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Constitutional Challenge to the Marijuana Prohibition in Missouri Unsuccessful

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RECENT CASES

CONSTITUTIONAL CHALLENGE TO THE MARIJUANA PROHIBITION IN MISSOURI UNSUCCESSFUL

State v. Mitchell[1]

Jerry Mitchell was charged with the sale of marijuana, the underlying offense being the sale of approximately eleven grams of marijuana for five dollars. The Missouri regulatory statute[2] prescribes a penalty of imprisonment from five years to life in a state correctional institution for the delivery of marijuana for remuneration. Pursuant to a plea bargain, Mitchell entered a guilty plea, and a second charge for the sale of a larger quantity of marijuana, which Mitchell admitted, was dismissed. After a presentence investigation, the trial court sentenced Mitchell to a term of twelve years in the state penitentiary. A motion was then filed to withdraw the guilty plea. At a subsequent hearing, this motion was withdrawn and the trial court reduced the sentence to seven years. Mitchell directly appealed to the Missouri Supreme Court contending that the classification of marijuana in the Missouri statute denies equal protection of the laws in violation of the fourteenth amendment to the United States Constitution and that the punishments prescribed for offenses involving the sale of marijuana constitute cruel and unusual punishment.[3] The Missouri Supreme Court affirmed the seven year sentence.[4]

Since the early 1930's when marijuana was defined as a narcotic in the Uniform Narcotic Drug Act[5] there have been numerous constitutional challenges to the drug's prohibition.[6] From 1930 until the mid-1960's,

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1. 563 S.W.2d 18 (Mo. En Banc 1978).
2. RSMo § 195.200 (Supp. 1975).
3. 563 S.W.2d at 21.
4. Since the Missouri Supreme Court's affirmation of the trial court's decision in this case, the Governor of Missouri on July 20, 1978, refused to grant Mitchell's request for a pardon. Mitchell recently filed a petition seeking a writ of habeas corpus. Mitchell v. Blackwell, Sup't, Intermediate Reformatory for Men, No. 78-0728-CV-W-2 (W.D. Mo. Sept. 25, 1978).
5. *See* 1932 HANDBOOK OF THE NATIONAL CONF. OF COMM. ON UNIFORM STATE LAWS AND PROCEEDINGS 95-107. For a review of the history of marijuana in the United States, see Bonnie & Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of the American Marijuana Prohibition*, 56 VA. L. REV. 971 (1970).
6. Soler, *Of Cannabis and the Courts: A Critical Examination of Constitutional Challenges to Statutory Marijuana Prohibitions*, 6 CONN. L. REV. 601, 601 (1974).

courts generally dismissed such arguments summarily.[7] Consequently, during this period of time persons seeking to overturn their convictions for possession or sale of marijuana were limited to raising procedural objections and evidentiary matters on appeal.[8] In the last decade, however, as the use of the drug has become more widespread and as public debate concerning its harmfulness has increased, constitutional attacks have begun to receive serious consideration by many courts. The primary constitutional claims that have been asserted in this area[9] are the right to equal protection of the laws[10] and the eighth amendment's guarantee against cruel and unusual punishment.[11]

The equal protection challenge focuses on the arbitrariness of the classification of marijuana in a regulatory statute. While some states classify controlled substances by definition or penalization,[12] a large number of state statutes, modeled after the federal comprehensive Drug Abuse Prevention and Control Act,[13] classify them by description.[14] Such a classification-by-description statute specifies each class of drugs, not by chemical or physical properties, but rather by "declarative statements which purport to convey social, political, medical, or scientific attitudes towards the members of the class."[15] The Missouri statute[16] is of this type, as evidenced by the statute's highest category, Schedule I, which embraces all substances (1) which have a high potential for abuse and (2) which have no accepted medical use in treatment in the United States or lack accepted safety for use in treatment under medical supervision.[17] Marijuana is classified in this category along with heroin and opiates.[18] On the other

