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Life without Parole, or a Juvenile Death Sentence

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NOTE

Life Without Parole, or a Juvenile Death Sentence?

State v. Andrews, 329 S.W.3d 369 (Mo. 2010) (en banc), *cert. denied*, 131 S. Ct. 3070 (2011).

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I. INTRODUCTION

In the recent case of *State v. Andrews*, the Supreme Court of Missouri faced the issue of whether sentencing a fifteen-year-old juvenile to imprisonment for life without the possibility of parole violated the Eighth Amendment's ban against cruel and unusual punishment.[1] The court ultimately decided two issues: first, whether Missouri's juvenile certification proceeding violated the U.S. Supreme Court's ruling in *Apprendi v. New Jersey*,[2] and second, whether the sentence was inherently unconstitutional.[3] In deciding the first issue, the court interpreted the scope of the *Apprendi* decision as not applying to the state's juvenile certification process.[4] As for the second issue, the court held that it was constitutional to sentence a juvenile to life in prison without the possibility of parole once that individual has been certified as an adult and has been convicted of first-degree murder.[5] By ruling in this manner, the Supreme Court of Missouri has ensured that the only punishment available to juveniles convicted of first-degree murder is a life in jail without any possibility of probation or parole regardless of any rehabilitation by the prisoner.

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1. State v. Andrews, 329 S.W.3d 369, 370 (Mo. 2010) (en banc), *cert. denied*, 131 S. Ct. 3070 (2011).

2. *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (holding that a jury must determine any fact that enhances the sentence for a crime beyond the prescribed statutory minimum beyond a reasonable doubt).

3. *Andrews*, 329 S.W.3d at 371.

4. *Id.* at 372.

5. *See id.* at 377-78.

Looking ahead, the decision in *Andrews* could prove consequential in that it places an unbelievably high importance on the juvenile certification process, which is a process done without any jury determination. While the court was likely correct in interpreting *Apprendi* and subsequent case law, the result of the court's ruling is that a single judge will decide whether juvenile murderers, like Antonio Andrews, are to be tried as adults and thus face life in prison. Furthermore, in deciding that juveniles can be sentenced to life in prison, the court has virtually done away with the penological goal of rehabilitation.

Part II of this Note will look at the court's decision to allow juveniles to be sentenced to life without parole. In doing so, this Note will outline the policies underlying the U.S. Supreme Court's Eighth Amendment jurisprudence. Next, Part III of this Note will survey more broadly the U.S. Supreme Court's interpretation of the Eighth Amendment in terms of life without parole as well as death penalty cases. Part IV of this Note will then look at the reasoning of the majority and the dissent in the instant case. Finally, Part V of this Note will attempt to reconcile the reasoning of the instant case with the "evolving standards of decency" that mark Eighth Amendment jurisprudence, ultimately concluding that the *Andrews* court arrived at the wrong decision under the Eighth Amendment and appropriate precedent at the expense of Missouri's youth. In the end, it may come down to the Missouri legislature to correct this problem by updating Missouri's statute that punishes juvenile murderers.

II. FACTS AND HOLDING

Fifteen-year-old Antonio Andrews and three of his friends were hanging out together in St. Louis, Missouri, on August 15, 2007.[6] Andrews and one of his friends, Lamont Johnson, made the ill-fated decision to walk to a restaurant to pick up some food.[7] In yet another ill-fated decision, Andrews asked for and received from one of his friends a .38 caliber pistol.[8] On their way to the restaurant, Officer Norvelle Brown tried to stop and question the two young boys.[9] For whatever reason, possibly because Andrews was carrying the pistol, the boys fled.[10] Officer Brown pursued the boys in his patrol car, frustrating Andrews and leading him to tell his friend, Johnson, that he was "tired of [Officer Brown] chasing us."[11] Andrews stopped in a vacant lot and waited for Officer Brown.[12] When Officer Brown arrived at the lot and exit-

6. *Id.* at 370.
7. *Id.*
8. *Id.*
9. *Id.* at 371.
10. *See id.*
11. *Id.* (internal quotation marks omitted).
12. *Id.*

ed his patrol car, Andrews pulled out the .38 caliber pistol and shot Officer Brown in the back, killing him.[13]

At the time of the killing of Officer Brown, Antonio Andrews was fifteen years old, and thus the Missouri juvenile justice system had exclusive original jurisdiction over him.[14] However, under Missouri law, a juvenile may be certified as an adult, and the court "may in its discretion, dismiss the petition and transfer the child to a court of general jurisdiction for prosecution under the general law."[15] Andrews was subsequently certified as an adult on December 26, 2007, and was sent to be prosecuted under the general laws of Missouri.[16]

A grand jury indicted Andrews for first-degree murder and armed criminal action on January 31, 2008.[17] On August 12, 2009, the jury returned a guilty verdict on both counts at his trial.[18] After Andrews waived jury sentencing, the circuit court sentenced him to life in prison without the possibility of parole for first-degree murder and to a consecutive fifty-year prison sentence for armed criminal action.[19]

Andrews appealed his conviction based on two constitutional challenges.[20] First, Andrews argued that Missouri's scheme of permitting courts to certify juveniles as adults for criminal trials violated the U.S. Supreme Court's holding in *Apprendi*.[21] *Apprendi* held that any fact that increases the defendant's punishment is an element of a crime.[22] As such, the defendant has a right to submit that element to a jury, and the state must prove it beyond a reasonable doubt.[23] Because certification increases the maximum punishment for a juvenile, Andrews argued that *Apprendi* should apply, and that whether one is certified as an adult should be submitted to and decided by a jury.[24] Second, Andrews argued that Missouri Revised Statutes section

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13. *Id.* Brown did not die instantly, but died later that night. *Id.*

14. *Id. See also* MO. REV. STAT. § 211.031.1(3) (Supp. 2010).

15. MO. REV. STAT. § 211.071.1.

16. *Andrews*, 329 S.W.3d at 371.

17. *Id.*

18. *Id.*

19. *Id.* Andrews was sentenced under MO. REV. STAT. § 565.020.2 (2000). *Id.*

20. *Id.*

21. *Id. See also* Apprendi v. New Jersey, 530 U.S. 466, 475-76 (2000). Andrews's argument was that as a juvenile, the maximum sentence he could have received was six years (the juvenile court would lose jurisdiction when he turned twenty-one years old), so the certification acted as a sentence enhancer which allowed him to be sentenced to life without parole. *Andrews*, 329 S.W.3d at 371-72 (citing MO. REV. STAT. § 211.041 (2000) (amended 2008)).

22. *See Apprendi*, 530 U.S. at 495. In *Apprendi*, the fact that led to a harsher punishment for the defendant was whether the crime was motivated by racial bias. *Id.* at 471.

23. *Id.* at 476-77.

24. *Andrews*, 329 S.W.3d at 372.

