Robinson V. California, 370 U. S. 660 (1962): A Study in Decisional Impact and Eighth Amendment Development

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ROBINSON V. CALIFORNIA, 370 U.S. 660 (1962)

A STUDY IN DECISIONAL IMPACT AND
EIGHTH AMENDMENT DEVELOPMENT

by

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INTRODUCTION

The development of the Eighth Amendment to the United States Constitution is a significant area of constitutional growth. This study focuses on the recent landmark decision, Robinson v. California, 370 U.S. 660 (1962), and subsequent reactions in federal and state courts to that decision. The case has been the vehicle for the extension of the Eighth Amendment prohibition against cruel and unusual punishment to the states through the due process clause of the Fourteenth Amendment.

The facts of the case illustrated judicial reaction to the social phenomenon of growing drug addiction in the United States. However, the principle that state laws punishing status alone were unconstitutional has been extended beyond addiction.

Through this investigation, the process of interaction and adaptation within the United States legal and constitutional system has been observed. The method used has been largely case analysis.

This is also a study of the scope and impact of the Robinson decision in lower federal court cases and a representative sample of state cases.
First, the Robinson case has been traced from its beginning in 1960, in the California state and federal courts to its 1962 decision in the United States Supreme Court. Then, the cases which cited Robinson were compared for the years between 1962 and 1970.

Between 1962 and 1970, there were 349 total cases in the United States court systems which cited the precedent of Robinson. Of those cases, 266 were decided in the state courts. In the federal district and circuit court system, 83 cases were decided.

Through studying the 83 federal cases, tendencies about the scope and impact of Robinson have been noted. After the tendencies of the precedent in the federal cases had been recognized, a selected sample of 21 cases from the state court system was made. Since these cases followed the same tendencies, the scheme of the 83 federal cases has been assumed to be characteristic of the universe of 349 cases which cited Robinson.

Concerning the scope of the decisions, two major trends have been: (1) application of the principle of Robinson, the Eighth Amendment prohibition against cruel and unusual punishment, to crimes of status; and, (2) interpretation of the decision as an extension of the doctrine of incorporation, or state's rights.

Regarding the first trend, application of the Eighth Amendment prohibition against cruel and unusual punishment to crimes of status, the cases have been divided into six categories. These are: (1) narcotic addict; (2) alcoholic; (3) vagrant; (4) hippie; (5) mentally ill; and, (6) sex offender.
Second, the extension of the Eighth Amendment to the states through the due process clause of the Fourteenth Amendment has been found in cases which have included the three phrases of the Eighth Amendment: (a) prohibition against denial of bail; (b) prohibition against levying of excessive fines; and, (c) prohibition against cruel and unusual punishment.

Besides crimes of status, which have been grouped separately in the paper, the third classification of prohibitions has been linked to criminal sentences. Especially the death penalty has been cited. Also, prohibition against unfair procedures in prisons and racially-motivated punishment of convicted persons have been said to be within the meaning of Robinson.

Concerning the impact of Robinson, the results of the federal and state cases have been critical reaction to the principle of not punishing status. Through subtle interpretations of the holding in the Supreme Court decision, lower federal and state courts have circumvented the Eighth Amendment prohibition against cruel and unusual punishment. Because of the involved reasoning to achieve the holding in the Supreme Court opinion, later courts have been able to extract many different procedures for settling issues based on laws which punish crimes of status.

Supplementing the case analyses determining the scope and impact of Robinson, preparation for the study has included collection of data about the tradition of punishment for crimes of status. This information has been drawn from anthropological, philosophical and sociological sources as well as legal ones.
Attention has been paid to law review articles and notes, also. However, appraisals of the history of the Eighth Amendment and of the future importance of the Robinson decision have been lacking in that literature.

Consequently, in this study, which has been based on actual decision-making within the legal process, speculative journalism about possible, alternative reasoning in the Supreme Court opinion has not been pertinent. Also, attorneys' theories about forms of treatment for persons convicted of crimes of status have not been relevant in tracing the development and application of the principle of not punishing cruelly or unusually.

Instead, the primary goal of this paper has been to establish trends about this new interpretation of the Eighth Amendment. Since its application to the states through the case of Robinson v. California, 370 U.S. 660 (1962), the prohibition against cruel and unusual punishment has been reconsidered and enlarged; although, it has not been accepted completely. It is the parameters of scope and impact within which the Eighth Amendment has been reasserted that have been described.
The beginning of the Robinson v. California, 370 U.S. 660 (1962), landmark Supreme Court decision occurred in the trial court of the City of Los Angeles, Los Angeles County, of the State of California. On June 9, 1960, after one day of hearings, a jury of twelve returned a verdict of guilty of narcotic addiction. 1

Having been arraigned February 4, 1960, for violation of Section 11721 of the State Health and Safety Code, 2 a misdemeanor,


2 The statute was: "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 a 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." Robinson v. California, 370 U.S. 661 (1962).
Lawrence Robinson was not sentenced, but placed on probation for two years with the first 90 days of that time to be served in the county jail. Also, he was to take a Nalline test whenever his probation officer requested; to work; to obey the law; and, to be under the general supervision of the probation officer and the court.

Then, on June 27, 1960, an appeal from the Municipal Court of the Los Angeles Judicial District of the City of Los Angeles was filed in the Appellate Department of the Superior Court of California in the City of Los Angeles. However, the reviewing court, the highest state court having jurisdiction, affirmed the earlier conviction of the trial court.

The brief for the appeal to the Superior Court stated that the ordinance under which Lawrence Robinson had been convicted, Section 11721 of the California Health and Safety Code, was unconstitutional. The first of ten reasons given for the unconstitutionality was that, in addition to being "vague, indefinite and

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3*United States Supreme Court Briefs and Records, p. 6.


5*United States Supreme Court Briefs and Records, p. 6.

6*Ibid., p. 9.
uncertain;" 7 the ordinance denied Robinson's "rights to Equal Protection and to Due Process under the federal and state constitutions." 8

The second reason alleged that evidence gained by an "unreasonable search and seizure and self-incrimination" 9 had influenced the decision and had been "admitted over the defendant's objections by the trial court." 10

The third point was that the "court misdirected the jury in matters of law." 11

The fourth said "several causes of action were improperly joined in a single count." 12

The fifth was that "the court erred in failing to submit the factual question re probable cause to the jury." 13

The sixth charged that the court had been in error by assisting the City Attorney to prepare for the expert testimony.

The seventh repeated that admissions and confessions which had not been voluntary were used in the trial.

The eighth said that "the verdict and judgment were contrary to law and to the evidence." 14

The ninth called the use by the jury of a magnifying glass to view evidence in photographs an error.

The tenth said the "court erred in not affirmatively giving the defendant the opportunity to poll the jury." 15

7 Ibid., p. 109. 8 Ibid. 9 Ibid. 10 Ibid. 11 Ibid. 12 Ibid. 13 Ibid. 14 Ibid., p. 110. 15 Ibid.
At that stage of the case, the appeal relied on the Fourth Amendment "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Eighth Amendment prohibition against cruel and unusual punishment was not introduced in the brief prepared for the Superior Court of California.

However, the Memorandum Opinion from the Appellate Department of the Superior Court did present the possible viability of the Eighth Amendment in the discussion of the rejection of the appeal from the trial court conviction. On March 31, 1961, the Appellate Department of the Superior Court filed a Memorandum Opinion which replied that the court had "held in a number of cases that the section (11721) is constitutional."17

This court has held in a number of cases that the section is constitutional. In People v. Bunn (1959), our Cr. A. 4062, we said: 'There is no merit in the claim (of appellant) that Health and Safety Code 11721 is unconstitutional because it makes being a narcotic addict a misdemeanor.' To the same effect is People v. Donlin (1960), our Cr. A. 4422. We shall, therefore, follow the rule of stare decisis.

Next, the opinion introduced the reasoning which became the major argument in the Robinson appeal to the United States Supreme Court. Presenting a rejoinder to its own first point, the

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16 United States Constitution, Amendment IV, clause (a).
17 United States Supreme Court Briefs and Records, p. 111.
18 Ibid.
court mentioned an example of an ordinance "which made it a misdemeanor to be a common drunkard" having been declared unconstitutional by a California court. "In re Newbern, 53 Cal. 2d 786 (1960), held that Penal Code 647 subsection 11 ... was so vague and uncertain that it was unconstitutional."  

Explaining itself, the court speculated that the precedent of In re Newbern might cause the higher courts to review the crime of being a narcotic addict or any crime of status. Although at present no appeal lies from the appellate department of the Superior Court to the District Court of Appeal or the Supreme Court, yet habeas corpus lies to test the constitutionality of the section in question. We would welcome such a test.

Then, responding to the second point in the defendant's appeal, the evidence obtained through unreasonable search and seizure, the Superior Court said that the Municipal Court had "acted properly in receiving this evidence outside the presence of the jury."  

In People v. Georg, (1955), 45 Cal. 2d 776, the court said at p. 781: 'The probative value of evidence obtained by a search and seizure, however, does not depend on whether the search and seizure was legal or illegal, and no purpose would be served by having the jury make a second determination of that issue.'  

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19 Ibid.
20 Ibid.
22 Ibid.
Concerning the seven remaining issues in the brief, the court said they had no merit. In conclusion, the opinion affirmed the Municipal Court order granting probation after 90 days in jail and denying a motion for a new trial.

Again in the Appellate Department of the Superior Court of the City of Los Angeles, an order for a rehearing of the case of People of the State of California, plaintiff and respondent, versus Lawrence Robinson, defendant and appellant, was entered. The rehearing was denied on April 11, 1961.24

Also, as directed in the Memorandum Opinion, the "appellant tried ... to secure habeas corpus relief in the District Court of Appeal and the California Supreme Court."25 Both petitions were unsuccessful.26

The United State Supreme Court

A notice of appeal to the Supreme Court of the United States from the final order of the Superior Court of the State of California on March 3, 1961, was filed June 26, 1961.27 The appeal was made in accordance with 28 United States Code Section 1257(2).