7. Bonnie & Whitebread, *supra* note 5, at 1083.

8. *Id.*

9. Various constitutional claims have been raised in these recent cases, including the right to privacy, Ravin v. State, 537 P.2d 494 (Alaska 1975), *noted in* Note, *Marijuana Prohibition and the Constitutional Right of Privacy: An Examination of Ravin v. State*, 11 TULSA L.J. 563 (1976); the right of the free exercise of religion, People v. Mitchell, 244 Cal. App. 2d 176, 52 Cal. Rptr. 884 (1966); State *ex rel.* Scott v. Conaty, 155 W. Va. 718, 187 S.E.2d 119 (1972); and the freedom of expression, Borras v. State, 229 So. 2d 244 (Fla. 1969), *cert. denied*, 400 U.S. 808 (1970).

10. U.S. CONST. amend. XIV, § 1.

11. U.S. CONST. amend. VIII.

12. *See* Soler, *supra* note 6, at 624-25.

13. 21 U.S.C. § 801 (1970).

14. *See, e.g.*, IOWA CODE § 204.203 (1977); KAN. STAT. § 65-4104 (1972). *But see* Cannabis Control Act of 1971, ILL. ANN. STAT. ch. 56½, §§ 701-19 (Smith-Hurd Supp. 1978) (statute solely proscribing marijuana).

15. Soler, *supra* note 6, at 625.

16. RSMo § 195.017 (Supp. 1975).

17. RSMo § 195.017.1 (Supp. 1975). Almost all of the state regulatory statutes which classify drugs by description employ, verbatim, these same criteria in their highest category. *See* IOWA CODE § 204.203 (1977); KAN. STAT. § 65-4104 (1972); KY. REV. STAT. § 218A.040 (1977); OKLA. STAT. ANN. tit. 63, § 2-203 (West 1973).

18. RSMo § 195.017.2(4)(j) (Supp. 1975).

hand, Schedule III of the Missouri statute[19] includes barbiturates, the illegal sale of which carries a comparatively lighter penalty.[20]

Defendants charged with conduct involving marijuana (possession or sale) have asserted that there is "no rational basis"[21] for this statutory classification of marijuana with so-called "hard drugs" such as heroin, cocaine and opium, while other substances more dangerous than marijuana, such as barbiturates, are classified in a lower category, or like alcohol and nicotine,[22] are not classified at all.[23] In an effort to prove that the substantive qualities of marijuana do not fit the descriptive criteria of the regulatory statute, defendants in jurisdictions with classification schemes similar to that employed in Missouri have endeavored to introduce into evidence the findings of recent scientific studies[24] concerning the drug's psychological and physiological effects.[25] Few courts have given full consideration to such evidence even though the United States Supreme Court has said that current factual data *can*[26] be used to determine the validity of statutory

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19. RSMo § 195.017.6(3)(a) (Supp. 1975).

20. From 2-10 years. RSMo § 195.270 (Supp. 1975).

21. *See, e.g.*, United States Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973).

22. For a discussion of the relative dangers of marijuana, alcohol and nicotine, *see* NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING (1972) [hereinafter cited as NATIONAL COMMISSION ON MARIHUANA]; UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, MARIHUANA AND HEALTH IN PERSPECTIVE, FIFTH ANNUAL REPORT TO THE UNITED STATES CONGRESS FROM THE SECRETARY OF HEALTH, EDUCATION AND WELFARE (1975) [hereinafter cited as FIFTH HEW REPORT].

23. *E.g.*, State v. Rao, 171 Conn. 600, 370 A.2d 1310, 1312 (1976); People v. McCabe, 49 Ill. 2d 338, 341, 275 N.E.2d 407, 409 (1971); People v. Demers, 42 App. Div. 2d 634, 634, 345 N.Y.S.2d 184, 186 (1973). *See* State v. Wadsworth, 109 Ariz. 59, 63, 505 P.2d 230, 234 (1973) (reasonable basis test used); People v. Stark, 157 Colo. 59, 66, 400 P.2d 923, 927 (1965) (reasonable relation test used).