565.020 was invalid because it violated the Eighth Amendment's prohibition against cruel and unusual punishment.[25] Andrews relied upon *Roper v. Simmons*, in which the U.S. Supreme Court held that the Eighth Amendment prohibited a state from sentencing a juvenile to death.[26]

The Supreme Court of Missouri first rejected Andrews's claim that the Missouri juvenile certification scheme violates *Apprendi* based on two lines of reasoning.[27] First, the court stated that a juvenile has no Sixth Amendment right to a jury during juvenile adjudication.[28] Since there is no right to a jury trial during this proceeding, the court concluded that *Apprendi* did not apply.[29] In a more interesting line of reasoning, the court stated that Missouri's certification scheme did *not* expose Andrews to an enhanced sentence, thus rendering *Apprendi* inapposite.[30] Instead of exposing Andrews to a harsher punishment, the court concluded that certification merely determined that his case would be heard under general jurisdiction and not governed by the juvenile courts.[31]

Next, by applying the "evolving standards of decency" test, the court also rejected Andrews's Eighth Amendment challenge.[32] Under U.S. Supreme Court precedent, in deciding whether a criminal sentence violates the Eighth Amendment, a court is to look at "the evolving standards of decency that mark the progress of a maturing society" to determine if the punishment at issue conforms to those standards.[33] Andrews relied on two U.S. Supreme Court cases, *Graham v. Florida*[34] and *Roper v. Simmons*,[35] to show that his sentence violated these standards.[36] The court found that Andrews's reliance on *Graham* was flawed because *Graham* concerned sentencing juveniles to life without parole for *non*-homicide crimes, whereas Andrews was found

25. *Id.* at 371.

26. *Id.* at 376; *see* Roper v. Simmons, 543 U.S. 551, 568 (2005).

27. *Andrews*, 329 S.W.3d at 372, 375.

28. *Id.* at 372; *see also In re* Gault, 387 U.S. 1, 14 (1967).

29. *Andrews*, 329 S.W.3d at 372.

30. *Id.* at 375. The court stated, "[Andrews's] certification did not expose him to any greater punishment than authorized by the jury's verdict as required to violate *Apprendi*. This is because the judgment that certified Andrews to be tried as an adult did not impose *any* sentence on him whatsoever." *Id.* (emphasis added) (citation omitted).

31. *Id.* at 375-76.

32. *Id.* at 376-78 (quoting Graham v. Florida, 130 S. Ct. 2011, 2021 (2010)) (internal quotation marks omitted).

33. *Id.* at 376 (quoting *Graham*, 130 S. Ct. at 2021) (internal quotation marks omitted).

34. *Graham*, 130 S. Ct. 2011.

35. 543 U.S. 551 (2005).

36. *See Andrews*, 329 S.W.3d at 376-77.

guilty of the homicide offense of first-degree murder.[37] As for *Roper*, that case, read narrowly, only prohibits sentencing juveniles to death, and says nothing as to life without parole.[38]

Andrews also argued that the "mandatory life without parole" punishment imposed by Missouri Revised Statutes section 565.020 was against the "evolving standards of decency" because the statute does not allow the sentencer to consider the offender's age.[39] The court again rejected this argument and held that Andrews "failed to demonstrate that Missouri's imposition of mandatory life without parole on a juvenile for committing first degree murder clearly and undoubtedly violates the Eighth Amendment."[40] For the reasons above, the Supreme Court of Missouri affirmed the sentence of life without parole for Antonio Andrews.[41]

III. LEGAL BACKGROUND

This section first will provide a historical overview of the U.S. Supreme Court's analysis of the Eighth Amendment and its use of the "evolving standards of decency" test. Next, this section will consider the differences in the Eighth Amendment analyses between death penalty cases and life without parole cases in terms of juvenile offenders. Courts have consistently held that "death is different," and this concept will be explored. While the instant case does not deal with the death penalty directly, it is important to understand that the death penalty is different in kind from life without parole and how that affects the Eighth Amendment analysis. Finally, this section will briefly look at *Apprendi* and a defendant's right to jury determination of particular facts.

A. Eighth Amendment Analysis

The Eighth Amendment to the U.S. Constitution prohibits the federal government from inflicting cruel and unusual punishment upon convicted criminals.[42] This provision of the Eighth Amendment has been incorporated to apply to the states through the Fourteenth Amendment's Due Process Clause.[43] While it is understood that the Eighth Amendment bans "cruel and unusual punishment," there is much debate about what these words mean. The debate seems to focus on whether the provision was intended only to

37. *Id.* The court read from *Graham* that non-homicide crimes deserve less severe punishment than a homicide crime, and thus *Graham* did not apply. *Id.* at 377.

38. *See* Roper v. Simmons, 543 U.S. 551, 570-71 (2005).

39. *Andrews*, 329 S.W.3d at 376-77; *see* MO. REV. STAT. § 565.020.2 (2000).

40. *Andrews*, 329 S.W.3d at 377-78.

41. *Id.* at 379.

42. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

43. Powell v. Texas, 392 U.S. 514, 558-59 (1968); Robinson v. California, 370 U.S. 660, 675 (1962).

govern modes of punishment or intended also to include a proportionality principle, prohibiting prison sentences disproportionate to the crime.[44]

The controlling test in determining whether the Eighth Amendment has been violated is to look to the "evolving standards of decency that mark the progress of a maturing society."[45] However, the debate about mode versus proportionality lives inside this question. Some Supreme Court Justices and scholars have found that one looks at the "evolving standards of decency" only to determine what *modes* of punishment are cruel and unusual.[46] And even when looking at modes of punishment, some Justices of the U.S. Supreme Court, such as Justice Scalia, have considered whether that particular mode of punishment was accepted as cruel and unusual in 1791 and not what is cruel and unusual today under the "evolving standards of decency."[47] The implication here is that imprisonment, no matter the length for the crime, would not be cruel or unusual even if highly disproportionate to the crime committed.[48] Instead, the Eighth Amendment would prohibit only extreme *types* of punishments (i.e., torture).

The other theory used in interpreting the Eighth Amendment is that it not only regulates modes of punishment but also whether a punishment is disproportional to the crime committed.[49] A proportionality review is based on retribution considerations in that it implies that a defendant should not be punished beyond what he "deserves" even if the more severe punishment would serve as a valid deterrent to future crimes (i.e., satisfying a utilitarian

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44. *Compare* Rummel v. Estelle, 445 U.S. 263, 274 (1980) (stating that the length of a sentence imposed for a felony crime is purely a matter of legislative prerogative), *and* Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (holding that the Eighth Amendment contains no proportionality guarantee), *with* Roper v. Simmons, 543 U.S. 551, 560-61 (2005) (finding the Eighth Amendment analysis to include a proportionality component), *and* Coker v. Georgia, 433 U.S. 584, 592 (1977) (finding a death sentence "grossly disproportionate" for the crime of rape).

45. Trop v. Dulles, 356 U.S. 86, 101 (1958); *accord* Gregg v. Georgia, 428 U.S. 153, 173 (1976); Furman v. Georgia, 408 U.S. 238, 242 (1972) (per curiam). While *Gregg* and *Furman* deal with the death penalty, they articulate an important standard in determining whether a punishment violates the Eighth Amendment.

46. *See, e.g.*, *Harmelin*, 501 U.S. at 981 (Scalia, J., concurring) (arguing that the original meaning of the words "cruel and unusual punishment" only apply to the *mode,* saying, "The early commentary on the Clause contains no reference to disproportionate or excessive sentences, and again indicates that it was designed to outlaw particular *modes* of punishment."); *see also Rummel*, 445 U.S. at 274.

47. *See Harmelin*, 501 U.S. at 981 (Scalia, J., concurring).

48. While this is true today, it seems possible that the "evolving standards of decency" in the future may mean that imprisonment has become "barbaric" and would no longer be tolerated under the Eighth Amendment.