26Ibid.
27"Calendar," Transcript of Record, p. 114.
The provision from the Federal Declaratory Judgment Act allowed for jurisdiction in the Supreme Court since the appellant had exhausted all state remedies.\textsuperscript{28}

The transcript of the record of the controversy between Lawrence Robinson and the State of California was filed and an order noting probable jurisdiction was entered November 20, 1961.\textsuperscript{29} Samuel Carter McMorris filed the opening brief on behalf of appellant Robinson.

In the introduction, the appeal stated the goal of the argument:

The remedy which we here seek would delete, at least, the addiction phrase of section 11721, without doing violence to the acts of use or being under the influence of a narcotic, as such, and would free the statute books of California of the last remaining vestige of the crime of vagrancy.\textsuperscript{30}

The questions presented by the appeal began with the statement that Section 11721 of the California Health and Safety Code was in violation of the appellant's rights under the Fourteenth Amendment to the United States Constitution.\textsuperscript{31} That was the reason

\textsuperscript{28}"Notice of Appeal to the Supreme Court," United States Supreme Court Briefs and Records, p. 114.

\textsuperscript{29}Robinson v. California, 368 U.S. 918 (1961).

\textsuperscript{30}"Proposed Statement on Appeal," (Appellant's Brief), United States Supreme Court Briefs and Records, p. 115.

\textsuperscript{31}United States Constitution, Amendment XIV, Section 1: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."
which had been given in the statement on appeal to the Superior Court of California.

However, the subsequent form of the brief was new. Instead of proceeding to the point of unlawful search and seizure, the reasoning developed the basis of the argument against punishment of status.

Capitalizing on the suggestion from the opinion of the Superior Court of California, the appeal brief states three ways in which the statute punished: (1) a status, not an act or omission; (2) an involuntary status; (3) a condition of mental and physical illness.

Besides punishing status, or an involuntary condition, the statute was said to be "vague, indefinite and uncertain." This point had been made in the appeal to the Superior Court of California, also.

Furthermore, the statute was "an unwarranted and unconstitutional infringement of freedom of movement." Any person entering the State of California who had ever been a narcotic addict was liable for arrest under the statute.

Since the statute could have punished a person who had been a narcotic addict at any time in the past, it was said to be ex post facto, too.

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33 Ibid.
Finally, the eighth subpoint under the major question raised in the brief was: "It imposes cruel and unusual punishment." The Eighth Amendment to the United States Constitution was introduced, although not directly stated. At that time, there would not have been precedent for raising the issue of the applicability of the Eighth Amendment through the due process clause of the Fourteenth Amendment.

Then, the second major question was that of evidence obtained through unreasonable search and seizure.

Third, the question of procedural due process having been lacking in the conviction was repeated. That issue had been phrased in terms of conflict between the law and the evidence in the appeal to the California Superior Court.

More fully described in the brief to the Supreme Court, the argument was as follows:

(1) There was no evidence whatsoever of either influence of a narcotic or addiction to a narcotic.

(2) The only conceivable evidence of venue was by admissions of the defendant and not as a part of the corpus delicti.

(3) There was no proof of the use of an illegal narcotic.

The development and substantiation of the questions rested on fifty cases drawn from both the state and federal courts. Generally, the citations applied the Fourteenth Amendment to the states. One illustrative case dated from January 4, 1926. In

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34 Ibid.
35 Ibid.
Connally v. General Construction Company, 269 U.S. 385(1962), Mr. Justice Sutherland spoke for the court.

The constitutional grounds of attack, among others, are that the statutory provisions, if enforced, will deprive plaintiff, its officers, agents and representatives, of their liberty and property without due process of law, in violation of the Fourteenth Amendment to the federal Constitution...  

Concerning point "(8) It Imposes Cruel and Unusual Punishment," the reasoning was:

The Eighth Amendment to the federal Constitution and Article I, sec. 6 of the California Constitution both prohibit cruel and unusual punishment.

A penalty is cruel when it shocks the moral sense and outrages those innate principles of humanity which have been broadened and expanded by civilized enlightenment. Finley, In re, 1 C.A. 198 at 104.

Furthermore,

(a) statute may be unconstitutional upon its face or in its application. By necessary implication, since no provision is made for the tapering off of the condition and since the court may take judicial notice of what happens in 'cold turkey' withdrawals, we re-submit that the law here involved is unconstitutional both upon its face and in its application. To negate this position it is necessary for appellee to show that, although no provision for humane treatment of addiction of incarcerated addicts is provided in the law, such in fact is the practice of the California authorities. This, of course, would be impossible for appellee to establish.

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38 Ibid.

39 Ibid., p. 9.
In reply, the brief of the appellee, the People of the State of California, was filed by Roger Arnebergh, the City Attorney of Los Angeles, Philip E. Grey, the Assistant City Attorney, and William E. Doran, the Deputy City Attorney. In five major answers to the three main questions raised by the appellant in his opening brief, the attorneys for the State of California defended the constitutionality of Section 11721 of the California Health and Safety Code.

First, in response to the question of denial of due process and equal protection of the laws under the Fourteenth Amendment, the appellee's brief stated that Section 11721 was "a proper exercise of the police power." 40

In defense of the position, the state cited recent holdings.

People v. Bunn, (1959), 45 Cal. 2d 776, we said: 'There is no merit in the claim that Health and Safety Code 11721 is unconstitutional because it makes being a narcotic addict a misdemeanor.' To the same effect is People v. Donlin, (1960), our CRA 4422. We shall, therefore, follow the rule of stare decisis...

Appellant also claims that the court erred in not submitting as to whether the search and seizure was lawful...In People v. Georg, (1955), 45 Cal. 2d 776, the court said at p. 781: 'The probative value of evidence obtained by a search and seizure, however, does not depend on whether the search and seizure was legal or illegal, and no purpose would be served by having the jury make a second determination of that issue.' 41

40"Reply Brief of Appellee," United States Supreme Court Briefs and Records, p. 10.

41Ibid., p. 2.
Second, the brief denied each of the eight reasons alleged in the appellant's brief to show the unconstitutionality of the statute with reference to its punishing a status.

Answering point (8) charging cruel and unusual punishment, the reply brief elaborated on the leniency of the punishment stipulated in Section 11721.

Violation of Section 11721 of the California Health and Safety Code results in punishment of not less than 90 days nor more than one year in the county jail. Appellant himself as a result of his conviction was placed on probation for two years subject to certain terms, including 90 days to be served in the county jail. Certainly such sentence could not be considered cruel or unusual (Weems v. U.S.). Furthermore, the 'cruel and unusual' punishment provisions of the Eighth Amendment to the United States Constitution are not made applicable to the states by the Fourteenth Amendment (Pervear v. Mass., Weems v. U.S., supra, Bartkus v. Ill.).

Third, in reply to the second major question in the appellant's opening brief, the State of California denied that Robinson had been subjected to an illegal search and seizure.

Fourth, also in support of the reasonableness of the evidence being used in the trial, the appellee brief reiterated:

California's exclusionary rules do not fall short of providing the protection afforded by the Fourth and Fourteenth Amendments to the United States Constitution.43

In the fifth section, the State of California succinctly concluded that the evidence was "sufficient to support the judgment."44

Summarizing the main points of the argument in reply to the appeal, the brief repeated: "Section 11721 does not impose

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42 Ibid., p. 22. 43 Ibid., p. 32. 44 Ibid., p. 34.
cruel or unusual punishment within the long understood meaning of
the term.\footnote{Ibid., p. 9.}

Seventy-five cases of authority were cited in the text of
the appellee brief for the State of California.\footnote{"Table of Authorities Cited," United States Supreme
Court Briefs and Records, p. iii.}

Then, in the appellant's reply brief to the appellee's
brief and in the oral argument before the Supreme Court on April
17, 1962, Samuel Carter McMorris reviewed the two central ideas.
These were: (1) Section 11721 made an involuntary status a crime;
and, (2) the statute punished a condition of mental and physical
illness.\footnote{Robinson v. California, 8 L. Ed. 758(1962), Annotations,
pp. 1079-1080.}

In his oral argument, William E. Doran for the State of
California, denied that Section 11721 punished a status or that
the statute was vague.\footnote{Ibid., p. 1080.}

On June 25, 1962, the Supreme Court decision on Robinson
v. California, 370 U.S. 660(1962), was given. The Court held that
Section 11721 of the California Health and Safety Code, which
punished a status, was unconstitutional through the Eighth Amend-
ment prohibition against cruel and unusual punishment made applic-
able to the state through the due process clause of the Fourteenth
Amendment.
Mr. Justice Stewart gave the opinion of the Court. He wrote for Chief Justice Warren and Justices Black and Brennan, in addition to himself.\(^{49}\) Justices Douglas and Harlan presented separate concurring opinions.\(^{50}\) Mr. Justice Frankfurter took no part in the consideration or decision.\(^{51}\)

Mr. Justice Stewart noted the question raised by Robinson.

We noted probable jurisdiction of this appeal, 368 U.S. 918(1961), because it squarely presents the issue whether the statute as construed by the California courts in this case is repugnant to the Fourteenth Amendment of the Constitution.\(^{52}\)

Then, Mr. Justice Stewart affirmed "(t)he broad power of a State to regulate the narcotic drugs traffic within its borders."\(^{53}\)

Also, he discussed the permissible forms of regulation which a state could use.

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


\(^{50}\) William O. Douglas, Democrat, Connecticut(1898-), appointed by President Roosevelt(1939-). John Marshall Harlan, New York(1899-), appointed by President Eisenhower(1955-).

\(^{51}\) Felix Frankfurter, Independent, Massachusetts(1939-1965), appointed by President Roosevelt(1939-1962).

\(^{52}\) Robinson v. California, 370 U.S. 664(1962).

\(^{53}\) Ibid.
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.

