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## Constitutional Law—Statute Making the Status of Being a Drug Addict a Crime Held Unconstitutional—*Robinson v. California* (Sup. Ct. 1962)

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## Notes

### CONSTITUTIONAL LAW—STATUTE MAKING THE STATUS OF BEING A DRUG ADDICT A CRIME HELD UNCONSTITUTIONAL— ROBINSON V. CALIFORNIA (Sup. Ct. 1962)

Petitioner was convicted and sentenced to jail under a California statute penalizing anyone found to be “addicted” to the use of narcotics.<sup>1</sup> Though there was evidence that petitioner had recently used narcotics in California, the instructions of the trial court authorized a conviction merely upon proof that the defendant was “addicted” to the use of narcotics, and had not reformed at the time of his arrest. The United States Supreme Court granted certiorari and reversed the conviction.<sup>2</sup> *Held*: The imprisonment of a person found to be in a “status” or “condition”<sup>3</sup> of drug addiction inflicts a cruel and unusual punishment in violation of the due process clause of the fourteenth amendment.<sup>4</sup>

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<sup>1</sup>CAL. HEALTH & SAFETY CODE § 11721 (1962 Supp.) provides:

No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county jail. The court may place a person convicted hereunder on probation for a period not to exceed five years and shall in all cases in which probation is granted require as a condition thereof that such person be confined in the county jail for at least 90 days. In no event does the court have the power to absolve a person who violates this section from the obligation of spending at least 90 days in confinement in the county jail.

<sup>2</sup>Robinson v. California, 370 U.S. 660 (1962), *rehearing denied*, 83 S.Ct. 202 (1963).

<sup>3</sup>The Court said, 370 U.S. at 666:

This statute . . . is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration. It is not a law which even purports to provide or require medical treatment. Rather, we deal with a statute which makes the ‘status’ of narcotic addiction a criminal offense, for which the offender may be prosecuted ‘at any time before he reforms.’ California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there.

<sup>4</sup>The Court said, *Id.* at 667:

We cannot but consider the statute before us as of the same category [as a statute punishing mental illness or leprosy] . . . . [A]

The eighth amendment to the United States Constitution forbids cruel and unusual punishments by the federal government.<sup>5</sup> It was not until *Louisiana ex rel. Francis v. Resweber*<sup>6</sup> that the Court assumed, but did not decide, that the fourteenth amendment would forbid the imposition of cruel and unusual punishments by the states. *Robinson* is the first case in which the Court has actually held that the fourteenth amendment would apply these restrictions. Even *Robinson*, however, does not decide whether other provisions of the eighth amendment would be included within fourteenth amendment due process guarantees.<sup>7</sup>

Mr. Justice Harlan, in his concurring opinion in *Robinson*,<sup>8</sup> suggests that the case could have been decided on the ground that the statute makes the mere desire or propensity to commit a crime a criminal act, and therefore is an arbitrary exercise of the state police power. The case was, however, decided on "cruel and unusual punishment" grounds. Why did the Court invoke this rarely used clause<sup>9</sup> to decide the case? Into what areas of the criminal law will the implications of *Robinson* reach? It is the purpose here to consider these and other questions raised by the *Robinson* opinion.

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state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment.

<sup>5</sup> U.S. CONST., amend. VIII, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

<sup>6</sup> *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), made this assumption, but did not so decide.

<sup>7</sup> See note 5, *supra*. *Louisiana ex rel. Francis v. Resweber*, note 6, *supra*, cited in *Robinson v. California*, 370 U.S. at 666, seems to assume that all of the eighth amendment would be included within fourteenth amendment provisions.

<sup>8</sup> *Robinson v. California*, 370 U.S. 660, 678-79 (1962).

<sup>9</sup> In *Trop v. Dulles*, 356 U.S. 86, 99-100 (1958), the Court said:

The exact scope of the constitutional phrase "cruel and unusual" has not been detailed by this Court. [citations omitted] But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. . . . The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . This Court has had little occasion to give precise content to the Eighth Amendment; and, in an enlightened democracy such as ours, this is not surprising.

See also *Weems v. United States*, 217 U.S. 349 (1910).