49. *See* Solem v. Helm, 463 U.S. 277, 284 (1983). The court held "as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted." *Id.* at 290.

goal).[50] In *Solem v. Helm*, the Court noted three considerations when performing an Eighth Amendment proportionality argument in determining whether a punishment falls within the "evolving standards of decency."[51] First, the *Solem* Court said that one should look at the "gravity of the offense and the harshness of the penalty."[52] Second, one should "compare the sentences imposed on other criminals in the same jurisdiction" who committed similar crimes.[53] Third, courts should "compare the sentences imposed for commission of the same crime in other jurisdictions."[54]

The proportionality reasoning has become the accepted view, at least among U.S. Supreme Court Justices, and has gained more approval in Eighth Amendment jurisprudence.[55] This is evidenced by the decisions in *Coker v. Georgia*[56] and *Enmund v. Florida*.[57] When the Court decides whether a death sentence violates the Eighth Amendment, it conducts a two-part analysis.[58] First, it decides whether the sentence is consistent with the "evolving standards of decency."[59] In deciding whether the sentence is within the evolving standards, the Court looks to objective indicia such as other state statutes and jury verdicts.[60] When looking at this objective indicia, the Court decides if state legislatures are trending away from this type of punishment and whether juries are handing down this punishment.[61] These objective indicia are used as indicators of whether a particular punishment is cruel and unusual according to the evolving standards.[62] In the second part of the analysis, the Court brings its own judgment to bear on whether the sentence is cruel and unusual.[63] The Court does this by deciding whether the sentence serves a legitimate state interest such as retribution or deterrence.[64]

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50. *See Harmelin*, 501 U.S. at 989 (Scalia, J., concurring) (stating that "[p]roportionality is inherently a retributive concept").

51. *Solem*, 463 U.S. at 290-92.

52. *Id.* at 290-91.

53. *Id.* at 291.

54. *Id.*

55. "The concept of proportionality is central to the Eighth Amendment." Graham v. Florida, 130 S. Ct. 2011, 2021 (2010).

56. 433 U.S. 584, 597 (1977) (holding that the imposition of the death penalty for the crime of rape was against the Eighth Amendment).

57. 458 U.S. 782, 797 (1982) (holding that, in that specific case, the imposition of the death penalty for felony murder was against the Eighth Amendment).

58. *See* Furman v. Georgia, 408 U.S. 238, 241-42 (1972) (Douglas, J., concurring) (per curiam).

59. *Id.* at 269-70 (Brennan, J., concurring).

60. *See Coker*, 433 U.S. at 592.

61. *See id.*

62. *See id.*

63. *See id.* at 597 ("[I]n the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.").

64. Kennedy v. Louisiana, 554 U.S. 407, 441 (2008).

The death penalty is not the only punishment that invokes the Eighth Amendment, although that is where the majority of the argument lies and where most of the law has been carved out. While many of the above-cited cases deal with the death penalty, some do not.[65] However, it is important to note that the Court has acknowledged that the death penalty is different in kind from a sentence of life in prison.[66]

B. The Death Penalty: Different in Kind from Life Without Parole

A legitimate debate exists among scholars in this country as to whether the death penalty is truly a more severe punishment than life without parole – an argument that death penalty scholar Hugo Bedau rejects.[67] As Bedau points out in response to the idea that life in prison is a more severe punishment than death:

> [f]ew death-row prisoners try to commit suicide and fewer keep trying until they succeed. Few death-row prisoners insist that all appeals on their behalf be dropped. Few convicted murderers sentenced to life in prison declare that they wish they had been sentenced instead to execution. Few if any death-row prisoners refuse executive clemency if it is offered to them.[68]

Whether or not this is a meritorious argument is moot because the U.S. Supreme Court has consistently held that "death is different" and *does* necessitate a stricter version of Eighth Amendment analysis than even life without parole.[69] Because "death is different," the Court applies a much stricter proportionality analysis than it does when a crime's punishment involves being sentenced to life without parole.[70] One commentator, Julia Sheketoff, goes so far as to say that the Court's pro-

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65. *See, e.g.*, Graham v. Florida, 130 S. Ct. 2011, 2017-18 (2010) (determining whether it is unconstitutional to sentence a juvenile to life without parole for a *non*-homicide crime); Trop v. Dulles, 356 U.S. 86, 87 (1958) (deciding whether forfeiture of citizenship is a valid punishment under the Constitution).

66. *See* Furman v. Georgia, 408 U.S. 238, 286 (1972) (Brennan, J., concurring) (per curiam) ("Death is a unique punishment in the United States.").

67. Hugo Adam Bedau, *The Minimal Invasion Argument Against the Death Penalty*, RESOURCE LIBR., Summer-Fall 2002, *available at* http://findarticles.com /p/articles/mi_hb3009/is_2_21/ai_n28975304/?tag=content;col1.

68. *Id.*

69. Gregg v. Georgia, 428 U.S. 153, 188 (1976); *see* Roper v. Simmons, 543 U.S. 551, 568 (2005); Enmund v. Florida, 458 U.S. 782, 797 (1982).

70. *See* Julia Fong Sheketoff, *State Innovations in Noncapital Proportionality Doctrine*, 85 N.Y.U. L. REV. 2209, 2214 (2010).

portionality review of life without parole is "shallow and perfunctory" in comparison to the death penalty review.[71]

Several U.S. Supreme Court cases demonstrate the "death is different" jurisprudence: *Roper v. Simmons*, *Coker v. Georgia*, and *Enmund v. Florida*.[72] These three cases, which this Note will examine below, are all examples of the Court invalidating the death penalty for various types of crimes. When these decisions are juxtaposed against the U.S. Supreme Court's holdings in non-death penalty cases, the obvious difference in the proportionality review is exposed. This is important in understanding the Supreme Court of Missouri's interpretation of the Eighth Amendment in the instant case because Antonio Andrews brought a non-death penalty case which may have been doomed from the start.

In *Roper*, the seventeen-year-old defendant was convicted of first-degree murder under the laws of Missouri.[73] The State sought and the judge imposed the death penalty.[74] On appeal, the U.S. Supreme Court conducted its "evolving standards of decency" test and considered the objective indicia by looking at current jurisdictions that imposed the death penalty on juveniles.[75] The Court applied its reasoning from *Atkins v. Virginia* and said that juvenile offenders lack the same culpability as an adult because of a lack of maturity.[76] The Court held that "[b]ecause the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force," and it invalidated the death penalty as a possible punishment for juveniles.[77]

In *Coker*, the Court was asked to determine whether a defendant may be sentenced to death for the crime of rape, a non-homicide crime.[78] Once again, the Court gave a very stringent proportionality review by conducting a

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71. *Id.*

72. *See Roper*, 543 U.S. at 568; *Enmund*, 458 U.S. at 797; Coker v. Georgia, 433 U.S. 584, 598 (1977); *see also* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that the death penalty was unconstitutional when inflicted on the mentally retarded).

73. *Roper*, 543 U.S. at 557. *Roper* is an interesting example of this stricter Eighth Amendment review because it originated in Missouri. *See id.* at 550.

74. *Id.* at 557-58.

75. *Id.* at 561. The court noted that many jurisdictions did not impose the death penalty on juveniles, and those that did rarely sentenced them to the death penalty. *Id.* at 564-65.

76. *Id.* at 569.

> [A] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions. . . . In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.

Id. (citations omitted) (internal quotation marks omitted).

77. *Id.* at 568.