24. CANADIAN COMMISSION OF INQUIRY INTO THE NON-MEDICAL USE OF DRUGS, CANNABIS (1972) [hereinafter cited as CANADIAN COMMISSION]; NATIONAL COMMISSION ON MARIHUANA, *supra* note 22.

25. *See, e.g.*, United States v. Kiffer, 477 F.2d 349, 353 (2d Cir.), *cert. denied*, 414 U.S. 831 (1973) (classification not arbitrary or irrational); United States v. Maiden, 355 F. Supp. 743, 748 (D. Conn. 1973) (motion to dismiss indictment denied); English v. Miller, 341 F. Supp. 714, 717 (E.D. Va. 1972) (classification violated equal protection clause), *rev'd sub nom.*, English v. Virginia Prob. & Parole Bd., 481 F.2d 188 (4th Cir. 1973); People v. McCabe, 49 Ill. 2d 338, 342, 275 N.E.2d 407, 410 (1971) (classification violated equal protection clause); State v. Leppanen, 252 Or. 352, 353, 449 P.2d 447, 447 (1969) (conviction upheld); State v. Zornes, 78 Wash. 2d 9, 15-19, 469 P.2d 552, 558-59 (1970) (classification of marijuana as a narcotic is improper).

26. The following dictum from the United States Supreme Court's decision in Goesaert v. Cleary should be noted: "The Constitution does not require legislation to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards." 335 U.S. 464, 466 (1948).

classifications.[27] Most courts simply have upheld challenged marijuana statutes by invoking the presumption of constitutionality with which all legislation is clothed.[28]

However, some courts have scrutinized the relevant medical, scientific and sociological data concerning the effects of marijuana.[29] The Illinois Supreme Court closely examined such data in *People v. McCabe*.[30] In deciding whether a rational basis existed for the classification of marijuana in the Illinois regulatory statute with narcotic drugs such as heroin and cocaine, the *McCabe* court meticulously assessed the "voluminous materials" presented as evidence by both the appellant and the respondent,[31] and found that, unlike narcotic drugs, marijuana is not addictive,[32] and that its use does not entail a powerful "compulsion to abuse"[33] or "singularly or extraordinarily" cause violent or aggressive behavior[34] or lead to heroin use.[35] Based on these considerations, the court concluded that the classifi-

27. *See, e.g.*, Leary v. United States, 395 U.S. 6, 53 (1969); Muller v. Oregon, 208 U.S. 412 (1905).

28. *See, e.g.*, Boswell v. State, 290 Ala. 349, 276 So. 2d 592 (1973), *cert. denied*, 414 U.S. 1118 (1974); State v. Wadsworth, 109 Ariz. 59, 505 P.2d 230 (1973); People v. Stark, 157 Colo. 59, 400 P.2d 923 (1965); People v. Demers, 42 App. Div. 2d 634, 345 N.Y.S.2d 184 (1973); State v. Leppanen, 252 Or. 352, 449 P.2d 447 (1969).

29. *See* State v. Rao, 171 Conn. 600, 370 A.2d 1310 (1976) (conviction upheld); People v. McCabe, 49 Ill. 2d 338, 341-49, 275 N.E.2d 407, 411-13 (1971) (conviction reversed); People v. Sinclair, 387 Mich. 91, 104-12, 194 N.W.2d 878, 881-86 (1972) (conviction reversed primarily on equal protection grounds); State v. Carus, 118 N.J. Super. 159, 161, 286 A.2d 740, 741 (1972) (complaint dismissed); Sam v. State, 500 P.2d 291, 297 (Okla. Crim. App. 1972) (conviction reversed). A Florida circuit court, relying primarily on expert testimony, has recently held that the classification of marijuana in that state's drug abuse control statute, FLA. STAT. ANN. § 893.03(1)(c)(10) (West Supp. 1978), is unconstitutional. State v. Leigh, No. 72-267 (Fla. Supp. 1978).