## I.

THE CRIMINAL POWER OF THE STATE—  
SCOPE AND LIMITATIONS

The Court has usually dealt with the "cruel and unusual punishments" clause in cases involving the propriety of the form of punishment.<sup>10</sup> In *Robinson*, however, the sentence involved only a short imprisonment,<sup>11</sup> which the Court agreed was not in itself cruel,<sup>12</sup> and which was certainly not, in the traditional sense, unusual.<sup>13</sup> As a punishment for being in the "status" of narcotic ad-

<sup>10</sup>*Trop v. Dulles*, 356 U.S. 86 (1958) held a statute punishing wartime desertion by loss of citizenship to be cruel and unusual. In *Louisiana ex rel. Francis v. Resweber*, note 6 *supra*, the Court said that an attempt to execute by electricity where a previous attempt had failed was not cruel and unusual. *Weems v. United States*, 217 U.S. 349 (1910) held that *cadena temporal*, a punishment involving certain civil disabilities, was cruel and unusual. *In re Kemmler*, 136 U.S. 436 (1890) and *Wilkinson v. Utah*, 99 U.S. 130 (1878), respectively upheld electrocution and shooting as proper means for exacting the death penalty. Such objections to the form of punishments have been considered in cases citing *Robinson*. See, e.g., *Kaganovitch v. Kilkins*, 305 F.2d 715 (2d Cir. 1962); *Fulwood v. Clemmer*, 206 F. Supp. 370 (D.D.C. 1962).

<sup>11</sup>The case does not specify the sentence given below, but it was apparently for the minimum statutory period of ninety days.

<sup>12</sup>The Court said:

To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a 'cruel and unusual punishment for the 'crime' of having a cold. 370 U.S. at 667.

<sup>13</sup>It has been said that only those punishments which were considered cruel and unusual at common law: *In re Pinaire*, 46 F. Supp. 113 (N.D. Tex. 1942); *People v. Sarnoff*, 302 Mich. 266, 4 N.W.2d 544 (1942); or which had become obsolete at the time of the writing of the Constitution: *Mickle v. Henrichs*, 262 Fed. 687 (D.C. Nev. 1918); or are inherently inhumane and barbarous: *In re Kemmler*, 136 U.S. 436 (1890); *Black v. United States*, 269 F.2d 38 (9th Cir. 1959); *People v. Sarnoff*, 302 Mich. 266, 4 N.W.2d 544 (1942); or which are shocking to the sense of justice of reasonable people: *Kasper v. Brittain*, 245 F.2d 92 (6th Cir. 1957); *State v. Becker*, 3 S.D. 29, 51 N.W. 1018 (1892); will constitute cruel and unusual punishment. In *In re Pinaire*, *supra*, 46 F. Supp. at 113, the court said: " 'Cruel and unusual punishments,' under the prohibition of the 8th Amendment, usually implies something inhumane and barbarous, or, some punishment unknown at common law." See also 4 BLACKSTONE, COMMENTARIES 377, "[T]he humanity of the English nation has authorized, by a tacit consent, an almost general mitigation of such parts of these judgments as savor of torture or cruelty; . . ." In *Kasper v. Brittain*, *supra* at 96, the court said: "Punishment is not 'cruel and unusual,' unless it is so greatly disproportionate to the offense

diction, however, this sentence, or indeed, any sentence, would be cruel and unusual.<sup>14</sup> Being an addict is not the type of wrong which is open to the criminal sanctions of the state. The attack of the Court, then, is upon the *power* of the state to punish, not merely upon the *form* of punishment which the state has chosen.

The Court has often said that mere substantive due process is no longer available to permit the judiciary to substitute its judgment for that of the legislatures of the states.<sup>15</sup> For this reason, in considering state court convictions under a due process challenge, the Court has examined them in the light of whether the substantive prohibitions of state statutes infringed upon specific constitutional rights, such as freedom of speech,<sup>16</sup> religion,<sup>17</sup> press,<sup>18</sup> or the right to travel.<sup>19</sup> *Robinson*, however, does not stand for the proposition that a person has a right to be addicted to

committed as to be completely arbitrary and shocking to the sense of justice."