In addition to the specific ways of handling narcotic drugs traffic by controlling the individual users, the Court proposed general social welfare campaigns aimed at the total population of the state. Mr. Justice Stewart hypothesized that narcotic traffic and addiction could be controlled best by "efforts to ameliorate the economic and social conditions under which those evils might be thought to flourish." 55

Finally, in the opinion of the Court, Section 11721 was "a statute which (made) the 'status' of narcotic addiction a criminal offense, for which the offender (might) be prosecuted at any time before he reform(ed)." 56 The statute was said to convey guilt whether or not the person had acted. 57

Explaining the meaning of the statute, Mr. Justice Stewart then began to reason by analogy. Comparing what the statute would have held for persons in a similar condition, the justice observed:

It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. 58

Citing Francis v. Resweber, 329 U.S. 459(1946), he said:

54 Ibid., 664. 55 Ibid., 665. 56 Ibid., 666.
57 Ibid. 58 Ibid.
in the light of contemporary human knowledge, a law which made
a criminal offense of such a disease would doubtless be uni-
versally thought to be an infliction of cruel and unusual punn
ishment in violation of the Eighth and Fourteenth Amendments.59

Next, the opinion repeated that the statute punished a
status which was recognized by the Court to be an illness. Quot-
ing the brief of the State in a footnote, the justice recalled:
'Thirty-seven years ago this Court recognized that persons addicted
to narcotics 'are diseased and proper subjects for (medical) treat-
ment.' Linder v. U.S., 268 U.S. 5, 18."60

Then, the holding in Robinson was:
a state law which imprisons a person thus afflicted (with an
illness) 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.

Concluding the opinion of the Court, Mr. Justice Stewart
acknowledged that "the narcotics traffic has occasioned the grave
concern of government."62 However, he admonished the states to
"legitimately"63 manage that concern.

Finally, Mr. Justice Stewart's closing statement narrowed
the future impact of the decision. He said that the Court had
dealt "in this case only with an individual provision of a particu-
larized local law as it has so far been interpreted by the Cali-
ifornia courts."64

Mr Justice Douglas concurred with the Court in a separate,

59 Ibid.  60 Ibid., 668.  61 Ibid., fn. 8, 667.
62 Ibid.  63 Ibid., 668.  64 Ibid.
longer opinion. Essentially agreeing with what had been said by Mr. Justice Stewart, the concurrence by Mr. Justice Douglas emphasized the development of the concept of cruel and unusual punishment.

Tracing the primitive methods of curbing unwanted behavior, which were used from the Sixteenth Century in England, to those of the present, Mr. Justice Douglas compared disease, especially mental illness, with narcotic addiction. 65

After graphically describing some of the physical effects of narcotic addiction, Mr. Justice Douglas introduced the method of treatment currently practiced in Great Britain. Admitting that the English approach was not more than custom in his argument, he, nevertheless, emphasized the contradictory point of view held by California. 66

Next, the complexity of narcotic addiction was explored. Mr. Justice Douglas covered the present lack of knowledge of how to cure narcotic addiction and the response of the community to that frustration. 67

Again, returning to citations of the historic meaning of cruel and unusual punishment, Mr. Justice Douglas demanded that the progressive "enlightenment" 68 concerning insanity be transferred to narcotic addiction, also. 69

65 Ibid., 668-9. 66 Ibid., 673. 67 Ibid., 674.
68 Ibid., 676. 69 Ibid.
Finally, Mr. Justice Douglas said that "convicting,"70 not the actual "confinement,"71 was cruel and unusual punishment.

Mr. Justice Harlan concurred with the Court in a short opinion. However, the separate statement urged caution in associating narcotic addiction with illness and in excluding narcotic addiction from subjection to criminal law.72

His agreement with the reversal of the earlier California Superior Court decision was based on the recklessness of the trial court instructions to the jury. "(T)he effect of this instruction was to authorize criminal punishment for a bare desire to commit a criminal act."73 To Mr. Justice Harlan, the California statute which would allow that finding would be "an arbitrary imposition which exceeds the power that a State may exercise in enacting its criminal law."74

Mr. Justice Clark dissented from the opinion of the Court in which Section 11721 of the California Health and Safety Code was "violative of due process as 'a cruel and unusual punishment.'"75 His dissent reflected knowledge of the California hearings and recommendations to the legislature which preceded a Governor's veto of a bill to repeal the statute.76 However, Mr.

70Ibid. 71Ibid. 72Ibid., 678. 73Ibid., 679.
74Ibid. 75Ibid.
Justice Clark did not report that the Governor's veto overrode the sentiment of the California legislature which had voted in favor of repeal of the statute. 77

Next, Mr. Justice Clark mentioned the protective nature of handling the narcotic addict in the State of California. He praised the sociological merit of the California laws pertaining to narcotic addiction.

Although the section is penal in appearance—perhaps a carryover from a less sophisticated approach—its present provisions are quite similar to those for civil commitment and treatment of addicts who have lost the power of self-control, and its present purpose is reflected in a statement which closely follows Section 11721: 'The rehabilitation of narcotic addicts and the prevention of continued addiction to narcotics is a matter of statewide concern.' California Health and Safety Code Section 11728. 78

Pursuing an extensive argument in support of California laws which were said to be adequate to the problem and superior to the Supreme Court direction, Mr. Justice Clark differed most sharply with the portion of the majority opinion which he said recommended hospitalization for addiction. He argued that the treatment existed already. 79

Then, he doubted that punishment of status was cruel and unusual punishment, anyway.

The fact that Section 11721 might be labeled 'criminal' seems irrelevant, not only to the majority's own 'treatment' test but to the 'concept of ordered liberty' to which the States must attain under the Fourteenth Amendment. 80

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77 Ibid. 78 Ibid., 680. 79 Ibid., 682. 80 Ibid., 683.
Mr. Justice Clark concluded that "even if the overall statutory scheme is ignored and a purpose and effect of punishment is attached to Section 11721, that provision still does not violate the Fourteenth Amendment."81 "Moreover, 'status' offenses have long been known and recognized in the criminal law. 4 Blackstone, Commentaries (Jones ed., 1916), 170."82

Finally, he disagreed with the appropriateness of invoking the cruel and unusual punishment clause of the Eighth Amendment. "Properly construed, the statute provides a treatment rather than a punishment."83

Mr. Justice White dissented, also. He did not concur in giving standing to the case which raised the issue of the constitutionality of a state statute. In his opinion, the decision was unnecessary. Also, it invalidated a state statute. Mr. Justice White did not approve of that interference.84 "California is entitled to have its statute and the record so read..."85

Mr. Justice White also concurred with Mr. Justice Clark that the statute was not being used to punish an involuntary condition.86 Then, he said that even if the status were involuntary, "(t)he Court recognizes no degrees of addiction."87

Deploring the application of the Fourteenth Amendment, Mr. Justice White speculated:

The Fourteenth Amendment is today held to bar any prosecution for addiction regardless of the degree or frequency of use, and the Court's opinion bristles with indications of further consequences.

He feared that the Court had "effectively removed California's power to deal effectively with the recurring case under the statute where there is ample evidence of use but no evidence of the precise location of use." 89 "Beyond this it has cast serious doubt upon the power of any State to forbid the use of narcotics under threat of criminal punishment." 90

Furthermore, the new application of the Eighth Amendment was said to be inappropriate because of lack of precedent. 91

Finally, he said that the Court had dealt in matters better left to "either the States or Congress." 92 Mr. Justice White did not accept the Court's "own abstract notions of how best to handle the narcotics problem." 93

88 ibid. 89 ibid., 689. 90 ibid. 91 ibid. 92 ibid. 93 ibid.
III

ANALYSIS OF THE SCOPE AND RAMIFICATIONS
OF ROBINSON

The Prohibition Against Punishing Status

Between 1962 and 1970, a major trend found in the cases citing the precedent of Robinson has been the application of the principle of the Eighth Amendment prohibition against cruel and unusual punishment to crimes of status. The federal cases analyzed have been divided among six categories. These are: (1) narcotic addict; (2) alcoholic; (3) vagrant; (4) hippie; (5) mentally ill; and, (6) sex offender.

The following discussion has been organized to show the chronological development of decisions within each category. Through the observation of the reliance upon the precedent of Robinson, the wide scope and diverse ramifications of the Supreme Court decision have become obvious.

Until 1970, in the United States federal court system, there had been twenty-two cases which dealt with some question of narcotics and that referred directly to Robinson. Six cases have been in the federal district courts. Sixteen cases have been decided in the federal circuit courts of appeals. Most of the cases
have been attempts to clarify the ruling about the status of narcotic addicts and to extend the Robinson decision to other facets of the narcotics issue.

The six federal district court cases between 1962 and 1970 were brought in six different courts of the ninety-one districts. They were civil claims based upon federal law. Five of the six petitions were requesting writs of habeas corpus; all five were rejected.

One of the six petitions was an action for a declaratory judgment and an injunction; that was denied, also.

In none of the district cases was the direct application of the Eighth Amendment prohibition against cruel and unusual punishment made to a similar factual situation. Nevertheless, the influence of the Robinson decision was present. The bases for attempting to gain writs and a declaratory judgment were the Supreme Court ruling.

Also, the acknowledgment of the ruling in the Robinson case was positive. The courts agreed that the Supreme Court had invalidated Section 11721 of the California Health and Safety Code which punished the status of narcotic addiction.

In the first district court case, Diaz v. California, 217 F. Supp. 473(1963), the plaintiff, Manuel Diaz said that his detention at the California Rehabilitation Center, Chino, California, was illegal because the arrest by San Diego narcotics officers was made on the basis of the void Section 11721 of the Health and Safety Code in direct violation of the Robinson decision.
However, the judge did not comment on the substantive merits of that assertion. Instead, he denied the petition for a writ of habeas corpus on procedural grounds. 94

Quoting from Section 2254 of Title 28 United States Code Amended, the Federal Regulatory Act, he explained, in part:

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State. 95

The second petition for a writ of habeas corpus was that of the State of Louisiana ex rel. Ernest Hayes v. Allgood, 254 F. Supp. 913 (1966). In denying the writ, District Judge West "held that a statute making it unlawful 'to be or become' a drug addict did not constitute cruel and unusual punishment in violation of the constitutional prohibition." 96

While indicating acceptance of the Robinson precedent, the judge differentiated between the California statute and the pertinent Louisiana statute.