30. 49 Ill. 2d 338, 275 N.E.2d 407 (1971). *McCabe* involved an equal protection challenge to the Illinois Narcotic Drug Act, ILL. REV. STAT. ch. 38, §§ 22-1 to 22-49.1 (repealed 1971), by a defendant sentenced to the mandatory minimum penalty of ten years in prison for a first conviction of selling marijuana. McCabe specifically contended that the more severe punishment for the offense under the narcotics statute as opposed to the lesser punishment for the sale of stimulant and depressant drugs under the Illinois Drug Abuse Control Act, ILL. REV. STAT. ch. 111½, §§ 801-12 (repealed 1971), violated the equal protection clause of the fourteenth amendment. 49 Ill. 2d at 340, 275 N.E.2d at 408-09.

Stimulant and depressant drugs as well as narcotic drugs are now classified in the Illinois Controlled Substances Act of 1971, ILL. ANN. STAT. ch. 56½, §§ 1100 *et seq.* (Smith-Hurd Supp. 1978). Marijuana is proscribed separately in the Cannabis Control Act of 1971, ILL. ANN. STAT. ch. 56½, §§ 701-18 (Smith-Hurd Supp. 1978).

31. 49 Ill. 2d at 341, 275 N.E.2d at 409.

32. *Id.* at 345, 275 N.E.2d at 411.

33. *Id.* at 347, 275 N.E.2d at 412.

34. *Id.* at 349, 275 N.E.2d at 413.

35. *Id.* at 348-49, 275 N.E.2d at 412-13.

cation of marijuana in the Illinois statute violated the equal protection clause of the fourteenth amendment.[36]

Like the defendant in *McCabe*, the appellant in *Mitchell*[37] introduced the results of several comprehensive research studies[38] in order to demonstrate that marijuana does not have a high potential for abuse.[39] Two of these studies, one by the National Commission on Marihuana and Drug Abuse and the other by the Canadian Commission of Inquiry Into the Non-Medical Use of Drugs, reported findings that marijuana is not addictive,[40] that it does not cause violent or criminal behavior,[41] and that it poses no danger of death from overdose.[42] Additionally, in an effort to demonstrate that marijuana does not fit the second criterion for substances included in Schedule I of the Missouri regulatory statute,[43] the appellant in *Mitchell* provided evidence that marijuana has been used in the United States as an anti-emetic for cancer patients receiving chemotherapy, and as an effective medication in the treatment of disorders such as glaucoma[44] and asthma.[45] The Missouri Supreme Court, however, did

36. *Id.* at 350, 275 N.E.2d at 413. The Illinois Supreme Court reversed McCabe's conviction.

37. The majority opinion of the Missouri Supreme Court in *Mitchell* pointed out that *McCabe* is a distinguishable precedent from the situation involving Jerry Mitchell in that, in Illinois, marijuana was classified with narcotic drugs and not with hallucinogenic drugs, while in Missouri marijuana is classified in Schedule I with hallucinogenic drugs. 563 S.W.2d at 24-25.

38. The studies presented by the appellant in *Mitchell* included the following: CANADIAN COMMISSION, *supra* note 24; DOMESTIC COUNCIL DRUG-ABUSE TASK FORCE, "WHITE PAPER ON DRUG ABUSE" (1975); FIFTH HEW REPORT, *supra* note 22; NATIONAL COMMISSION ON MARIHUANA, *supra* note 22; NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE, DRUG ABUSE IN AMERICA: PROBLEM IN PERSPECTIVE (1973); V. RUBIN & L. COMITAS, GANJA IN JAMAICA (1975); MENDLESON, BEHAVIORAL AND BIOLOGICAL CONCOMITANTS OF CHRONIC MARIJUANA USE (UNITED STATES ARMY MEDICAL RESEARCH AND DEVELOPMENT COMMAND) (1974).