<sup>14</sup>Mr. Justice Douglas, concurring in *Robinson v. California*, 370 U.S. at 677, says: "A prosecution for addiction, with its resulting stigma and irreparable damage to the good name of the accused, cannot be justified as a means of protecting society, where a civil commitment would do as well."

<sup>15</sup>Mr. Justice White, dissenting in *Robinson v. California*, 370 U.S. at 689, declared:

Finally, I deem this application of 'cruel and unusual punishment' so novel that I suspect the Court was hard put to find a way to ascribe to the Framers of the Constitution the result reached today rather than to its own notions of ordered liberty. If this case involved economic regulation, the present Court's allergy to substantive due process would surely save the statute and prevent the Court from imposing its own philosophical predilections upon state legislatures or Congress. I fail to see why the Court deems it more appropriate to write into the Constitution its own abstract notions of how best to handle the narcotics problem, for it obviously cannot match either the States or Congress in expert understanding.

<sup>16</sup>*Thomas v. Collins*, 323 U.S. 516 (1945).

<sup>17</sup>*Cantwell v. Connecticut*, 310 U.S. 296 (1940).

<sup>18</sup>*Smith v. California*, 361 U.S. 147 (1959).

<sup>19</sup>*Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868), though decided on privileges and immunities grounds, established a right to travel under the federal constitution. The right to travel was recognized on fourteenth amendment due process grounds in *Edwards v. California*, 314 U.S. 160 (1941), and *Lambert v. California*, 355 U.S. 225 (1957). In these cases, the state had placed restrictions upon indigents and convicted felons, respectively, to enter the state. *Query*: Had the Court wanted to decide the *Robinson* case on other grounds, could it not have said that the statute prohibiting addiction, even without proof of use, placed an unconstitutional restraint upon an addict from entering the state?

narcotics. The state may civilly confine an addict for treatment,<sup>20</sup> or it may use other means to discourage and treat addiction,<sup>21</sup> but the person does have a right not to be *punished* for being in the *status* of drug addiction.

It would obviously be cruel and unusual, under *Robinson*, to punish a person under a statute which is constitutionally objectionable on other grounds. The protection of *Robinson*, however, reaches beyond such cases and forbids the punishment of acts which are not otherwise protected, and even demands that a new appraisal be made of the criminal law to determine where criminal statutes are void for punishing conduct which is not really criminal in nature.

*Poe v. Ullman*<sup>22</sup> involved Connecticut statutes forbidding a married woman to use, and a doctor to advise her in the use of, contraceptives for medical purposes. The Court decided the case without reaching the issue of whether the state can constitutionally punish such conduct. Mr. Justice Harlan, in his dissent,<sup>23</sup> however, asserted that it is clearly beyond the police power of the state to invade the privacy of the home in this manner, urging that there

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<sup>20</sup> California has a statute allowing the confinement of dope addicts, CAL. WELFARE & INST'NS CODE §§ 5350-5361 (1956).

<sup>21</sup> The Court said in *Robinson*, 370 U.S. at 664-65:

Such [permissible] regulation [of the narcotic drugs traffic], it can be assumed, could take a variety of valid forms. A state might impose criminal sanctions, for example, against the unauthorized manufacture, prescription, sale, purchase, or possession of narcotics within its borders. In the interest of discouraging the violation of such laws, or in the interest of the general health or welfare of its inhabitants, a State might establish a program of compulsory treatment for those addicted to narcotics. Such a program of treatment might require periods of involuntary confinement. And penal sanctions might be imposed for failure to comply with established compulsory treatment procedures. Cf. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). Or a state might choose to attack the evils of narcotics traffic on broader fronts also—through public health education, for example, or by efforts to ameliorate the economic and social conditions under which those evils might be thought to flourish. In short, the range of valid choice which a State might make in this area is undoubtedly a wide one, and the wisdom of any particular choice within the allowable spectrum is not for us to decide.

<sup>22</sup> 367 U.S. 497 (1961).