Citing the case of State of Louisiana ex rel. Blouin v. Walker, 244 La. 699 (1963), he recalled:

(T)he Louisiana Supreme Court held in Blouin that the Robinson decision was not applicable to the Louisiana statute. The United States Supreme Court agreed, and on January 13, 1964, denied certiorari. Watkins v. Walker, 375 U.S. 988 (1964).

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95 Ibid.
In both the *Blouin* case and this case, the petitioners were convicted of drug addiction, were given suspended sentences on condition that they go to a hospital for medical relief, and after violating their probation, were sentenced to serve time in the Louisiana State Penitentiary. 97

The holding supported the rights of states to provide their own legal sanctions and to determine criminal behavior.

In the case of *Burmeister v. New York City Police Department*, 275 F. Supp. 690(1967), plaintiffs, "Peter Burmeister, Ronald Johnson and James Hutchinson"98 requested "action for declaratory judgment and injunctive relief."100

Judge Tenney of the Southern District of New York settled the case in a form similar to that in *Diaz v. California*, 217 F. Supp. 478(1963). He based his opinion on procedural grounds: failure to raise a substantial federal question and to exhaust state remedies.101

*Pierce v. Turner*, 276 F. Supp. 289(1967), the second 1967 case, was a habeas corpus proceeding, also. Among the facts of the case was the situation of a second-degree murder charge "involving a glue-sniffing episode during which (the) defendant allegedly attempted to stab ghosts while the lights were out."102

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The admission of glue-sniffing was central to the request for a writ of habeas corpus on the basis of Robinson.\textsuperscript{103}

Since the trial court had given "instruction applying the modern M'Naghten test of legal insanity,"\textsuperscript{104} the defendant said that the case had "moved beyond the bounds of due process"\textsuperscript{105} and had "rendered it one of cruel and unusual punishment."\textsuperscript{106} The thrust of the argument was that the insanity test implied the question of involuntary behavior which had been the basis for the Robinson decision.

Judge Christensen of the district court disagreed. In his reasoning, the judge referred to Robinson. He said: "punishment of a status, as such, apart from the commission with specific intent of an affirmative criminal act ... (was) not involved or reached in this case."\textsuperscript{107}

The sentence had been for judgment of a criminal action, not for the condition of insanity through glue-sniffing.

The fourth of the district court habeas corpus proceedings, Ortega v. Rasor, M.D., 291 F. Supp. 748(1968), was, also, a discharge from custody in a facility which was basically a mental institution.

\textsuperscript{103}Ibid.  
\textsuperscript{105}Ibid.  \textsuperscript{106}Ibid.  \textsuperscript{107}Ibid.
In the judgment, the petition for a writ of habeas corpus was denied; but, the petitioner was discharged from the custody of the Surgeon General for return to the United States Marshal.\textsuperscript{108}

However, the judge did not invalidate an article of the federal Narcotic Rehabilitation Act which provided for commitment of narcotic addicts to the custody of the Surgeon General for treatment. Robinson was not extended to an act which ordered compulsory treatment since Ortega "had acted of his volition in requesting civil commitment."\textsuperscript{109}

Showers v. Lloyd, 296 F. Supp. 441(1969), was the most recent district court case in which a petitioner, "who was in state custody pursuant to his conviction upon his plea of guilty to the charge of possession of heroin,"\textsuperscript{110} was denied his petition for a writ of habeas corpus.

In his opinion, District Judge Hauk held that delay in sentencing until after the petitioner's discharge from the narcotics rehabilitation center did not deprive him of due process of law.\textsuperscript{111} Referring to Robinson, the opinion denied that sentencing after his discharge from the rehabilitation center was double jeopardy.

Petitioner contends that his commitment for narcotic addiction was a criminal sentence, and thus the subsequent sentence by the Los Angeles County Superior Court constituted a double

\textsuperscript{109}Ibid., 749.
\textsuperscript{111}Ibid.
punishment for the same offense. The California Superior
Court has consistently held that no penal sanctions are in-
volved in such a commitment for narcotics addiction...

Should commitment pursuant to Welfare and Institutions
Code, 3051 be considered penal in nature, it is clear that the
doctrine of Robinson v. California, 370 U.S. 660(1962), would
require that the statute be declared unconstitutional. This
Court is satisfied that the statutes in question are not uncons-
itutional on the ground that they permit double punishment.

Besides the district court cases, Robinson was cited in
sixteen federal circuit courts of appeals. Three of the eleven
circuits were represented in those cases.

Concerning the decisions in the cases, the majority of
them upheld lower court rulings; eleven upheld decisions or denied
petitions to vacate or correct sentences. Four of the cases were
reversed. Three of those were remanded for new trials. In two of
the four cases granting appeals and reversing lower court decisions,
the precedent of Robinson was cited to substantiate reasons for the
decisions. However, in the other two decisions which were reversed
Robinson was not central to the final opinion of the Court.

Nevertheless, in the cases which denied petitions or upheld
lower court rulings, there were direct references to Robinson.
Through those cases, the relationship of narcotic addiction to ill-
ness was stressed and, then, dismissed in later cases. Also, the
weight of the Robinson decision was found in dissenting opinions in
three cases.

\[112\] \textit{Ibid.}, 447.
Consequently, there has been no sustained extension of the Supreme Court ruling in the later narcotic cases of the federal circuit courts of appeals. The question of status has not been raised again.

In 1963, the first federal circuit court of appeals case, Nickens v. U.S., 323 F. 2d 808 (1963), was heard in the second District of Columbia Court of Appeals. The opinion included an indirect reference to Robinson.

Concurring with the Court, Circuit Judge J. Skelly Wright observed: "This case involves a drug addict. Narcotics addiction poses a serious problem for society, but the solutions at times attempted raise other dangers."[113]

The footnote references given indicated the hearings at the White House Conference on Narcotic and Drug Abuse during which the Robinson findings were mentioned indirectly.

It is now 'overwhelmingly accepted' that 'addiction is the manifestation of disease and not in itself a crime.' Statement of Senator Jacob K. Javits, Proceedings, White House Conference on Narcotic and Drug Abuse, p. 71 (1962).[114]

However, since the appellant "was convicted in the United States District Court for the District of Columbia ... of possession, sale, and importation of narcotics,"[115] and not for addiction, the Supreme Court decision was not considered applicable.

The case of Rightower v. U.S., 325 F. 2d 618 (1963), referred to Robinson in a footnote which extended the reasoning about

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[114] Ibid., fn. 6.
[115] Ibid., 808.
the correlation of narcotic addiction and mental disease.

We do not, of course, pass on the correctness of these views ... As to proposals for the 'treatment' of drug addicts and methods, past and current, for their 'punishment,' see concurring opinion of Mr. Justice Douglas in Robinson v. California, 370 U.S. 660, 668 et seq. (1962).

Although the information in the footnote did not influence the decision in Hightower, it did have an effect on later cases in which the treatment of narcotic addicts and mentally ill persons was considered to be the same.

Also, Robinson was mentioned in the dissent by Circuit Judge Fahy. 117

The third District of Columbia case, Brown v. U.S., 331 F. 2d 822 (1964), decided the appeal of Alvin J. Brown who challenged his district court conviction for narcotic charges. 118 Heard before Senior Circuit Judge Edgerton and Circuit Judges Wright and McGowan, the case emphasized Robinson.

The moving papers contained allegations of long narcotic addiction which, being unquestioned by the Government or the Court, must be taken as true. '(N)arcotic addiction is an illness ... Of course it is generally conceded that a narcotic addict, particularly one addicted to the use of heroin, is in a state of mental and physical illness.' Robinson v. California, 370 U.S. 660, 667 and note 8, (1962). 119

Lloyd v. U.S., 343 F. 2d 242 (1964), the fourth District of Columbia Circuit Court of Appeals case, was an appeal of a conviction for violation of the Harrison Act of 1914, which made criminal

117Ibid., 616.
any unauthorized manufacture, possession, control, sale, prescription or dispensation of narcotic drugs. The Court of Appeals affirmed the decision. Circuit Judge Fahy dissented. Also dissenting were Chief Judge Bazelon and Circuit Judges Washington and Wright; they said:

This petition should be granted for two reasons: (1) The trial judge's interference with jury consideration of the insanity defense ... (2) The presence of substantial constitutional questions which have been presented to this court with increasing frequency. These questions are (a) whether punishment of an addict such as he, whose purchase and possession of narcotic drugs is explained entirely by his personal need for repeated dosages of them, is cruel and unusual punishment, Robinson v. California, 370 U.S. 660(1962) ... The third 1964 District of Columbia case and the second to be remanded, Jackson v. U.S., 336 F. 2d 579(1964), did not rely on Robinson for the majority opinion. Remanded with instructions, the case was a successful appeal of the defendant's conviction of "narcotic violations." 120

In Chief Judge Bazelon's dissent, which was a dissent in part only, the Robinson precedent was affirmed with reference to other governmental support of the ruling.

Authoritative declarations from institutions in all three branches of Government recognize a relation between drug addiction and mental illness ... The Supreme Court: (I)t is generally conceded that a narcotic addict, particularly one addicted to the use of heroin, is in a state of mental and physical illness. Robinson v. California, 370 U.S. 660, 667 ... 121

121 Ibid., 581.
The fourth 1964 District of Columbia Circuit Court of Appeals case, the Adams v. U.S., 337 F. 2d 548 (1964), petition, was to vacate or correct lower court action on a Harrison Act violation for narcotics offenses. Although the petition was denied, Chief Judge Bazelon again dissented in an opinion which used Robinson to foster the legal connection between narcotic addiction and mental problems.

It appears that our indigent petitioner has a history of drug addiction and claims to have been an addict at the time of the alleged narcotics offenses; that he was convicted of Harrison Act violations by a jury unaware that he wished to raise an insanity defense...

... here the point at issue is not the merits of petitioner's insanity defense, but whether petitioner was denied a constitutionally fair trial.

The first 1965 case in the Circuit Court of Appeals, Hutcherson v. U.S., 345 F. 2d 964 (1965), involved what became a narcotics arrest after an initial detainment for being caught drinking an alcoholic beverage in the presence of an officer.

