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177. *See* State v. Jeffries, 430 N.W.2d at 735-39.

178. Nat'l L.J., Dec. 26, 1988, at 29, col. 2.

179. *See* State v. Jeffries, 430 N.W.2d at 738, 741.

180. *Id.* at 737.

181. Author's note: In a case handed down since this Casenote was written, the United States Supreme Court addressed the double jeopardy concerns herein raised. In a five to four decision, the Supreme Court, Justice Brennan, held the double jeopardy clause of the fifth amendment bars subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct which constitutes an offense for which the defendant has already been prosecuted. *Grady v. Corbin*, 110 S. Ct. 2034, 2093 (1990).