78. Coker v. Georgia, 433 U.S. 584, 586 (1977).

jurisdiction-by-jurisdiction survey of the death penalty for rape.[79] The Court held that "the death sentence imposed on Coker is a disproportionate punishment for rape."[80] In its reasoning, the Court stated that "[r]ape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder."[81]

The *Enmund* case employed very similar logic as *Coker* in that it invalidated the death penalty for a certain kind of crime – felony murder.[82] This is an even more drastic scaling back of the death penalty – and a stricter Eighth Amendment analysis – in that the crime here was a homicide for which the Court refused to permit the punishment of death.[83] Invalidating the death penalty for a type of offense, even crimes resulting in death, shows how restrictively courts apply the Eighth Amendment to death penalty cases.

Comparing these decisions to two non-death penalty decisions highlights the difference in the Court's Eighth Amendment jurisprudence. Those two cases are *Harmelin v. Michigan* and *Rummel v. Estelle*.[84] In *Harmelin*, the defendant was convicted of possession of 672 grams of cocaine.[85] This crime carried with it a mandatory sentence of life in prison without the possibility of parole.[86] One of the petitioner's arguments was that this sentence was cruel and unusual in that it was "'significantly disproportionate' to the crime he committed."[87] The Court's majority held that the sentence was *not* unconstitutional.[88] Justice Scalia stated for the majority that, "[w]e conclude from this examination that *Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee."[89] This statement goes to show the Court's, or at least Justice Scalia's, approach to non-death penalty cases and proportionality review.

In *Rummel*, the defendant challenged a recidivist statute, arguing that it violated the Eighth Amendment.[90] The defendant stole $120.75 worth of goods.[91] Because this amount exceeded $50, the State charged the defendant with a felony.[92] Because this was the defendant's third felony, the State

79. *Id.* at 593-96.

80. *Id.* at 595.

81. *Id.* at 598.

82. Enmund v. Florida, 458 U.S. 782, 797 (1982).

83. *Id.* at 784.

84. Harmelin v. Michigan, 501 U.S. 957 (1991); Rummel v. Estelle, 445 U.S. 263 (1980).

85. *Harmelin*, 501 U.S. at 961.

86. *Id.*

87. *Id.*

88. *Id.* at 965.

89. *Id.*

90. Rummel v. Estelle, 445 U.S. 263, 265 (1980). A recidivist statute is one that punishes a repeat offender more harshly. 24 C.J.S. *Criminal Law* § 2289 (2011).

91. *Rummel*, 445 U.S. at 266.

92. *Id.*

sought a life sentence for defendant.[93] The Court held that this did *not* violate the ban on cruel and unusual punishment.[94] Despite the appearance of disproportionality, life in prison for stealing $120.75 worth of goods, the Court upheld the punishment, writing, "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare."[95]

While both death penalty cases as well as non-death penalty cases receive a proportionality review, it is obvious that non-death penalty cases receive a stricter version of this review. In death penalty cases, as seen above, the Court will strike down a death sentence on the showing of any disproportion.[96] For example, in *Coker* the Court held that imposing the death penalty for rape was unconstitutional because the punishment was merely disproportionate, not *grossly* disproportionate.[97] However, in a non-death penalty case, the Court looks for *gross* disproportion before it will strike down the sentence.[98] This allows an individual to be punished beyond what they deserve, which disregards retributivist considerations but arguably satisfies the utilitarian goal of deterrence.

While non-death penalty cases may receive a less-strict version of the proportionality review, there is still *some* review that goes into the decision.[99] This is seen in a case that Andrews, the defendant in the instant case, relied on: *Graham v. Florida*.[100] *Graham*, which is similar to *Rummel*, involved the issue of whether a juvenile defendant can be sentenced to life without parole for a *non*-homicide offense.[101] The defendant, a seventeen-year-old, violated his probation by "possessing a firearm, committing crimes, and associating with persons engaged in criminal activity."[102] The trial court found the defendant guilty of the charged crimes in violation of his probation, sentencing him to life without parole.[103] The U.S. Supreme Court reversed the sentence, stating that "[t]he concept of proportionality is central to the Eighth Amendment."[104] The Court laid out the two types of proportionality: "The first involves challenges to the length of term-of-years sentences given all the cir-

93. *Id.*

94. *Id.* at 285.

95. *Id.* at 272.

96. *See* Kennedy v. Louisiana, 554 U.S. 407, 421, 435 (2008); Coker v. Georgia, 433 U.S. 584, 595 (1977).

97. *Coker*, 433 U.S. at 599.

98. *See Rummel*, 445 U.S. at 271.

99. "This is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent, if a legislature made overtime parking a felony punishable by life imprisonment." *Id.* at 274 n.11 (citation omitted).

100. Graham v. Florida, 130 S. Ct. 2011 (2010).

101. *Id.* at 2017-18.

102. *Id.* at 2019.

103. *Id.* at 2020.

104. *Id.* at 2021, 2034.

cumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty."[105] The Court combined the rulings from *Roper* and *Enmund* by saying that juveniles have a lessened culpability and that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment."[106] The specific holding of *Graham* is that juveniles who commit nonhomicide offenses are not subject to life in prison without parole.[107]

Another aspect of proportionality review is looking at what the sentencer can consider in sentencing. In *Graham*, the Court stated that "[a]n offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed."[108] This logic is in line with the seminal U.S. Supreme Court death penalty case, *Woodson v. North Carolina*, which held that it was unconstitutional to have a mandatory death sentence scheme.[109] The reasoning behind this holding is that an individualized assessment of the defendant is necessary to conform to the "evolving standards of decency."[110] While it is true that this decision applies to mandatory death penalty schemes, the premise that an individualized assessment of the defendant plays a factor in the "evolving standards of decency" still *may* play a role in non-death penalty cases.

Missouri Revised Statutes section 565.020 states that the punishment for first-degree murder "shall be either death or imprisonment for life without eligibility for probation or parole."[111] However, after *Roper*,[112] it became unconstitutional to sentence a juvenile under the age of eighteen to death, effectively removing that possible punishment from the purview of section 565.020. Once removed, the only remaining punishment for a juvenile convicted of first-degree murder was a mandatory sentence of life without parole. The mandatory nature of this statute was raised by Andrews in the instant case.

C. Apprendi*'s Requirement of Jury Determination*

The other claim that Andrews raised was that, under *Apprendi v. New Jersey*, the juvenile certification proceeding required a jury to determine the

105. *Id.* at 2021.

106. *Id.* at 2027.

107. *Id.* at 2030. The Court said, "It follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." *Id.* at 2027.

108. *Id.* at 2031.

109. *See* Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

110. *See id.* at 293.

111. MO. REV. STAT. § 565.020.2 (2000).

112. *See* Roper v. Simmons, 543 U.S. 551, 568 (2005).

facts in that it imposed an enhanced sentence on him.[113] In *Apprendi*, the defendant fired a gun into the home of an African-American family.[114] The defendant pleaded guilty to possession of a firearm for an unlawful purpose, which was a second-degree offense.[115] However, since this crime was considered a "hate crime," there was an enhanced sentence leading to an extended period of jail time.[116] To be considered a hate crime, the judge had to find "that the crime was motivated by racial bias."[117] In New Jersey, whether the crime was motivated by racial bias was determined by the judge, rather than by a jury.[118]

Apprendi argued that since the determination of whether the facts constituted a "hate crime" exposed him to a greater sentence, those facts had to be decided by a jury.[119] The Court agreed with Apprendi's reasoning that the historic role of the jury was to determine "elements" of crimes.[120] The Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[121]

Then, the following question arises: What elements must be submitted to a jury? While this question is at the heart of the instant case, cases have held that "trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement."[122] If this is the case, then should a jury determine the certification process in the instant case?