Replying to Hutcherson's appeal, Senior Circuit Judge of the Court of Appeals, Wilbur K. Miller, held that the ten-year sentence for the two offenses was not cruel and unusual punishment and that Hutcherson was not able to choose to be prosecuted under District of Columbia law rather than federal statutes.

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However, Chief Judge Bazelon dissented in part. Referring to the portion of the appeal entitled "Cruel and Unusual Punishment," the Chief Judge noted: "Appellant argues for the first time on appeal that Robinson v. California, 370 U.S. 660 (1962), bars punishment for possession and concealment of narcotics." Reminding the Court of the Castle holding, which was then before the Court on appeal "No. 17894, 120 U.S. App. D.C.____," Chief Judge Bazelon suggested that "the Robinson argument ... is more properly to be made to the Supreme Court." Then, calling for additional study of the "assertion of voluntariness" in the decisions which rejected the Robinson precedent, the Chief Judge observed:

Indeed, the question of responsibility is the heart of the addict's argument that he should not be punished for possession. Addicts have frequently been successful in this jurisdiction in raising the insanity defense. Other theories to excuse responsibility, such as 'pharmacological duress,' have also been advanced ... I submit that Robinson requires serious consideration of these claims as matters affecting responsibility. But I am constrained to agree that we cannot consider these claims now since they were not advanced below and no evidence was offered to show that here possession was compelled by addiction. That "state court reluctance to extend Robinson seems to rest on a conclusive presumption of responsibility," was the reason offered by Chief Judge Bazelon for the need to examine the question of responsibility and cruel and unusual punishment.

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U.S. ex rel. Swanson v. Reincke, 344 F. 2d 260(1966), was the second circuit court case in 1965 which upheld a district court conviction for both possession and self-administration of narcotics. However, the vehicle, a federal habeas corpus proceeding, through which the appeal was made was unusual.

Nevertheless, Circuit Judges Waterman, Friendly and Hays heard the case on its merits. In the opinion, Circuit Judge Friendly held:

Connecticut statutes forbidding any person to manufacture, possess, have under his control, sell, prescribe, dispense, compound, administer to himself or another or be addicted to use of narcotic drug and specifying measure of punishment for crimes thus defined were not unconstitutional as applied to defendant who pleaded guilty to self-administration of narcotics. 133

Summarizing the rejection of Robinson, Circuit Judge Friendly stated:

We are unable to believe that a decision stated by the Supreme Court to be limited to 'a particularized local law as it has so far been interpreted' by the local courts was meant to prevent all state legislatures and Congress from determining, if they see fit, that the self-administration of narcotics or other noxious substances, and attendant purchase or possession, involve such dangers to their users, such potential of creating new addicts, and such other harmful social by-products, that proof of strong emotional or even of physiological compulsion shall not be a defense. 134

The third 1965 circuit court case, Morales v. U.S., 344 F. 2d 846(1965), was one of two Ninth Circuit appeals. In the

134 Ibid., 263.
district court, Morales had been prosecuted "for concealment and facilitation of concealment of heroin."\textsuperscript{135} Through the appeal, the opinion reached was that the defendant's constitutional rights had been violated.

However, the case did not deal with \textit{Robinson} except in a footnote which said that the case did not pertain.\textsuperscript{136}

In the record of this case, however, there is no clear evidence that appellant was addicted to the compulsive use of narcotics; consequently, there is no adequate supporting premise for his argument.\textsuperscript{137}

In 1965, the case of Castle v. U.S., 347 F. 2d 492(1965), was appealed from the District of Columbia District Court. Circuit Judge Wright treated the case in a manner which reversed the trend toward combining narcotic addiction and mental illness. He said:

(T)estimony relating to narcotic addiction provided a basis from which the jury, under proper instructions, could have found a causal relationship between defendant's drug-related abnormality and the charged offenses of purchasing drugs without a tax stamp and facilitating the concealment and sale of drugs knowing them to have been imported contrary to law, but the jury was not required to find on the evidence that defendant had mental disability which caused the acts charged.\textsuperscript{138}

Since the appellant's claim rested on that issue of the relationship of drug purchase and mental disability, the lower court conviction was upheld. The appeal had been based on the growing tradition of linking narcotic addiction and mental illness.

\textsuperscript{135}Morales v. U.S., 344 F. 2d 847(1965).
\textsuperscript{136}Ibid., fn. 2. \textsuperscript{137}Ibid.
However, the need to stop that association was advocated by Circuit Judge Burger, in a concurring opinion to that of Circuit Judge Wright: "Neither this court nor any other court has ever held that drug addiction is per se a form of mental disease or 'insanity' in the context of assessing criminal responsibility."139

Instead of continuing to build a set of cases in which addiction was equated with disease, the Castle appeal stressed the right of federal regulation of interstate commerce with respect to narcotics. Circuit Judge Burger warned that continuing to combine narcotic addiction and disease was "opening the door to evading the severe penalties Congress has fixed for trafficking in narcotics."140

The fifth 1965 circuit court case and the fourth one in the District of Columbia to consider a narcotic offense, Heard v. U.S., 348 F. 2d 43(1965), affirmed a district court conviction.

The Court of Appeals held that evidence showing at most that defendant's behavior controls might have been affected if defendant were deprived of heroin was insufficient to warrant instruction on mental disease or defect resulting from addiction, in absence of showing that defendant was deprived of heroin at the time of the offense, especially where there was evidence that defendant had large quantities of heroin at the time of the offense.141

Another rejection of the cases which attempted to correlate

139Ibid., 495. 140Ibid., 496.
narcotic addiction and mental illness, the opinion commented upon Robinson in negative terms. Explaining that every addict's case was not an insanity case, a footnote clarified the following:

Reference in the dissent to our ambiguous if not misleading statement in Brown v. United States, 118 U.S. App. D.C. 76 (1964), requires that the quotation from Brown and the reliance on Robinson v. California, 370 U.S. 660, 667 ... be scrutinized in context.

That portion of the Brown quotation from Robinson which states that narcotics addiction is a mental illness is not the language of the Supreme Court.

The first 1966 District of Columbia Circuit Court of Appeals case, Hansford v. U.S., 365 F. 2d 920(1966), reversed a decision of the district court which had convicted appellant Hansford of a federal narcotic violation. The opinion reverted to the earlier holdings that there was a connection between narcotic addiction and mental illness.

However, Circuit Judge Danaher, who dissented from the opinion of the Court, reminded the justices of previous decisions which had rejected that relationship of narcotic addiction and mental illness. "This court en banc earlier rejected the contention of one or two of our colleagues as to their construction of Robinson v. California, 370 U.S. 660, 662(1962)."143

Also, in 1966, in the Northern District of Illinois, U.S. v. Oliver, 363 F. 2d 15(1966), affirmed a lower court conviction for sale of narcotics, resisting arrest and assault. There was

142Ibid., fn. 3, 45.
admission of narcotics use and addiction. However, the crimes with which Oliver was charged were not thought to have been confused with his status. "Addiction to narcotics is not itself a crime. Robinson v. California, 370 U.S. 660(1962)." 144

The second Ninth Circuit Court of Appeals case, Joseph v. Klinger, 378 F. 2d 308(1967), was an appeal "in forma pauperis from an order of the United States District Court for the Central District of California." 145

In the opinion which affirmed the lower court decision, Judge Barnes "held that defendant's conviction and sentence for driving an automobile while under the influence of narcotics did not constitute a cruel and unusual punishment." 146

The Court of Appeals separated the state of addiction from any action performed while under the influence of narcotics.

While appellant was tried after Robinson v. St. of Calif., 370 U.S. 660(1962), he cannot rely on its 'cruel and unusual punishment; theory, because of the distinction made by the California Supreme Court between the crime charged in Robinson (status of addiction) and that charged here (the act of driving) described in 23105 of the California Vehicle Code. 147

Also, in 1967, the case of Bailey and Smith v. U.S., 386 F. 2d 1(1967), held that Robinson was limited to the criminality of addiction; and, concealing and transporting illegally imported

146 Ibid.
147 Ibid., 311.
narcotics and purchasing narcotics not from the original stamped package violated federal narcotics prohibitions. 148

Then, the first Second Circuit Court case to comment on cruel and unusual punishment with reference to narcotics, U.S. v. Chow, 398 F. 2d 596(1968), affirmed a conviction of the United States District Court for the Southern District of New York. Not a major point in the opinion, the section which mentioned the Eighth Amendment clause prohibiting cruel and unusual punishment was raised in issue and dismissed. It was not considered substantial.

(A) five-year minimum sentence under the Narcotic Control Act did not constitute a cruel and unusual punishment prohibited by the Eighth Amendment even when applied to a mother who had no previous criminal record and whose nine-year-old twins were dependant on her for support. 149

Although Robinson was cited, the length of the prison sentence was not cruel and unusual punishment "in the light of Chow's significant participation in a large scale narcotics conspiracy." 150

In Worthy v. U.S., 409 F. 2d 1105(1968), the Circuit Court of Appeals of the District of Columbia upheld the decision of the district court which convicted the defendant of violating narcotics laws.

150 Ibid., 598.
Heard before Senior Circuit Judge Fahy and Circuit Judges Burger and Wright, the case was decided by Senior Judge Fahy, who wrote the opinion, and Circuit Judge Burger. Circuit Judge Wright dissented.\textsuperscript{151}

The opinion did not extend to Robinson. However, in Judge Wright’s dissent, the concept of status was introduced to show that the statute under which the arrest had been made was unconstitutional.

Appellant (Worthy) was convicted on two counts of violation of narcotics laws. The narcotics themselves, which were introduced into evidence at trial, were discovered by the police when they searched appellant after arresting him for vagrancy under 22 D.C. Code 3302(1967) ... the statute authorizes arrest (and search) for a status which, arguably, cannot constitutionally be made the subject of the criminal sanction. Robinson v. California, 370 U.S. 660(1962).\textsuperscript{152}

Through citations in the twenty-two federal cases of narcotics convictions, the Robinson decision has been tested since 1962. In the cases, the Supreme Court ruling has not been consistently applied, however. Also, the elements of commerce regulation of narcotics traffic and of punishment for criminal behavior while under the influence of narcotics have not been found to be within the scope of the decision.