<sup>23</sup> *Id.* at 522. Mr. Justice Harlan stated:

Precisely what is involved here is this: the State is asserting the right to enforce its moral judgment by intruding upon the most intimate details of the marital relation with the full power of the criminal law . . . arrests, searches and seizures; inevitably, it must

are limits to the reach of justifiable state control, and that certain areas of human activity are, by their nature, not properly regulated by criminal sanctions. This, then, is the apparent meaning of *Robinson*. Although the state may control drug addiction, criminal prohibition of the status itself is cruel and unusual because it is not actually criminal in nature.

*Butler v. Michigan*<sup>24</sup> involved the right of the state to prohibit completely the distribution of literature which would "tend to the demoralization of children."<sup>25</sup> The Court held that the statute involved was not reasonably restricted to the problem sought to be controlled, and therefore, was an arbitrary exercise of the police power and a violation of the right of free press. Considering *Butler* in conjunction with *Robinson*, it may be seen that the state is restricted in its criminal power to the reasonable restraint of actions which are actually criminal in nature. Certain activities, traits, or weaknesses, though socially undesirable, are not amenable to control by criminal sanctions.

## II.

### CRUEL AND UNUSUAL PUNISHMENTS— A FEW SPECIFICS

Although *Robinson* forbids the punishment of "status crimes," no detailed analysis of such constitutionally protected status is made. It would seem that statutes punishing a person for being a "common drunk,"<sup>26</sup> or imposing harsher penalties upon a "tramp"<sup>27</sup>

mean at the very least the lodging of criminal charges, a public trial, and testimony as to the *corpus delicti*. *Id.* at 548.

He added:

Though undoubtedly the States are and should be left free to reflect a wide variety of policies, and should be allowed broad scope in experimenting with various means of promoting those policies, I must agree with Mr. Justice Jackson that "There are limits to the extent to which a legislatively represented majority may conduct . . . experiments at the expense of the dignity and personality of the individual. *Skinner v. Oklahoma*, [316 U.S. 535, 546 (1942)]. In this instance these limits are, in my view, reached and passed. *Id.* at 555.

<sup>24</sup> 352 U.S. 380 (1957).

<sup>25</sup> *Id.* at 381.

<sup>26</sup> *State v. Hogan*, 63 Ohio St. 202, 58 N.E. 572 (1900) did hold that it was not cruel and unusual for a punishment for assault under the state "Tramp Law" to be more severe than usual, but the decision rested primarily on the concept that the punishment itself was not cruel and unusual in nature.

<sup>27</sup> *E.g.*, NEB. REV. STAT. §§ 28-1115 through 28-1119 (Reissue 1956).

or "common beggar,"<sup>28</sup> would be subject to the same arguments as those made in *Robinson*. As with a drug addict, reformation of such a person as a "common drunk," "tramp" or "beggar" is obviously difficult, regardless of his intent or desire to reform. His difficulty in reforming would necessarily involve continuing liability to criminal punishments.

*Robinson* did not reach the point of whether one may be convicted of being under the influence of narcotics,<sup>29</sup> or even in the state of intoxication, but such a person would likewise be in a condition where immediate reform would be impossible, and subject to continuous criminal liability. Unquestionably, a state may restrain a person while he is not in full control of his faculties; but, imprisonment beyond the period necessary for the protection of himself and society raises questions of punishment rather than mere deterrence.

Similarly, *Robinson* raised, but did not answer, the question of whether a person could be convicted for the use of narcotics.<sup>30</sup> The state could possibly punish a non-addict for using narcotics on the theory that this is a means of deterring him from becoming an addict. However, if an involuntary addict is unable, without medical or other treatment, to resist the use of narcotics, is it not unreasonable, and therefore cruel and unusual, to punish him for his unavoidable conduct?

Another question raised by *Robinson* is that of its effect upon other types of crime which derive from mental deficiency. For example, a person might realize that it is wrong to set fires, but because of a mental disorder, burn a building. Do not *Robinson* and modern concepts of humanity and justice demand treatment

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<sup>28</sup>Such status is usually forbidden under vagrancy statutes, which punish, not the act of begging itself, but "persons . . . who go about from door to door, or from place to place, or occupy public places for the purpose of begging and receiving alms. . . ." NEB. REV. STAT. § 28-1119 (Reissue 1956).