IV. INSTANT DECISION

Writing for the majority in a 4-3 decision, Judge Zel M. Fischer analyzed both the defendant's juvenile certification claim under *Apprendi* as well as the defendant's Eighth Amendment claim.[123] The court's standard of re-

113. *See* State v. Andrews, 329 S.W.3d 369, 370 (Mo. 2010) (en banc), *cert. denied*, 131 S. Ct. 3070 (2011).

114. Apprendi v. New Jersey, 530 U.S. 466, 469 (2000).

115. *Id.*

116. *See id.*

117. *Id.* at 471 (internal quotation marks omitted).

118. *Id.* at 468-69.

119. *See id.* at 471.

120. *Id.* at 500 (Thomas, J., concurring).

121. *Id.* at 490 (majority opinion).

122. McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971).

123. State v. Andrews, 329 S.W.3d 369, 370 (Mo. 2010) (en banc), *cert. denied*, 131 S. Ct. 3070 (2011). The majority consisted of Chief Justice William Ray Price and Judges Zel M. Fischer, Mary R. Russell, and Patricia Breckenridge. *Id.* at 369. Judge Michael A. Wolff wrote one dissenting opinion, and Judge Laura Denvir Stith wrote another, which Judge Richard B. Teitelman joined. *Id.*

view was de novo because it was interpreting Missouri statutes[124] and therefore owed no deference to the trial court's decision.[125]

The court's first task in analyzing the Andrews's claim was to reconcile *Apprendi*'s requirement of a jury determination of "sentence enhancing" facts with Missouri Revised Statutes section 211.071.[126] In doing so, the court looked at the holding in *Apprendi* and determined when a defendant's Sixth Amendment right to a jury trial was required.[127] The *Apprendi* holding, according to the court, meant that any fact that would expose the defendant to a penalty "that exceeds the statutory maximum" is to be decided by a jury and proven beyond a reasonable doubt.[128]

While Andrews was only fifteen years old when he committed the murder, he was certified as an adult through the statutory certification process.[129] Andrews argued that the hearing certifying him as an adult exposed him to an enhanced punishment, and thus the facts determined at the certification proceeding should have been decided by a jury instead of a judge pursuant to *Apprendi*.[130]

In rejecting Andrews's argument, the court looked at *Oregon v. Ice*[131] and the U.S. Supreme Court's interpretation of *Apprendi*.[132] The U.S. Supreme Court in *Ice* limited the scope of *Apprendi*, and the instant case noted that *Apprendi*'s requirement of a jury determination is based on the "jury's historic role as the bulwark."[133] It is the historical role of the jury that determines when Sixth Amendment rights must be given to a criminal defendant.[134] The Court stated that while some of the rights found in the Bill of Rights apply to juvenile adjudications, the Sixth Amendment does not.[135]

After looking at the historical role of the jury, including the fact that every other jurisdiction with similar juvenile certification processes as Mis-

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124. MO. REV. STAT. § 211.071 (Supp. 2010); MO. REV. STAT. § 565.020 (2000).

125. *Andrews*, 329 S.W.3d at 371.

126. *Id.*; *see also* MO. REV. STAT. § 211.071 (governing when a juvenile under the age of seventeen can be certified as an adult, transferring jurisdiction to the court of general jurisdiction).

127. *Andrews*, 329 S.W.3d at 373; *see also* Apprendi v. New Jersey, 530 U.S. 466, 476 (2000).

128. *Andrews*, 239 S.W.3d at 372.

129. *See id.* at 370-71.

130. *Id.* at 371.

131. 555 U.S. 160 (2009).

132. *Andrews*, 329 S.W.3d at 373.

133. *Id.*

134. *Id.* at 373-74.

135. *Id.* at 374. *Compare* Breed v. Jones, 421 U.S. 519, 541 (1975) (holding double jeopardy Fifth Amendment right does apply to juvenile adjudications), *and In re* Winship, 397 U.S. 358, 367 (1970) (holding that proof beyond a reasonable doubt applies to delinquency proceedings), *with* McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971) (holding that a jury trial is not required for juvenile court adjudications).

souri has found that *Apprendi* does not apply,[136] the court addressed whether the certification process was even considered a sentence enhancement at all.[137] Andrews argued that if he was sentenced in the juvenile system, the maximum sentence he could have received was six years.[138] Once he became certified as an adult, however, the maximum sentence increased to life without parole.[139] In three sentences the court rejected this argument and said that the certification "did *not* enhance the potential maximum sentence for the crime he was alleged to have committed."[140] The court reasoned that the certification did not enhance Andrews's sentence because the certification "did not impose *any* sentence on [Andrews] whatsoever. . . . [I]t only determined that his case would be heard in a circuit court of general jurisdiction rather than the juvenile division of the circuit court."[141] For the above reasons, the court held that Andrews was not entitled to the right of a jury determination of the facts necessary for juvenile certification.[142]

The second and maybe more interesting claim raised by Andrews on appeal is that the mandatory sentence of life without parole for a juvenile under the age of eighteen is unconstitutional as against the Eighth Amendment's ban on cruel and unusual punishment.[143] There are seemingly two aspects to this claim. First, does the mandatory nature of the sentence violate the Eighth Amendment, in that it does not allow for consideration by the sentencer?[144] Second, is sentencing a juvenile to life without parole who committed first-degree murder *per se* against the Eighth Amendment?[145]

Missouri Revised Statutes section 565.020 gives only one punishment for the sentencer to impose against the defendant – life without parole.[146] What this means is that as soon as Antonio Andrews was certified as an adult, and thus eligible for punishment under section 565.020, and he was found

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136. *Andrews*, 329 S.W.3d at 374-75; *see also* Gonzales v. Tafoya, 515 F.3d 1097, 1101-02 (10th Cir. 2008); United States v. Miguel, 338 F.3d 995, 997 (9th Cir. 2003); State v. Rodriquez, 71 P.3d 919, 926 (Ariz. Ct. App. 2003); State v. Jones, 47 P.3d 783, 777 (Kan. 2002).

137. *Andrews*, 329 S.W.3d at 375.

138. *Id.* at 372. The juvenile system only has jurisdiction until the defendant turns twenty-one, at which point the court loses jurisdiction. MO. REV. STAT. § 211.041 (2000). At the time of the crime, the defendant was fifteen years old; thus, he could only be imprisoned for six years. *Andrews*, 329 S.W.3d at 394.

139. *Andrews*, at 372.

140. *Id.* at 375 (emphasis added).

141. *Id.* (emphasis added).

142. *Id.* at 375-76.

143. *Id.* at 376.

144. *See* Woodson v. North Carolina, 428 U.S. 280, 292-93 (1976) (holding that mandatory death penalty schemes are unconstitutional because they violate the evolving standards of decency).

145. *See Andrews*, 329 S.W.3d at 377.