Similarly, the legal status of alcoholism has been reviewed by cases which have used Robinson citations. Six cases have included reasoning, at least in part, from Robinson to decide issues

\textsuperscript{151}Worthy v. U.S., 409 F. 2d 1105(1968).

\textsuperscript{152}Ibid., 1111.
about persons convicted of violating laws which punished alcoholism.

In Bates v. Rivers, 323 F. 2d 311 (1963), the appeal involved a conviction for intoxication while on parole after having served time in prison for another charge. Although Circuit Judge Burger held that Bates was not entitled to apply his time spent on parole against the remaining sentence following revocation of parole for intoxication, Circuit Judge Wright disagreed.

Robinson was introduced and dismissed in the dissent, however. The argument was based on the difference between the maximum sentence authorized (72 months) and the actual time in custody (75 months).

Then, in 1966, the case of Driver v. Hinnant, 356 F. 2d 761 (1966), approximated both the factual situation and the decision in Robinson.

The Court of Appeals ... held that a North Carolina statute providing that any person found drunk or intoxicated on a public highway or at any public place or meeting shall be guilty of a misdemeanor could not be applied to a chronic alcoholic.

Circuit Judge Albert V. Bryan explained that the "unwilled and ungovernable" quality of chronic alcoholism caused the status to be within the ruling of Robinson.

Compounding precedent for the defense of chronic alcoholism

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155 Ibid., 763.
in contrast to public intoxication, the case of Easter v. District of Columbia, 361 F. 2d 50 (1966), in which Circuit Judge Fahy, Chief Judge Bazelon and Circuit Judge McGowan joined, asserted:

There can be no judgment of criminal conviction passed upon him. To do so would affront the Eighth Amendment, as cruel and unusual punishment in branding him a criminal, irrespective of consequent detention or fine.

Also, in 1966, the Supreme Court case of Budd v. California, 385 U.S. 911 (1966), included Robinson in Mr. Justice Fortas' dissent. Although the Court denied certiorari in the case, Mr. Justice Fortas stressed the need for instruction on state laws governing alcoholism.

Mr. Justice Stewart's opinion for the Court in Robinson makes it clear that a State may not constitutionally inflict punishment for an illness, whether the illness be narcotics addiction or the 'common cold.'

One year later, Powell v. Texas, 392 U.S. 514 (1967), did raise the issue of the constitutionality of a statute which punished public intoxication. The opinion of Mr. Justice Black with which Mr. Justice Harlan concurred, emphasized that Powell v. Texas, 392 U.S. 514 (1967), was not within the scope of Robinson.

However, Mr. Justice White, who concurred in the result, disagreed with Justices Black and Harlan concerning the appropriateness of Robinson.

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Unless Robinson is to be abandoned, the use of narcotics by an addict must be beyond the reach of the criminal law. Similarly, the chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk. 159

Repeating his earlier views in Budd, Mr. Justice Fortas, who dissented from the opinion of the Court, supported the precedent of Robinson.

Robinson stands upon a principle which, despite its sublety, must be simply stated and respectfully applied because it is the foundation of individual liberty and the cornerstone of the relations between a civilized state and its citizens: Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change.

In its decision, the Court distinguished between chronic alcoholism and public intoxication. The former was considered to be unpunishable because involuntary. The latter was said to be criminal behavior, or within the criminal laws. Since Powell was charged with the latter, he was convicted justly, according to the Supreme Court at that time.

Then, in 1968, Doughty v. Beto, 396 F. 2d 128(1968), which did involve a conviction for alcoholism, was not governed by the Robinson precedent; because, the conviction rested on behavior, not the status itself. 161

From the six cases between 1962 and 1970, the status of alcoholism has followed that of narcotics addiction with respect to

159Ibid., 548, 9. 160Ibid., 567.
the criminal law. The involuntary condition has been removed from criminal sanction, but any criminal behavior has not been excused.

Also, vagrancy, the ripe issue stated in the Memorandum Opinion of the State of California Superior Court which prompted the structuring of the Robinson appeal to the Supreme Court in terms of a status question, has been shown to be within the scope of the Supreme Court ruling. Clearly held to be exempt of criminal sanction, the status of vagrancy was absolved in two federal court cases between 1962 and 1962 and 1970.

First brought to the Supreme Court in Hicks v. District of Columbia, 383 U.S. 257(1965), the issue of vagrancy was not decided; because, the case was denied certiorari.

However, Mr. Justice Douglas commented on the issue in a dissenting opinion which said that certiorari should have been granted. Quoting his own concurring opinion in Robinson, Mr. Justice Douglas said: "I do not see how economic or social status can be made a crime any more than being a drug addict can be. Robinson v. California, 370 U.S. 660, 668(concurring opinion)."162


Powell, Robinson, and Edwards, Judge William E. Doyle reasoned:

If addiction to narcotics is a status which the legislature cannot validly declare to be a crime under Robinson, it follows that the Colorado attempt to declare idleness or indigency coupled with being ablebodied must also (indeed even more) be held beyond the power of the state legislative body. The statute, to part at least, does not require either act or behavior. It deals with condition. Therefore, insofar as the statutory prescription seeks to legislate against status, it is in conflict with the substantive due process limitations of the Fourteenth Amendment.

Another category which has reflected the culture of the period has been that of hippie. Not the same as vagrant, the status, nevertheless, has been subjected to similar laws and judgments. Two cases between 1962 and 1970 have made Robinson relevant to cases about punishing hippies.

In an action under the Civil Rights Act, Hughes v. Rizzo, 282 F. Supp. 881(1968), the district court held:

... our criminal laws are directed toward actions not status. Robinson v. California, 370 U.S. 660(1962). It is not a crime to be a 'hippie' and the police could not lawfully arrest on the basis of suspicion, or even probable cause to believe, that the arrestee occupied the status of being a homosexual or narcotic addict.

After that inclusive, if illogical, pronouncement on the range of freedom of status provided by Robinson, there was a 1969 case which reached the same conclusion. Broughton v. Brewer, 298 F. Supp. 260(1969), declared an Alabama vagrancy statute, which had been invoked against hippie loitering, was so vague that it

violated due process of law. However, a request for an injunction against future arrest under the same statute was denied. Robinson was not extended to the granting of that injunction where prosecution had not taken place, but was "merely threatened."165

Then, a fifth category of status, mental illness, has been cited frequently in the tradition of Robinson. Nearly synonymous with narcotic addiction in many cases subsequent to the Supreme Court decision, mental illness was not a status which had been punished by criminal statutes. However, the cases have sought to prove that indirectly the condition was the controlling force in behavior which was punished.

In Sas v. State of Maryland, 334 F. 2d 506(1964), Circuit Judge J. Spencer Bell reviewed the history of the law and status cases.

Care, however, should be taken to read these cases in the light of the Court's more recent decisions beginning with Gitlow v. New York, 268 U.S. 652(1925), in which the Court has broadened the concept of liberty contained in the fourteenth amendment and thus has brought to bear on the states the constitutional requirement of fundamental fairness contained in many sections of the Bill of Rights not theretofore thought to apply to them.166

In U.S. ex rel. Kessler v. Fay, 232 F. Supp. 139(1964), a petition for a writ of habeas corpus based on mental illness was denied; but, the possible relationship of Robinson was established. The justification of the petition was acknowledged.

To be sure, the fact that he was once a mental incompetent and an incessant user of narcotics thereafter does not, in and of itself, establish that he was insane at vital periods, but is certainly probative on the basic issue and is sufficient to repel any suggestion that his claim was made of whole cloth. 167

Then, in Sweeney v. U.S., 353 F. 2d 10(1965), the precedent of Robinson was used to combine alcoholism and involuntary behavior to constitute a status which should not have been punished. 168

More consistently related to Robinson, the case of Rouse v. Cameron, 373 F. 2d 451(1966), argued that "indefinite confinement without treatment of one who has been found not criminally responsible may be so inhumane as to be 'cruel and unusual punishment.'" 169

Then, in Collins v. Cameron, 377 F. 2d 945(1967), an appeal of a district court ruling ordering hospital commitment, Circuit Judge Burger stated: "Nothing in Robinson, or Easter, impinges in any way on our holdings ... being found not guilty by reason of insanity on a charge of second-degree murder." 170

Correspondingly, there was a rejection of Robinson as a basis for alleging that a mental patient's extended jail sentence

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170Collins v. Cameron, 377 F. 2d 947(1967).
was cruel and unusual punishment in Roberts v. U.S., 391 F. 2d 991 (1968). 171

Similar to Rouse v. Cameron, 373 F. 2d 451 (1966), the case of U.S. ex rel. Schuster v. Herold, 410 F. 2d 1071 (1969), discussed the right to treatment while confined. Lack of medical attention was said to be prohibited by the Eighth Amendment; Robinson was cited as precedent. 172

Finally, the last category of status which has been said to be within the scope of Robinson has been that of so-called sex offender. One case between 1962 and 1970 has been tried in the district court of the Western Division of Pennsylvania and appealed to the Third Circuit. U.S. ex rel. Gerchman v. Maroney, 235 F. Supp. 588 (1964), the district court case, upheld the Barr-Walker Act because it had not "authorized or imposed punishment for the condition of a person within Pennsylvania." 173 The opinion continued to say that if the Act had punished status, then it would have been in violation of the Fourteenth Amendment as provided in Robinson. 174

When the appeal of U.S. ex rel. Gerchman v. Maroney, 355 F. 2d 302 (1966), was affirmed with an opportunity for the district court to retry the case within 60 days, the reason for the decision

174 Ibid.
was lower court denial of procedural due process. Reference to Robinson was a footnote which indicated the constitutional basis of considering the Pennsylvania statute.\textsuperscript{175}

The Incorporation and Expansion of the Eighth Amendment

The second trend indicated by decisions citing Robinson has been the extension of the doctrine of incorporation. Through the expansion of the Eighth Amendment prohibition against cruel and unusual punishment to the states through the due process clause of the Fourteenth Amendment, Robinson has been an example of the progress toward applying the first ten Amendments to the United States Constitution to the states.