<sup>29</sup>The question was not specifically raised since there was no evidence that the defendant had been under the influence of narcotics at the time of the arrest.

<sup>30</sup>Indeed, the Court very carefully avoided the question. This prompted Mr. Justice White to assert in his dissent:

It is significant that in purporting to reaffirm the power of the States to deal with the narcotics traffic, the Court does not include among the obvious powers of the State the power to punish for the use of narcotics. I cannot think that the omission was inadvertent. 370 U.S. at 688.

rather than punishment? In *Lynch v. Overholzer*,<sup>31</sup> the Court held that it would be a violation of due process (no mention of cruel and unusual punishment) to confine to a hospital one found not guilty because of insanity, where there was no showing that he was either insane at the time of commitment, or likely to become insane again. It is at least as improper to punish where treatment is necessary for rehabilitation.

The Court in *Robinson* speaks of the impropriety of any statute which unreasonably subjects a person to "continuing liability."<sup>32</sup> It would seem that this objection would apply in a bigamy prosecution where a person has remarried after he reasonably, but erroneously, believed that he had been divorced.<sup>33</sup> It is basically unfair to punish someone who, innocently and in good faith, enters a status otherwise desirable to society. A second marriage is not really so dangerous to society that the parties should be strictly liable for any unknown imperfections in a previous divorce.

In *Smith v. California*,<sup>34</sup> the Court held that the arrest of a bookseller on charges of selling obscene literature was a violation of the right of free press under the fourteenth amendment where there was no showing that the accused either knew or reasonably should have known the contents of the books which he sold. Phrasing the issue differently, is it not cruel and unusual to punish a

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<sup>31</sup> 369 U.S. 705 (1962), cited by Mr. Justice Douglas in his concurring opinion, *Robinson v. California*, 370 U.S. at 676.

<sup>32</sup> 370 U.S. at 666:

[W]e deal with a statute which makes the 'status' of narcotic addiction a criminal offense, for which the offender may be prosecuted 'at any time before he reforms.' California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there.

<sup>33</sup> See *Williams v. North Carolina (II)*, 325 U.S. 226 (1945), in which the parties, formerly residents of North Carolina, went to Nevada to get divorces from their respective spouses, then remarried each other. They returned to North Carolina and were prosecuted for bigamy. The Court reversed the conviction on a prior appeal on grounds that the divorces in Nevada had to be given full faith and credit by the North Carolina courts as to the facts tried by the Nevada courts. *Williams v. North Carolina*, 317 U.S. 287 (1942). After a retrial and new conviction, the parties again appealed. The North Carolina courts denied that Nevada had jurisdiction to grant the divorces, and therefore held the divorces invalid. The Court affirmed the convictions on grounds that the full faith and credit clause of the Constitution did not require that other states with an interest in the matter accept the facts of jurisdiction as found by the Nevada court.

<sup>34</sup> 361 U.S. 147 (1959).

person for performing some valuable function with reasonable diligence and without moral dereliction?

*Wieman v. Updegraff*<sup>35</sup> held that a state cannot remove a person from state employment for having been a member of a subversive organization unless it is shown that he had knowledge of the nature of its purposes. This again involves a problem of innocent intent. Is it not cruel and unusual to punish a person for belonging innocently to an organization which commits an improper act? For example, X corporation commits an illegal act. The criminal punishment of the corporation itself<sup>36</sup> falls not upon the officers or directors who have the control of the corporation, but upon the stockholders, even those who, from every realistic standpoint, were not culpable in the wrong of the corporation. Similarly, it would seem to be of questionable constitutional propriety to hold an innocent partner liable for the criminal conduct which his partner commits for the partnership, or an innocent principal criminally liable for the acts of his agents. If the person neither knew nor reasonably should have known what the other was doing, it is unjustifiable to hold him criminally liable.

The question of culpability is similarly raised in cases involving motor vehicle homicide and similar crimes involving the death of persons due to the improper driving of an automobile by the defendant. Where the defendant's negligence has not made injury to life, limb or property of others probable,<sup>37</sup> but merely possible,

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<sup>35</sup> 344 U.S. 183 (1952).