146. *Id.* at 371.

guilty of first-degree murder, the only punishment available to him was life without the possibility of parole.[147] Andrews claimed that this violated the Eighth Amendment in that his age was not taken into consideration when deciding his punishment, making that punishment cruel and unusual.[148]

While the court agreed with Andrews's premise that a sentencer must be able to consider a defendant's age before imposing a sentence for murder, it disagreed with this premise's application in this case.[149] The court rejected Andrews's argument because a court is required to take into consideration the age of the offender during the juvenile certification process.[150] The court says that the imposition of a mandatory sentence of life without parole is constitutional because defendant's age has been taken into consideration through the certification process.[151] For this reason, Andrews has "failed to demonstrate that Missouri's imposition of mandatory life without parole on a juvenile . . . violates the Eighth Amendment of the Constitution."[152]

The second part of Andrews's Eighth Amendment argument was that sentencing a juvenile to life without the possibility of parole is inherently against the Eighth Amendment.[153] In evaluating an Eighth Amendment claim, the court must look to the "evolving standards of decency that mark the progress of a maturing society"[154] to see if the punishment conforms to those standards. Andrews relied on *Roper* and *Graham* to point to the unconstitutionality of the Missouri statute.[155] The court again rejected Andrews's argument that sentencing a juvenile to life without parole violates the "evolving standards of decency."[156]

Specifically, the court said that *Roper* and *Graham* were inapposite in that *Roper* held that sentencing a juvenile to death is unconstitutional and even stated that life without parole is a possible sanction for juveniles.[157] *Graham* did not apply because that case dealt with non-homicide offenses.[158] The court in the instant case pointed to the fact that *Graham* illustrates the difference between "juvenile criminals" and "murderers," the *Graham* Court saying it is "perfectly legitimate for a juvenile to receive a sentence of life

147. *See id.*

148. *Id. See also* Graham v. Florida, 130 S. Ct. 2011, 2031 (2010) ("An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.").

149. *See Andrews*, 329 S.W.3d at 377.

150. *Id.* (citing MO. REV. STAT. § 211.071.6(7) (Supp. 2010)).

151. *Id.*

152. *Id.* at 377-78.

153. *Id.* at 377. The defendant relied heavily on *Graham* for this argument. *Id.*

154. *Id.* at 380 (internal quotation marks omitted); *see also* Gregg v. Georgia, 428 U.S. 153, 173 (1976).

155. *See Andrews*, 329 S.W.3d at 376.

156. *Id.* at 377-78.

157. *See* Roper v. Simmons, 543 U.S. 551, 568, 571 (2005).

158. *See* Graham v. Florida, 130 S. Ct. 2011, 2015 (2010).

without parole for committing murder."[159] However, this quote comes from Justice Roberts's concurrence from *Graham*.[160]

The opinion was not without dissent. As for the first issue of Andrews's claim, Judge Laura Denvir Stith addressed the *Apprendi* point in her dissenting opinion.[161] Judge Stith disagreed with the majority in that the certification *had* "greatly enhanced the punishment to which Antonio could be subjected."[162] Judge Stith's dissent said that the majority's statement that the certification was not a sentence enhancer, but merely decided which court had jurisdiction, "dramatically oversimplifies what is occurring."[163] Judge Stith's dissent stated that the majority's view violated *Apprendi* because "*multiple* findings of fact increased the possible sentence [Andrews] could receive from a mere six years to an entire lifetime in prison."[164]

In a second dissent, Judge Michael A. Wolff addressed Andrews's second issue – whether his sentence violates the Eighth Amendment.[165] The central point of Judge Wolff's dissent focused on a proportionality argument.[166] Judge Wolff acknowledged that while this was not a death penalty case as *Roper* was, the outcome of the majority's opinion is that "young Andrews also has been sent to prison to die, albeit of whatever natural causes might take him."[167] The Wolff dissent went on to say that in *Roper* and *Graham* the Supreme Court noted that "juveniles as a class, were less culpable than other offenders."[168] The dissent here relied upon scientific data that shows, through brain imaging, that juveniles have "innate biological differences" that do not allow them to be held to the same standard as adults.[169]

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159. *Andrews*, 329 S.W.3d at 377 (citing *Graham*, 130 S. Ct. at 2027). In *Graham*, the Court also stated that there is "nothing *inherently* unconstitutional about imposing sentences of life without parole on juvenile offenders." *Graham*, 130 S. Ct. at 2041 (Roberts, J., concurring in the judgment).

160. *Graham*, 130 S. Ct. at 2041 (Roberts, J., concurring in the judgment).

161. *Andrews*, 329 S.W.3d at 390 (Stith, J., dissenting).

162. *Id.* at 391.

163. *Id.* at 392.

164. *Id.* The "*multiple* findings of fact" that the judge made in certifying Andrews as an adult include

> the crime alleged involved "viciousness, force and violence;" Antonio had a "repetitive pattern of offenses;" he was "both sophisticated and streetwise" and tested positive for marijuana when he was arrested; he had no "extreme emotional problems" or "diagnosed learning disability;" he had a good relationship with both parents; insufficient time existed to rehabilitate Antonio in the juvenile justice system because the division of youth services is not required to retain juveniles after they reach the age of 18.

Id. at 393-94.

165. *Id.* at 379 (Wolff, J., dissenting).

166. *See id.* at 379-89.

167. *Id.* at 379.

168. *Id.* at 381.

169. *Id.* at 383.

The dissent also countered the majority's argument that *Roper* implicitly left life without parole as a possible punishment for juveniles by saying that *Roper* said "life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person."[170]

The Wolff dissent addressed the "evolving standards" test and believed that "[s]entencing juvenile offenders to life without the possibility of parole is cruel and unusual punishment because society's standards have evolved to prohibit it."[171] In support, this dissent looked at other jurisdictions and found that seven states and the District of Columbia "prohibit life without parole for juveniles," and four states, while allowing this punishment, do not impose it.[172]

In what may be the dissent's most persuasive argument, Judge Wolff discussed four penological goals that permit the state to punish criminals: retribution, deterrence, incapacitation, and rehabilitation.[173] Judge Wolff then explained that he did not believe any of those four goals were met by sentencing a juvenile to life in prison without the possibility of parole.[174] Judge Wolff said he does not believe that retribution is met in this situation because of the reduced culpability of a juvenile offender.[175] Deterrence is also not satisfied because, as the brain imaging shows, juveniles have "diminished capacity to evaluate the long-term consequences of their behavior."[176] As for incapacitation, there is no evidence that a juvenile offender "present[s] a permanent danger to society" requiring permanent imprisonment.[177] Finally, a sentence of life without parole "explicitly rejects . . . rehabilitation" in that no matter how reformed the prisoner becomes, he is denied a chance to leave prison.[178]

V. COMMENT

The "evolving standards of decency" test that governs the Eighth Amendment's cruel and unusual punishment analysis gives a court the ability to apply a more subjective determination in invalidating a state's punishment. By subjective, I mean to say the court can look at its own personal views on whether a punishment violates the "evolving standards of decency" and not just rely on the "objective indicia." The instant case is interesting in that the

170. *Id.* at 382 (citing Roper v. Simmons, 543 U.S. 551, 572 (2005)).

171. *Id.*

172. *Id.*

173. *Id.* at 386.

174. *Id.* at 386-87.

175. *Id.* at 386 ("Imposing the most severe non-death punishment on a juvenile is not proportional to a juvenile's culpability.").

176. *Id.*

177. *Id.*

178. *Id.* at 386-87.

majority, in upholding Andrews's punishment, uses the more objective portion of the "evolving standards of decency" test, while the dissent uses a more sympathetic, subjective version of the test. The result is that, objectively through preexisting case law, Antonio Andrews *may* be sentenced to life without parole. But subjectively, the dissent argues, Andrews *should not* be sentenced to this punishment. The difference between the majority and dissent is judicial discretion and deference to the legislature.