Robinson has been cited in cases which have sought to develop the three phrases of the Eighth Amendment. Besides the prohibition against cruel and unusual punishment, the prohibitions against excessive bail and excessive fines have been cited. The death penalty has been said to be cruel and unusual punishment in this time. Also, unfair procedures in prisons and racially-motivated punishment of convicted persons have been said to be within the prohibition given in Robinson.

Mentioned in five landmark Supreme Court cases and in three lower court cases in the federal courts between 1962 and 1970, Robinson has been recognized to be one of the chain of opinions

which brought the first eight of the Amendments to the states through the due process clause of the Fourteenth Amendment.

Beginning with Gideon v. Wainwright, 373 U.S. 342 (1962), which provided for the constitutional right to counsel in state criminal trials, Robinson was cited in support of the growing understanding of the states' rights in terms of the first ten Amendments.

In his opinion for the Court, Mr. Justice Black developed the theme. Progressing through the Fourth and Fifth Amendments, he said: "though not always in precisely the same terminology, the Court has made obligatory on the States ... the Eighth's ban on cruel and unusual punishment." 176 At that point, there was a footnote citing Robinson.

Then, in Malloy v. Hogan, 378 U.S. 6 (1963), when Mr. Justice Brennan delivered the opinion of the Court, he included an extensive footnote concerning the Eighth Amendment. Following a citation of Gideon v. Wainwright, 373 U.S. 342 (1962), he recommended:

See also Robinson v. California, 370 U.S. 660 (1962), which despite In re Kemmler, 136 U.S. 436; McElvaine v. Brush, 142 U.S. 155; O'Neil v. Vermont, 144 U.S. 323, made applicable to the States the Eighth Amendment's ban on cruel and unusual punishments. 177

Next, in Griswold v. Connecticut, 381 U.S. 488(1964), Mr. Justice Goldberg, joined by Chief Justice Warren and Mr. Justice Brennan, wrote a separate concurring opinion which noted Robinson as precedent for the application of the Eighth Amendment.

This Court, in a series of decisions, has held that the Fourteenth Amendment absorbs and applies to the States those specifics of the first eight amendments which express fundamental personal rights.

Again, Mr. Justice Goldberg concurred in a separate opinion in Pointer v. Texas, 380 U.S. 412(1964), which cited Robinson to explain that "the Eighth Amendment's prohibition of cruel and unusual punishments" 179 was one of "the Fourteenth Amendment guarantees against infringement by the States." 180

Recently, the Supreme Court case, Duncan v. Louisiana, 391 U.S. 145(1968), contained a footnote which relegated the significance of Robinson to striving for incorporation. Commenting upon the novelty of the cases which accomplished the incorporation, the reference observed that "recent cases applying provisions of the first eight Amendments to the States represent a new approach to the 'incorporation' debate." 181

Following were three lower federal court cases which stated that Robinson had brought the cruel and unusual punishment clause

180 Ibid.
of the Eighth Amendment to the states through the due process clause of the Fourteenth Amendment. Two of these were Hobson v. Hansen, 269 F. Supp. 401 (1967), a school integration suit, and Green v. Board of Elections of the City of New York, 380 F. 2d 445 (1967).

Also, in the case of U.S. ex rel. Bruno v. Herold, 410 F. 2d 1088 (1969), the emphasis continued to be placed on the extension of the Bill of Rights to the states. Although a status issue was involved in the petition for a writ of habeas corpus filed on behalf of an inmate of the Dannemora State Hospital, Dannemora, New York, the citation of Robinson was a footnote about its role in incorporating the Eighth Amendment. 182

In addition to the extension of the Eighth Amendment, the development of the scope of its provisions has been encouraged through cases which have relied on Robinson. The prohibition against denial of bail has been read into the prohibition against excessive bail. However, the application of the Robinson ruling has not reversed any opinions of that kind.

U.S. ex rel. Privitera v. Kross, 239 F. Supp. 118 (1965), contained a ruling by District Judge Weinfeld of the Southern District of New York, which held that it was not cruel and unusual to

impose excessive bail with imprisonment as an alternative if the accused were unable to raise the amount. 183

Kelly v. Schoonfield, 285 F. Supp. 732(1968), was an action by city jail prisoners who alleged that "confinement for nonpayment of fines and costs was unconstitutional." 184 However, the Maryland District Court held that the statutes which provided for the confinement were constitutional. 185 Furthermore, in an unusual commentary on the meaning of Robinson, the Court observed that the prisoners had committed crimes; and, they were not diseased. 186

U.S. ex rel. Siegel v. Follette, 290 F. Supp. 632(1968), was a group of "petitions for habeas corpus seeking release from state prison pending appeal of convictions." 187 The petitions were denied on the grounds that the "burden of presenting facts to support a finding of arbitrary denial of bail" 188 was not met. The opinion did state that the right to bail should be respected to the extent that the Eighth Amendment had been made relevant to the states by Robinson. 189

Besides cases which extended the prohibitions against levying excessive bail and excessive fines, there have been cases which

185 Ibid., 733. 186 Ibid., 735.
188 Ibid., 635. 189 Ibid.
presented particular instances of punishment that were said to be cruel and unusual. Irregularities in court procedures and in sentencing were protested.

The case of U.S. ex rel. Kaganovitch v. Wilkins, 305 F. 2d 715(1962), held that the Eighth Amendment prohibition against cruel and unusual punishments was applicable to the states. Nevertheless, the Court of Appeals affirmed a district court denial of a writ of habeas corpus; because, the defendant had not applied to the Supreme Court for certiorari to review the state court decisions.


Then, two 1963 cases applied Robinson to determine that unfair punishments had not been invoked. U.S. v. Hendrick, 218 F. Supp. 293(1963), stated that the punishment had not been disproportionate to the offense. Hyser v. Reed, 318 F. 2d 224(1963), held that parole had not been revoked unjustly.

Both Gideon and Robinson were applied to Perkins v. State of North Carolina, 234 F. Supp. 333(1964); Perkins was ordered "released within 60 days unless the State should elect to try him again."

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190 U.S. ex rel. Kaganovitch v. Wilkins, 305 F. 2d 715(1962)
191 Ibid.
A second 1964 habeas corpus proceeding, Goss v. Bomar, 337 F. 2d 341(1964), was not successful. The petitioner had not exhausted his state remedies. Nevertheless, the appropriateness of raising the issue of whether a "life sentence without possibility of parole under the Tennessee Habitual Criminal Statute violated the Eighth Amendment to the federal Constitution" was shown to be free of doubt left by Graham v. West Virginia, 224 U.S. 616 (1912), as a result of the action taken in Robinson.

Also accepting the Supreme Court decision as precedent, the case of U.S. ex rel. Hetenyi v. Wilkins, 348 F. 2d 844(1965), granted an appeal for a habeas corpus proceeding under civil remedy proceedings.

However, in Sturm v. California Adult Authority, 395 F. 2d 446(1967), the court affirmed a lower court ruling against granting a writ of habeas corpus. The California Adult Authority was said to have exclusive jurisdiction to decide the length of time to be served when indeterminate sentences had been ordered.

A particular form of punishment has been said to be prohibited by Robinson. That is the death penalty. It was the primary issue in four cases between 1962 and 1970 which cited the Eighth Amendment. Although the death penalty was not removed from use, it has been threatened by the prohibition against cruel and unusual punishment.

195 Ibid., 342.
Whether the Eighth Amendment applied to the death penalty was asked in Rudolph v. Alabama, 375 U.S. 889 (1963). The Court denied certiorari; although, Mr. Justice Goldberg, who was joined by Justices Douglas and Brennan, dissented vigorously.

Citing Weems v. U.S., 217 U.S. 89 (1909), and referring to Robinson, the justices asked: "does the imposition of the death penalty for rape constitute 'unnecessary cruelty'?"196 The question followed another:

Can the permissible aims of punishment (e.g., deterrence, isolation, rehabilitation) be achieved as effectively by punishing rape less severely than by death (e.g., by life imprisonment) ... 197

Repeating the same question, Jackson v. Dickson, 325 F. 2d 575 (1963), decided December 30, two months after Rudolph, also affirmed the imposition of the death penalty for a person found responsible not only for rape, but also for murder. 198 However, in the opinion, Judge Duniway speculated "that if anything in the Constitution forbids the penalty, it must be the Eighth Amendment." 199 The reasoning was directed away from the death penalty to the question of status.

Does the imposition of the death penalty under these circumstances constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments? Jackson asserts that it does. His primary reliance is on Robinson v. California, 370 U.S. 660 ... The State of California did not sen-

197 Ibid.
199 Ibid., 575.
tence Jackson to death because he was mentally ill. It sentenced him for murder.200

Again, in Bell v. Patterson, 279 F. Supp. 760(1968), the death penalty was not held to be cruel and unusual punishment. However, the applicability of Robinson to the issue was credited.

Finally, the most recent example of a case which raised the issue of the death penalty was settled in the manner in which the earlier ones were decided. In Sims v. Eyman, 405 F. 2d 439 (1969), the opinion was that under current law, the death penalty was not cruel and unusual punishment.201

Similar to the cases which challenged unfair sentences, there have been others which have been lodged by inmates seeking to remedy prison conditions and treatment employed. In most of the cases of this nature between 1962 and 1970, the convicted have rejected particular regulations and codes practiced by prison officials.