<sup>36</sup> It has usually been held that a corporate stockholder is not individually liable for a crime committed by the corporation unless he is shown to have some special relationship to the firm. *In re Greene*, 52 Fed. 104 (S.D. Ohio 1892). He may, however, be held if he actually participated in the crime. *Commonwealth ex rel. Cunningham v. Dean*, 30 Pa. Dist. 563 (Q.S. Philadelphia Co. 1921). The corporation itself may be held criminally liable where punishment is by fine. *Joplin Mercantile Co. v. United States*, 213 Fed. 926 (8th Cir. 1914). This holds true, even where the crime requires specific intent, on the theory that the intent of its agents may be imputed to the corporation. *United States v. Nearing*, 252 Fed. 233 (S.D.N.Y. 1918). For a general description and discussion of a corporation's criminal liability, see 19 C.J.S. *Corporations* 1358-71 (1940).

<sup>37</sup> As, perhaps, in the case of driving while under the influence of alcohol. *People v. Townsend*, 214 Mich. 267, 183 N.W. 177 (1921); *State v. Kline*, 168 Minn. 263, 209 N.W. 881 (1926); *Maxon v. State*, 177 Wis. 319, 187 N.W. 753 (1922).

it seems improper to hold him criminally responsible for a death resulting from his concededly wrongful conduct.<sup>38</sup> In other words, a violation of speed laws, traffic ordinances, etc., commits a legal wrong and may be punished by the state, usually by a small fine. If as the result of such violation someone is fortuitously killed, the present law in most states may allow the defendant to be punished for the killing as well as for the traffic offense.<sup>39</sup> His wrongful conduct, however, involved no more than the minor offense—the death often being a tragic, but truly unexpected and unavoidable, misfortune.<sup>40</sup> No one would deny that the nation's traffic problem is extremely serious, but the imprisonment of people who fortuitously happen to kill does not really deter simple negligence or the violation of minor traffic ordinances. A similar application of this analysis of culpability may be made in the case of felony murder where the defendant, though guilty of a lesser felony, is not really the direct and active cause of the death resulting from the commission of the felony.<sup>41</sup>

Another situation which often involves a "crime" without guilty conduct is that of writing an insufficient fund check. A person innocently writing a check, which he erroneously thinks is covered by funds in his account, subjects himself to criminal liability.<sup>42</sup>

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<sup>38</sup>Indeed, the contributory negligence of the deceased does not even affect the defendant's guilt. *State v. Campbell*, 82 Conn. 671, 74 Atl. 927 (1910); *Lauterbach v. State*, 132 Tenn. 603, 179 S.W. 130 (1915). See generally Comment, *The Fallacy and Fortuity of Motor Vehicle Homicide*, 41 NEB. L. REV. 793 (1962).

<sup>39</sup>*E.g.*, NEB. REV. STAT. § 28-403.01 (Reissue 1956). See *Pribyl v. State*, 165 Neb. 691, 87 N.W.2d 201 (1957); *Birdsley v. State*, 161 Neb. 581, 74 N.W.2d 377 (1956); *Birdsley v. Kelley*, 159 Neb. 74, 65 N.W.2d 328 (1954).

<sup>40</sup>*Commonwealth v. Root*, 195 Pa. Super. 164, 170 A.2d 310 (1961), involved the question of whether the defendant was guilty of involuntary manslaughter when he engaged in an automobile race on the highway and the driver of the other automobile collided with the deceased. The court held that this was not involuntary manslaughter, on grounds that the defendant's negligence was not the proximate cause of the death. Is this not another way of saying that, even though the defendant was guilty of racing on the highway, he should not be liable for every fortuitous mishap which occurs as the result of the original, and separately punishable, wrong, where his wrongful conduct does not go beyond that original wrong? *But see Jones v. Commonwealth*, 247 S.W.2d 517 (Ky. 1952); *State v. Fair*, 209 S.C. 439, 40 S.E.2d 634 (1946).