First, this section will look at the majority's reasoning for not applying *Apprendi* to the juvenile certification process and whether that is in line with the policy underlined in the *Apprendi* decision. Next, this section will focus on the merits of the majority opinion's ruling that Andrews may be sentenced to life without parole as well as the dissent's view as to why he should not be sentenced to life without parole. In the end, the Supreme Court of Missouri was asked to answer the following question: Did the statute pass constitutional muster through both objective indicia as well as the "evolving standards"?

In *Apprendi*, the Court stated that, "in order to bring the defendant within that higher degree of punishment" one must have a jury determination of facts.[179] However, this does not apply when a judge sentences a defendant within statutory limits.[180] One scenario in which this rule often comes up, as it did in *Apprendi*, is a sentence enhancer such as a hate crime.[181] In order for the defendant to be sentenced to the harsher sentence under the hate crime, a jury must first determine that the facts show the defendant acted with the purpose to intimidate the victim based on the victim's characteristics.[182] Andrews had a compelling argument that his certification in essence was a sentence enhancer, and therefore any facts determined at the juvenile certification process should have been decided by a jury rather than by a judge.

The majority disagreed with Andrews for two reasons, both of which seem illogical and are disputed by the dissent.[183] Why should *Apprendi* not apply here when the decision by the juvenile judge has exposed Andrews to a much harsher penalty? Several facts must be decided before a juvenile may be certified as an adult, and these facts should be decided by a jury.[184] Even if it is true that historically a jury is not required for juvenile adjudications, when that juvenile certification process is going to subject the defendant to a mandatory sentence of life without parole, then there should be the extra safeguard of having a jury decide the facts of that certification. A juvenile defendant such as Andrews is subject to a harsher penalty as an adult, and

179. Apprendi v. New Jersey, 530 U.S. 466, 480 (2000) (internal citations omitted).

180. *Id.* at 481. This means that if a felony calls for five to ten years in prison, once a defendant is convicted, the judge may sentence within that five-to-ten-year range without having to have a jury determination.

181. *Id.* at 490.

182. *Id.* at 491-92.

183. *See supra* notes 161-78 and accompanying text.

184. *See supra* note 164 and accompanying text.

"[t]here is no coherent way to evade *Apprendi*'s requirements where a juvenile transferred to adult court receives a sentence in excess of what he or she could have received in juvenile court."[185]

The majority next stated that the certification of Andrews did *not* enhance his potential maximum sentence.[186] Instead, the certification merely transferred jurisdiction and "did not impose any sentence on him whatsoever."[187] This argument by the majority is based on semantics and seems illogical. While it is technically true that the certification process of Andrews was not in itself a punishment, and that Andrews still had to go through a trial, it is also true that the process *did* expose Andrews to a life without parole sentence, whereas previously he could have only been subject to a six-year jail sentence. As the Stith dissent points out, *Apprendi* made it unconstitutional to "remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed."[188] There were no less than eight facts[189] decided in the instant case that placed Andrews in the general jurisdiction and "exposed" him to life without parole. It makes sense to require a jury even in juvenile adjudications, particularly those exposing the defendant to life without parole.

The more heated debate came when deciding whether it was constitutional to sentence Andrews to life without parole. The majority, looking between the lines of the holdings in *Graham* and *Roper*, held that it was constitutional to sentence a juvenile to life without parole.[190] The problem with this is that *Roper* focuses on a death penalty case and only in passing mentions life without parole.[191] Also, the majority cites to the Roberts concurrence from *Graham*, which the dissent points out is "not binding precedent."[192] After stripping the case law from the majority opinion, the remainder is not as persuasive as it first appears. After looking past the two cases cited by the

185. Jenny E. Carroll, *Rethinking the Constitutional Criminal Procedure of Juvenile Transfer Hearings:* Apprendi, *Adult Punishment, and Adult Process*, 61 HASTINGS L.J. 175, 219 (2009).

186. State v. Andrews, 329 S.W.3d 369, 375 (2010) (en banc), *cert. denied*, 131 S. Ct. 3070 (2011).

187. *Id.*

188. *Id.* at 391 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)) (internal quotation marks omitted).

189. *See supra* note 164.

190. *See Andrews*, 329 S.W.3d at 376-78.

191. Roper v. Simmons, 543 U.S. 551, 572 (2005). *Roper* says that, "To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person." *Id.* This quote merely compares the two punishments and recognizes that life without parole serves a deterrent function even without the death penalty. It is not an endorsement of this punishment for juveniles.

192. *Andrews*, 329 S.W.3d at 381 (Wolff, J., dissenting) (emphasis omitted).

majority, there are three reasons to repeal – or invalidate – the Missouri statute[193] that sentenced Andrews to life without parole, two of which were discussed by the dissent.

The first reason to repeal this statute is that it is unconstitutional in that the evolving standards of decency have, as they tend to do, evolved. As Judge Wolff's dissenting opinion points out, seven states and the District of Columbia "prohibit life without parole for juveniles" as well as four states that, while allowing this, do not impose it.[194] While this is not a majority of states, it does show a trending away from this type of punishment. Also, the dissent points out that the number of juveniles sentenced to life without parole is "significantly higher" in jurisdictions with mandatory life without parole versus a jurisdiction where the juries are given a choice between life without parole and life with parole.[195] While such data does not constitute overwhelming evidence of an evolution in the nation's standards of decency, it does show a "trending away" from this type of punishment for juveniles.[196]

The United States is currently the only country in the world that actively sentences juveniles to life without parole, which further supports a "trending away" from this practice.[197] While the sentencing practices in other countries are not binding on courts in the United States, the Supreme Court has relied on this type of data in the past in overturning cruel and unusual penalties.[198] Within the United States, the trend is also moving away from this form of punishment for juveniles. In the 1990s there was a push for more severe punishments for juvenile offenders, and with that came a more relaxed standard in trying juveniles as adults.[199] Since this era of harsher punishment for juve-

193. MO. REV. STAT. § 565.020 (2000).

194. *Andrews*, 329 S.W.3d at 382 (Wolff, J., dissenting); *see also* Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983, 1031-44 (2008) (providing a state-by-state look at all juvenile sentencing provisions). "[Twelve] States and the District of Columbia either do not allow or do not appear to practice JLWOP sentences." *Id.* at 1029.

195. *See Andrews*, 329 S.W.3d at 382 (Wolff, J., dissenting).

196. *See* Coker v. Georgia, 433 U.S. 584, 597 (1977). In *Coker*, the court invalidated the death penalty for rape after looking at legislatures and juries and finding that there is a trend away from this type of punishment. *Id.*

197. de la Vega & Leighton, *supra* note 194, at 989 ("[A] single country is now responsible for 100% of all child offenders serving this sentence: the United States. Most governments have either never allowed, expressly prohibited, or will not practice such sentencing on child offenders because it violates the principles of child development and protection established through national standards and international human rights law.").

198. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 575 (2005) ("Yet at least from the time of the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'").

199. de la Vega & Leighton, *supra* note 194, at 992.

niles, states have slowly stepped back from this standard.[200] Even Georgia, a state that does allow life without parole, has the Georgia Justice Project (GJP) which "utilizes an innovative approach to breaking the cycle of crime and poverty among children in Atlanta, Georgia."[201] Under that program, the recidivism rate in Georgia is "18.8%, as compared to the national United States average of over 60%."[202] This again points to a trend away, as well as suggests another scheme that may work better than incarcerating children for the rest of their life.