39. Brief for Appellant at 11-17.

40. CANADIAN COMMISSION, *supra* note 24, at 123; NATIONAL COMMISSION ON MARIHUANA, *supra* note 22, at 87.

41. CANADIAN COMMISSION, *supra* note 24, at 110; NATIONAL COMMISSION ON MARIHUANA, *supra* note 22, at 73.

42. CANADIAN COMMISSION, *supra* note 24, at 113-14; NATIONAL COMMISSION ON MARIHUANA, *supra* note 22, at 56-57.

43. A substance is placed in Schedule I if it is found that the substance: "(1) has high potential for abuse; and (2) has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision." RSMo § 195.017 (Supp. 1975).

44. The New Mexico legislature has enacted a statute which permits a citizen to use marijuana for certain medical needs such as treating glaucoma and also counteracting the nausea attendant upon chemotherapy. Controlled Substance Therapeutic Research Act, House Bill 329, 33rd Legislature, Signed by the Governor, February 21, 1978.

45. Brief for Appellant at 24-25. Marijuana has also been used in the treatment of leukemia, high blood pressure and anorexia nervosa. *See* Soler, *supra*

not address the question of accepted medical use in treatment, even though the evidence would seem to support appellant's contention of misclassification; nor did it squarely face the conclusions of the government-financed studies which the appellant presented in order to show that marijuana does not have a high potential for abuse. The court merely acknowledged appellant's data and, without specifying the authorities to which it was referring, stated: "[T]here are, however, other authorities which take a contrary view regarding the hazards involved in using marijuana."[46] This statement sheds little light on the basis for the court's reasoning. The court then relied on a United States Supreme Court decision, *United States v. Carolene Products Co.*,[47] in support of the proposition that where legislation is based upon questions of fact that are unsettled, a court must sustain that legislation until the invalidity of the premises on which the statute rests is no longer contested.[48] Accordingly, since the harmlessness of marijuana is, in the court's opinion, a debatable medical issue, the court could find no basis for concluding that the classification of the substance in Schedule I of section 195.017 is arbitrary or irrational.

In light of the court's application of the *Carolene Products* test in *Mitchell*, it appears that equal protection arguments in this area will fail as long as the Missouri Supreme Court contends that marijuana use may be harmful. Solid and irrefutable proof of marijuana's benign nature apparently will be required before the court will alter its position. The *Mitchell* court, however, provided little guidance for future defendants as to what

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note 6, at 633. The alleged therapeutic values of marijuana were virtually unknown until relatively recent years. *Mitchell* is one of the first cases to consider such evidence.

46. 563 S.W.2d at 26. In its brief, however, the State of Missouri did cite one authority describing adverse qualities of marijuana, G. NAHAS, KEEP OFF THE GRASS!, A SCIENTIST'S DOCUMENTED ACCOUNT OF MARIJUANA'S DESTRUCTIVE EFFECTS (1976). Brief for Respondent at 13. Other studies to which the Missouri Supreme Court might have referred include: Kolansky & Moore, *Effects of Marijuana on Adolescents and Young Adults*, 216 J.A.M.A. 486 (1971); Kolansky & Moore, *Marijuana: Can It Hurt You?*, 232 J.A.M.A. 923 (1974); Talbott & Teague, *Marijuana Psychosis*, 210 J.A.M.A. 299 (1969).

47. 304 U.S. 144 (1938). The Connecticut Supreme Court also applied *Carolene Products* recently in a marijuana case. State v. Rao, 171 Conn. 600, 370 A.2d 1310, 1314 (1976) (upholding the Connecticut marijuana regulatory statute).

48. 563 S.W.2d at 26. Judge Seiler in his dissenting opinion in *Mitchell*, however, pointed out that *Carolene Products*, which upheld the constitutionality of the Filled Milk Act of 1923, is a distinguishable precedent from the instant case. *Id.* at 29 (Seiler, J., dissenting). Judge Seiler directed the court's attention to the footnote in *Carolene Products* in which Justice Stone stated: "There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." 304 U.S. 144, 152 n.4 (1938).

constitutes conclusive proof in that regard. The majority opinion never challenged the reliability of appellant's data or pointed out why it was inadequate. The court also chose not to cite authorities contrary to Mitchell's position. Until the Missouri Supreme Court confronts this issue of conclusive proof, the prospects for a successful equal protection attack on the marijuana regulatory statute appear bleak.