<sup>41</sup>See 47 IOWA L. REV. 1116 (1962) and cases collected therein. See particularly the inconsistency of application of the felony murder rules noted *Id.*, n.5 at p. 1118.

<sup>42</sup>NEB. REV. STAT. § 28-1213 (Reissue 1956).

Although it may be a defense that the writing of the check was without knowledge of the insufficiency,<sup>43</sup> such a defense is usually difficult to prove and, in Nebraska, statutes raise a presumption of knowledge.<sup>44</sup> Similarly, where malice cannot be shown by eye-witnesses in such crimes as second-degree murder, the law allows an implication of malice.<sup>45</sup> It is questionable whether such limitations on the state's burden of proof are really justified. It is certainly no harder for the state to prove wrongful intent or malice than it is for the accused to prove the lack thereof. It is cruel and unusual to punish a person merely because it is impossible for him to prove his innocence, even though the state can no more successfully prove his guilty state of mind. The whole of the criminal law has traditionally asserted that an accused person is innocent until *proven* guilty. Presumptions and definitions of the criminal law which circumvent the right of the accused person to be assumed innocent until conviction are cruel and unusual in the *Robinson* sense.

An attempt has been made here to analyze the *Robinson* application of cruel and unusual punishments prohibitions in terms of a few specific crimes. The crimes discussed were intended to be merely illustrative, by no means comprehensive. The extent to which criminally forbidden types of conduct involve dubious culpability no doubt encompasses far greater numbers of "crimes." Indeed, *Robinson* makes it incumbent that the objectives and methods of our whole criminal law system be re-examined and re-appraised.

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<sup>43</sup>NEB. REV. STAT. § 28-1213 (Reissue 1956) specifies that the insufficient fund check must be made with intent to defraud.

<sup>44</sup>NEB. REV. STAT. § 28-1214 (Reissue 1956) provides for a presumption of an intent to defraud and of knowledge of insufficient funds in the drawer's account, unless the drawer pays the amount of the check within five days after notice.

<sup>45</sup>*Commonwealth ex rel. Johnson v. Myers*, 402 Pa. 451, 167 A.2d 295 (1961) states, in regard to a presumption of malice in a second-degree murder conviction:

Charges to the jury about the presumption of second degree are often followed by the statement that the burden is on the defendant to lower the offense to manslaughter. The trial judge in the instant case first correctly said 'until the contrary appears in evidence', but later referred to the defendant's burden. We disapprove the use hereafter of an instruction that refers to the defendant's 'burden'. A defendant has no burden whatever, and the word 'presumption' may impress the jury as establishing the crime at the high level of second degree murder and requiring the defendant to present extenuating evidence, failing which the jury would be required to convict him. No jury can be required to convict anybody of anything. 402 Pa. at 455, 167 A.2d at 297-98.

## III.

## CONCLUSION

Had *Robinson v. California* been decided fifty years ago, the decision would probably have been to allow the conviction of a narcotic addict. But with scientific knowledge of the nature and methods of treatment for narcotics addiction developed to what it is today, the Court could only say that narcotics addiction is not truly a type of criminal conduct. Inherent in *Robinson* is all the medical knowledge that has been gained in recent years. As medical and scientific knowledge increase, especially in the fields of mental and emotional illness, perhaps even greater emphasis will be placed upon treatment of wrongdoers, rather than upon their punishment. Indeed, to the extent that nearly all criminal activity is the result of emotional or social maladjustment, perhaps some future generation will see the termination of penal sanctions as we know them today.

For the immediate future, *Robinson* places in question the constitutional validity of laws which merely punish convicted persons where no purpose of deterrence, rehabilitation, or prevention of crime is or reasonably can be hoped for.

*Robinson* is merely the formal judicial declaration of a principle of mercy which is certainly as old as the criminal law itself. Who has not, upon hearing of the conviction of an acquaintance, said, "He really wasn't a bad person"? What prosecuting attorney or judge has not been embarrassed by a conviction of someone who really did not deserve punishment *per se*? This emotional reaction against a conviction which profits society nothing in reformation or prevention of crime is the spirit of *Robinson v. California*.

Calvin E. Robinson '64