Another indicator that society has, over time, been scaling back punishment for juveniles is the decisions in death penalty cases culminating in *Roper v. Simmons*. In *Roper*, the Court ultimately limited the death penalty to offenders aged eighteen years or older, but this came after a decision that banned the death penalty for any offender under the age of sixteen.[203] The Court in *Roper* was asked to expand this holding to the age of eighteen, which it did.[204] While this decision obviously only applies to the death penalty, it still shows that the Court in recent years is willing to protect America's youth from excessive punishment.

The second reason to repeal this statute is a policy reason that has to do with the mandatory nature of the statute, as limited by *Roper*, in that it may lead to jury nullification. Assuming that the statute does comport with the Eighth Amendment, Missouri should nevertheless change the statute for this reason. The statute in question gives only one punishment option once a juvenile has been convicted of first-degree murder. This means that once Andrews was convicted of first-degree murder, the only punishment left to give was life without the possibility of parole. In *Woodson v. North Carolina*, one of the Court's concerns when it held unconstitutional a mandatory death penalty scheme was the possibility of jury nullification.[205]

After the instant case – a juvenile guilty of first-degree murder facing a mandatory life without parole sentence – the issue of jury nullification may

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200. *See, e.g.*, COLO. REV. STAT. § 17-22.5-104(2)(d)(IV) (LEXIS current through the end of the 1st Reg. Sess. 68th General Assembly (2011)) (abolishing juvenile life without parole); KAN. STAT. ANN. § 21-6618 (West, Westlaw current through 2011 Regular Sess.) (reserving life without parole for those over the age of eighteen); KY. REV. STAT. ANN. § 640.040(1) (West, Westlaw current through end of 2011 legislation) (same).

201. de la Vega & Leighton, *supra* note 194, at 1022.

202. *Id.*

203. *See* Thompson v. Oklahoma, 487 U.S. 815, 838 (1988).

204. Roper v. Simmons, 542 U.S. 551, 578-79 (2005).

205. *See* Woodson v. North Carolina, 428 U.S. 280, 293 n.29 (1976). Jury nullification is defined as: "A jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness." BLACK'S LAW DICTIONARY 936 (9th ed. 2009).

arise in two important ways. First, a jury may deliberately choose to acquit a guilty defendant of first-degree murder because of the stringent mandatory sentence. And second, a jury may choose to acquit, as Black's Law Dictionary points out, "because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness."[206] The reason why a jury would nullify the law and acquit in both of these examples is because it is the only thing left in their control. A jury that knows a fifteen-year-old boy is guilty of first-degree murder, but feels that the boy should be afforded a chance at rehabilitation, may take the lesser of two evils and acquit the defendant.

Jury nullification is a problem both the courts and the legislature would like to avoid as it inserts arbitrariness and randomness into the criminal justice system. While Andrews would certainly not be walking free – he would be convicted, likely, of a lesser-included offense such as second-degree murder or armed criminal action – it still makes it arbitrary in who is being convicted of first- versus second-degree murder. Meaning, even though all of the elements are met for first-degree murder, a jury may find that this defendant is more sympathetic and convict only of second-degree murder to avoid sending the defendant to life in prison without parole. A second defendant may not be as sympathetic and will be convicted of first-degree murder with identical facts.

Luckily, there is a simple solution to this problem – repeal or amend the current statute and leave open the option for a less stringent punishment for offenders under the age of seventeen. That more lenient punishment could even be life in prison *with* the possibility of parole. This way a jury can feel comfortable finding a defendant guilty knowing that he will be put behind bars, but also that if he becomes fit to reenter society he may.

Finally, the Supreme Court of Missouri should have reversed the defendant's sentence and invalidated the Missouri statute because juvenile offenders are simply less culpable, and the sentence of life without parole fails to meet any of the four penological goals that *allow* a state to punish, thus making the statute unconstitutional.[207] *Allow* the state to punish is the correct phrase here, because the state possesses a great power to punish, and the Eighth Amendment, as applied to the states through the Fourteenth Amendment, must be used to restrain this power when necessary. It can be argued that unless one of the four penological goals listed by the dissent are met, then the state cannot impose that punishment.

At the center of the dissent's argument is that juveniles such as Antonio Andrews are less developed and thus less culpable than a similarly situated adult offender.[208] Just because an individual judge certified Andrews as an adult through a proceeding without a jury does not mean that Andrews in-

206. BLACK'S LAW DICTIONARY 936.

207. *See supra* notes 173-78 and accompanying text.

208. *See* State v. Andrews, 329 S.W.3d 369, 383-84 (2010) (en banc) (Wolff, J., dissenting), *cert. denied*, 131 S. Ct. 3070 (2011).

stantly became more culpable. He was still a fifteen-year-old with a less developed frontal lobe.[209] The studies cited by the dissent explain how "juveniles have a 'lack of maturity and an underdeveloped sense of responsibility.'"[210] But is it really necessary to prove this point through the use of brain imaging and neurological studies? It is generally accepted through our society that juveniles are less mature. This is shown through national drinking ages, voting ages, and state driving laws.[211]

Despite these policy concerns – jury nullification, evolving standards of decency, and the lesser culpability of juvenile defenders – the majority held that Antonio Andrews's sentence of life without parole was constitutionally permissible. The result of this is that Andrews will spend the rest of his life in jail along with 2600 other juvenile offenders nationwide.[212]

VI. CONCLUSION

Andrews upholds the State of Missouri's right to sentence juvenile murder defendants to life in prison without the possibility of parole. Through this holding, the court expressly rejected the penological goal of rehabilitation in Missouri's correctional system. While Andrews himself is not the most compelling victim of the justice system – as he killed a police officer – this holding will have the future impact of sentencing juveniles to life in prison for less severe killings.

It seems that the majority's holding is in line with the Supreme Court's Eighth Amendment jurisprudence, but when the standard is one as subjective as "the evolving standards of decency," is this holding more about judicial restraint and deference to the legislature than about the real evolving standards of decency? The dissent points out that as a society we consider our youth to be less culpable and thus less deserving of punishment.[213] Science seems to back up this claim; even so, the majority, citing case law more than their own subjective beliefs, disregards this argument and holds that this punishment does fall within the "evolving standards of decency." It seems that if this is the test the Supreme Court wants states to use in determining when the Eighth Amendment bars a punishment as being disproportionate, then more than merely case law should go into the determination.

While the dissent makes some good points, the real solution lies with the legislature. Missouri's statute does not allow a jury a choice in sentencing when a juvenile is convicted of first-degree murder. Amending the statute to

209. *Id.*

210. *Id.* at 385 (quoting Graham v. Florida, 130 S. Ct. 2011, 2026 (2010)).

211. *See, e.g.*, 23 U.S.C. § 158 (2006) (setting the national drinking age at twenty-one years old); MO. REV. STAT. § 302.060 (Supp. 2010) (setting the state driving age at sixteen years old).

212. *Andrews*, 329 S.W.3d at 382 (Wolff, J., dissenting).

213. *Id.* at 389.

allow options when sentencing a juvenile convicted of murder would be simple, and would alleviate the issue for any future case. This solution still would allow a jury to give a life without parole sentence to the truly heinous crimes, while allowing an option of parole for the more borderline cases. Without this possibility in the statute the result is the same as in *Roper* – "young Andrews . . . has been sent to prison to die."[214]

214. *Id.* at 379.