The other primary constitutional challenge in this area is the eighth amendment's guarantee against cruel and unusual punishment. Unlike equal protection which contests the statutory classification scheme, an assertion of cruel and unusual punishment challenges the length of sentence[49] or type of penalty prescribed by statute as punishment for certain conduct. The leading case on the subject is *Weems v. United States*,[50] in which the United States Supreme Court held that a Phillipine statute authorizing a minimum sentence of twelve years at hard labor for falsifying government documents constituted cruel and unusual punishment. The statute violated the eighth amendment prohibition not only because of the method of punishment it prescribed but also because of the disproportionality of the sentence to the severity of the offense.[51] Since *Weems*, the Supreme Court has made numerous attempts to formulate a definitive standard for determining which punishments are excessive under the eighth amendment.[52] However, a universally applicable test has never been developed.[53] Many courts consequently have been reluctant to consider cruel and unusual punishment challenges as long as the penalty imposed is within the guidelines authorized by statute.[54]

In a recent effort to refine such an eighth amendment test, the United States Supreme Court in *Coker v. Georgia*[55] stated that "a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment[56] and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly

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49. Early opinions construed this prohibition as a ban only against physical torture and barbarous methods of punishment. *See, e.g.*, O'Neil v. Vermont, 144 U.S. 323, 337 (1892); *In re* Kemmler, 136 U.S. 436, 446-47 (1890); Wilkerson v. Utah, 99 U.S. 130 (1878).

50. 217 U.S. 349 (1910).

51. *Id.* at 368.

52. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 592 (1977); Gregg v. Georgia, 428 U.S. 153, 173 (1976); Furman v. Georgia, 408 U.S. 238 (1972); Robinson v. California, 370 U.S. 660 (1962); Trop v. Dulles, 356 U.S. 86 (1958).

53. *See* Soler, *supra* note 6, at 677.

54. *See, e.g.*, Page v. United States, 462 F.2d 932, 935 (3d Cir. 1972); United States v. Shunk, 438 F.2d 1204, 1205 (9th Cir. 1971); Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U. L. REV. 846, 852 (1967).

55. 433 U.S. 584 (1977).

56. Isolation, rehabilitation, deterrence, etc.

out of proportion to the severity of the crime."[57] The Supreme Court in *Coker* went on to advise future courts to employ objective criteria as much as possible when determining whether the above standard has been met.[58] To ensure adequate objectivity, several such criteria were suggested: comparison of current state statutes concerning punishment for the offense, historical comparison of such statutes,[59] and contemporary jury determinations.[60] These factors, however, have not been consistently employed by subsequent courts.[61]

In *Mitchell*, it was asserted that the penalty in Missouri for the sale of marijuana constituted cruel and unusual punishment both on the face of the statute and as applied to the appellant. In the latter argument, for which there is authority in only a few jurisdictions,[62] the appellant contended that the seven year sentence was not justified due to his specific circumstances: he was nineteen years old, he had no history of violent crime, and he had plead guilty to selling only a small amount of marijuana to an adult.[63] The Missouri Supreme Court summarily dismissed this argument.[64] The court instead was primarily concerned with the former contention that there is no rational relationship between the punishment under section 195.200 for the sale of marijuana (five years to life imprisonment) and the gravity of the offense. However, rather than analyzing objective factors "to the maximum possible extent" as *Coker* mandated,[65] the court, in considering the eighth amendment challenge, chose to follow a Missouri appellate decision, *State v. Johnson*,[66] which employed a subjective approach: "[A] punishment which is within the statutory limits for the offense . . . is not cruel and unusual because of its duration unless so disproportionate to the offense committed *so as to shock the moral sense of all reasonable men* as to what is right and proper under the circum-

57. 433 U.S. 584, 592 (1977). It should be noted that although *Coker* was specifically concerned with different circumstances than *Mitchell*—capital punishment rather than length of prison sentence—the United States Supreme Court has applied the disproportionality concept in a few eighth amendment cases involving excessive sentence. *See, e.g.*, Robinson v. California, 370 U.S. 660 (1962); Weems v. United States, 217 U.S. 349 (1910).

58. 433 U.S. 584, 592 (1977).

59. Application of this factor is illustrated by *Coker*, where it was employed to point out that at no time in the last fifty years have a majority of the states authorized capital punishment for the rape of an adult women.

60. 433 U.S. 584, 592 (1977).

61. *See, e.g.*, Harris v. State, 352 So. 2d 479 (Ala. 1977); Bakri v. State, 551 S.W.2d 215 (Ark. 1977); Upshaw v. State, 350 So. 2d 1358 (Miss. 1977); State v. Mitchell, 563 S.W.2d 18 (Mo. En Banc 1978).

62. *See, e.g.*, Faulkner v. State, 445 P.2d 815 (Alaska 1975); *In re* Lynch, 8 Cal. 3d 410, 425, 503 P.2d 921, 930, 105 Cal. Rptr. 217, 226 (1972).

63. Brief for Appellant at 37-38.

64. 563 S.W.2d at 27.

65. 433 U.S. 584, 592 (1977).

66. 548 S.W.2d 245 (Mo. App., D. St. L. 1977).

stances."[67] The court held that the penalty of from five years to life did not meet this standard, and thereby sustained section 195.200.

Believing that the application of *Johnson* would result in the compromising of all eighth amendment challenges in Missouri,[68] Judge Seiler in his dissenting opinion in *Mitchell* suggested a different approach. He proposed that four factors be considered in determining whether a sentence is excessive: "(a) reliable factual data, (b) relevant informed public opinion, (c) the sanction imposed in other jurisdictions, and (d) the penalties in Missouri for other crimes."[69] In Judge Seiler's opinion, when these factors[70] are applied to conduct involving marijuana, a minimum sentence of five years must constitute cruel and unusual punishment.[71]

Judge Seiler's first proposed factor, reliable factual data, essentially involves the same proof as that called for in an equal protection challenge. Under this criterion, a defendant charged with the sale of marijuana could supply such reliable factual data by presenting the findings extracted from the government-financed studies referred to earlier[72] which demonstrate that the substance does not have a high potential for abuse. The second factor, relevant informed public opinion, seemingly is an attempt to fulfill the suggestion in *Coker* that an assessment of contemporary values and attitudes towards the specific offense is pertinent to an evaluation of a cruel and unusual punishment argument. In *Coker*, an analysis of jury determinations in similar cases was deemed to meet this goal.[73] Judge Seiler, on the other hand, cited the opinions of numerous reputable organizations, such as the American Medical Association, the American Bar Association, and the Board of Governors of the Missouri Bar, favoring the decriminalization of marijuana.[74] Both the third factor (the sanction imposed in other jurisdictions) and the fourth factor (penalties in Missouri for other crimes) closely follow the suggestion in *Coker* that the judgment of the legislature be considered as an objective criterion.[75] The third proposed factor would

67. *Id.* at 252 (emphasis added).
68. 563 S.W.2d at 28 n.1 (Seiler, J., dissenting).
69. *Id.* at 30.
70. A fifth factor, the availability of parole, perhaps should also be considered by a court. If a defendant will be eligible for parole from the day he enters prison, as he is in Missouri, the likelihood that he will be freed before serving the minimum statutory sentence may mitigate somewhat the harshness of the penalty. *But see* People v. Gonzales, 25 Ill. 2d 235, 240, 184 N.E.2d 833, 835-36 (1962), *cert. denied*, 372 U.S. 923 (1963), in which the Illinois Supreme Court said that regardless of the possibility of parole, a minimum sentence of ten years for a first offense involving the sale of marijuana was too severe. *Id.* at 240, 184 N.E.2d at 835-36.
71. 563 S.W.2d at 31 (Seiler, J., dissenting).
72. *See* authorities cited note 40 *supra.*
73. 433 U.S. 584, 596-97 (1977).
74. 563 S.W.2d at 30-31 (Seiler, J., dissenting).
75. 433 U.S. 584, 592 (1977).

compare[76] the challenged penalty to the punishments prescribed for the same offense in other jurisdictions. Such a comparison applied to the instant case reveals that forty-nine jurisdictions[77] authorize a lesser minimum[78] penalty than does Missouri for a first offense of selling less than one-half ounce of marijuana.[79] Only in the State of Virginia is the minimum penalty[80] for such an offense as severe as it is in Missouri. Judge Seiler's fourth factor would compare the penalty in question with that given in the same jurisdiction for more serious offenses. For example, in Missouri the minimum sentence of five years for the delivery of marijuana for remuneration is the same as that prescribed in the new Criminal Code[81] for such heinous offenses as assault in the first degree committed without a deadly weapon or dangerous instrumentality,[82] robbery in the second degree,[83] rape without physical injury or the display of a deadly weapon in a threatening manner,[84] and arson in the first degree.[85] Furthermore, in Missouri, the minimum penalty for the offense of manslaughter is a mere two years imprisonment or six months in jail.[86]

As a result of its objectivity and its feasibility of application, Judge Seiler's eighth amendment test presents a viable approach for evaluating the excessiveness of sentences. In light of the test's reliance on primarily objective indicia, it, unlike the *Johnson* standard used by the majority in *Mitchell*, adheres closely to the United States Supreme Court's reasoning in *Coker*. At the same time, the Seiler test would appear to be a relatively straightforward standard to apply. A potential weakness in this test is the use of relevant informed public opinion as one of the factors. Even under

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76. It should be noted that the United States Supreme Court has ruled that the Constitution does not require that sentences meet a comparative test. Williams v. Oklahoma, 358 U.S. 576, 586 (1959).

77. *See, e.g.*, Cannabis Control Act of 1971, ILL. ANN. STAT. ch. 56½, § 705(c) (Smith-Hurd Supp. 1978) (1-3 years); IOWA CODE § 204.401(1)(b) (1977) (0-5 years); KAN. STAT. § 65-4127(a) (Supp. 1977) (1-10 years); KY. REV. STAT. § 218A.990(4) (1977) (0-1 year); ME. REV. STAT. tit. 17A, § 1103(2)(C) (Supp. 1977) (0-1 year and/or $1000); S.D. COMPILED LAWS ANN. § 22-42-7 (Supp. 1977) (0-1 year and/or $1000).

78. The California Supreme Court, however, has compared *maximum* sentences. *See In re* Lynch, 8 Cal. 3d 410, 436, 503 P.2d 921, 938-39, 105 Cal. Rptr. 217, 234-35 (1972).

79. 563 S.W.2d at 31 (Seiler, J., dissenting).

80. VA. CODE § 18.2-248 (Supp. 1977).

81. V.A.M.S. §§ 556.011-577.100 (Supp. 1978) (effective January 1, 1979).

82. V.A.M.S. § 565.050.2 (Supp. 1978). Under the current statute, the penalty is 6 months in jail or 0-5 years in prison. RSMo § 559.190 (1969).

83. V.A.M.S. § 569.030.2 (Supp. 1978). Under the current statute, the penalty is 3-5 years imprisonment. RSMo § 560.135 (1969).

84. V.A.M.S. § 566.030.2 (Supp. 1978).

85. V.A.M.S. § 569.040.2 (Supp. 1978). Under the current statute, the penalty is 2-5 years imprisonment. RSMo § 560.025 (1969).

86. RSMo § 559.140 (1969). The penalty is unchanged by the new Missouri Criminal Code.