Two cases decided in the United States District Court for the Northern District of Illinois, Eastern Division, by Judge Will immediately asserted the Robinson findings. In Redding v. Pate, 220 F. Supp. 124(1963), the opinion commented upon alleged "intentional deprivation of essential medical care."202

The alleged facts probably constitute cruel and unusual punishment within the meaning of the Eighth Amendment. In light of this, it is perhaps fair to assume that Judge Lindley did not rely on the Eighth Amendment because as the law stood

then(1948), the Supreme Court had never, in so many words, sanctioned its application to the States.\textsuperscript{203}

Generously viewing the parameters of \textit{Robinson}, Judge Will said that "the cases make it clear that the concept of 'cruel and unusual punishment' is broad and elastic."\textsuperscript{204}

Again, quoting Mr. Justice Douglas, in \textit{U.S. ex rel. Hancock v. Pate}, 223 F. Supp. 202(1963), Judge Will asked whether "the use of the sanction against a prisoner who acted in self-defense, to borrow language from Mr. Justice Douglas, was a punishment out of all proportion to the offense so as to bring it within the ban against cruel and unusual punishment?"\textsuperscript{205}

However, the Tenth Circuit decision of \textit{Kostal v. Tinsley}, 337 F. 2d 845(1964), did not so broadly interpret \textit{Robinson}. Placing a prisoner in solitary confinement after he had attempted to escape was not considered to be cruel and unusual punishment.\textsuperscript{206}

A year later, an Arkansas District Court from the Eastern District, Pine Bluff Division, in \textit{Talley v. Stephens}, 247 F. Supp. 687(1965), did grant an "injunction restraining authorities"\textsuperscript{207} from the use of "corporal punishment"\textsuperscript{208} "an infliction of cruel and unusual punishment."\textsuperscript{209}

\begin{footnotes}
\textsuperscript{203} \textit{Ibid.}, 127. \textsuperscript{204} \textit{Ibid.}.
\textsuperscript{206} \textit{Kostal v. Tinsley}, 337 F. 2d 845(1964).
\textsuperscript{208} \textit{Ibid.} \textsuperscript{209} \textit{Ibid.}, 687.
\end{footnotes}
In Landman v. Peyton, 370 F. 2d 135(1966), the United States Court of Appeals for the Fourth Circuit affirmed a decision by the Eastern District of Virginia at Richmond. Supporting the "use of tear gas approximately 12 to 15 times in the course of a year in a Virginia prison," Judges Haynsworth, Sobeloff and Bryan ruled that these were legitimate exercises of disciplinary authority. The placement of prisoner Landman "in solitary confinement for violation of a regulation prohibiting inmates against using, for scrap, legal papers supplied by the penitentiary" was permissible, too.

Wright v. McMann, 257 F. Supp. 739(1966); 387 F. 2d 519 (1967), another prisoner's motion protesting solitary confinement, was dismissed first on defendant's motion. Then, the Civil Rights action was reversed and remanded in a later 1967 appeal. The Robinson principle was reinforced by an earlier citation from Trop v. Dulles, 356 U.S. 86(1958): "The Eighth Amendment forbids treatment so foul, so inhuman and so violative of basic concepts of decency."

Also directed against the practice of solitary confinement

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211 Ibid.
213 Wright v. McMann, 387 F. 2d 520(1967).
214 Ibid., 526.

Emerging from the Eastern District of Arkansas where Talley v. Stephens, 247 F. Supp. 845(1964), had secured an injunction against corporal punishment, Jackson v. Bishop, 268 F. Supp. 804(1967), was another case requesting that prison officials be ordered to desist from physically abusing prisoners. Although Robinson was cited, Judges Oren Harris and Gordon E. Young doubted that the use of the strap would be cruel and unusual punishment. In order to remove the possibility of a misuse of the punishment, the judges devised an elaborate procedure requiring administrative review.216

Then, in 1968, the tendency to acknowledge the Eighth Amendment, but to deny that any action involving a petitioner had been cruel and unusual punishment, continued in Konigsberg v. Ciccone, 285 F. Supp. 5(1968).

Treatment of prisoner in a medical center, including alleged beating when he resisted search of his person, his confinement to strip cell, and inspection of his person for contraband by nonmedical administrative persons, did not constitute cruel and inhuman punishment.217

However, the prisoner was granted the right to attend Jewish religious services. 218

The second 1968 case against prison officials, Burns v. Swenson, 288 F. Supp. 4(1968), was a hearing of a number of complaints by prisoners in a maximum security unit. The grievances concerning abridgment of constitutional rights were ordered to be resubmitted through revised standards of the Missouri department of corrections. 219

Occurring a third time in 1969, the case of Holt v. Sarver, 330 F. Supp. 825(1969), was an action by state prisoners in the Eastern District of Arkansas who claimed that solitary confinement and substandard cells were in violation of constitutional rights. An order granting declaratory judgment and injunctive relief was based on Robinson. The punishment was measured against "concepts of decency and human dignity and precepts of civilizations which Americans profess to possess." 220

Also protesting the use of solitary confinement, Hancock v. Avery, 301 F. Supp. 786(1969), established that it was cruel and unusual to ignore "the fundamental concepts of decency." 221

Quoting Robinson in the text, the case reaffirmed the applicability of the Eighth Amendment prohibition against cruel and unusual punishment to solitary confinement.

In a special area of complaints from prison inmates were those alleging racially-motivated punishment. Two cases protested actions in Alabama prisons.

Washington v. Lee, 263 F. Supp. 327(1966), granted "declaratory and injunctive relief concerning racial segregation in the state penal system and in county, city and town jails."\(^{222}\)

Beard v. Lee, 396 F. 2d 749(1968), upheld an allegation of cruel and unusual punishment on racial grounds.\(^{223}\) The case considered Robinson in its finding.

Throughout the cases which extended the scope of Robinson, there have been issues concerned with the provisions of the Eighth Amendment. The ramifications of these cases have been decisions about the prohibitions of the Eighth Amendment and about the possible implications of those prohibitions. Although inconsistent, the opinions of the federal courts have stretched the cruel and unusual punishments clause to include excessive bail and fines, unfair sentencing procedures, and harsh prison conditions. There has been indication that even the death penalty may come to be considered within the prohibition against cruel and unusual punishments.

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\(^{223}\)Beard v. Lee, 396 F. 2d 749(1968).
IV
CONCLUSIONS ABOUT FEDERAL COURT PERCEPTION
AND INTERPRETATION OF ROBINSON

In contrast to its broad scope and diverse ramifications, Robinson has been interpreted narrowly in the federal courts between 1962 and 1970. Rather than seeking ways to bring the decision to comparable questions before them, justices in both federal district and circuit courts of appeals have shown reluctance even to accept the principle that a state law which punishes status is unconstitutional.

An explanation for the response by the federal court system to Robinson has resulted from observation of the 349 federal and state court cases which have cited the Supreme Court decision. The opinions have reflected especially close reading of the entire majority opinion of the Supreme Court and of the concurring opinion of Mr. Justice Douglas.

In the opinion of the Court, the new application of the Eighth Amendment prohibition against cruel and unusual punishment was balanced by reassurance that state's rights were not infringed. The right to penalize unwanted behavior was established before the protection of status was imposed. These provisions for exceptions to the decision were central to the reasoning. Later courts
utilized the alternatives to the holding to evade the fundamental principle of Robinson.

Furthermore, Mr. Justice Douglas' concurring opinion was frequently quoted. Seized enthusiastically by sponsors of rehabilitation who condemned prison terms for persons convicted of crimes of status, the text also was lamented by advocates of severe penalties for criminals. While the opinion apparently was written to insure the humane attitude of courts toward man in whatever condition he was, the dramatic presentation was thought by law enforcement advocates to be "brimful of what Learned Hand once called the 'watery sentiment that obstructs, delays and defeats the prosecution of crime.'"\textsuperscript{224}

Consequently, the roots of the later decisions which perceived and interpreted Robinson have been drawn from the Supreme Court decision itself. It is possible that the development of the case and its influence have recorded correctly the sentiments of the eight Supreme Court justices who manifested the national feeling at that time. Reflecting the need to press the Eighth Amendment into current service, the justices also indicated the hesitancy of conservative factions to push the new understanding too far and too soon. Therefore, the impact on later cases has mirrored the guarded, ambivalent ruling in the Supreme Court.

From the earliest stages in the California state courts, the question of the appropriateness of the Eighth Amendment had been raised carefully. That caution permitted flexibility which has weakened substantially the force of **Robinson**. Through procedural and subtle, diversionary methods, the lower federal court judges have avoided reaching decisions which supported or enlarged the Supreme Court decision.

Generally, procedural tactics have been used to refuse to hear petitions for writs of habeas corpus submitted by prisoners serving convictions for laws similar to the California statute, Section 11721 of the California Health and Safety Code, or for pre-

**Robinson** sentences for violation of that very law.

Those cases have not been decided on the merits of the issue raised, but on the more basic question of standing in the federal court system. Opinions which declared that the petitioners had not exhausted their state court remedies have frustrated the progress of the law with respect to crimes of status.

In addition to procedural grounds, the decisions have been reached often in terms of the protective role of the federal courts toward the state courts. Justice Stewart's concluding statement in the majority opinion has prompted the federal court judges in two cases, at least. Connecticut and Louisiana statutes which punished addiction have not been considered to be affected by the "individ-
ual provision of a particularized local law as it has so far been interpreted by the California courts."\textsuperscript{225}

Also, confinement of Robinson has been accomplished through reasoning about the actions performed instead of the condition of the person. Weighed against a charge of a brutal physical act, a plea for not sentencing on the basis of involuntary status has been inconsequential.

Mentioned in connection with Mr. Justice Douglas' opinion, an alternative approach to the dilemma of involuntary status and criminal action has been the use of rehabilitative measures for the convicted. Instead of punishing wrong behavior, some of the lower court justices have ordered treatment of the persons through sentences in hospitals. Through cooperation of the medical profession, expert testimony has been introduced to show that the accused were incompetent.

Handling status issues by passing the responsibility for judging to physicians has not been successful in all cases, however. Some of the persons who had been treated more humanely by being confined in mental institutions have sought legal aid to be transferred to penal institutions. Although the public may have been convinced that spending time in a hospital was an example of progressive jurisprudence, the recipients of that theory have not been fooled.

\textsuperscript{225}Robinson v. California, 370 U.S. 668(1962).
Lon L. Fuller, in *Anatomy of the Law*, revealed the faulty assumption made by judges who have given opinions which have rendered men ill rather than wrong.

Do men in fact feel less shame in being formally declared to be functioning badly than they do in being found to have broken the rules? One perceptive observer has remarked that it is more of an affront to human dignity to subject a man to compulsory improvement than it is to punish him.226

When the federal court justices have written opinions which purportedly did not punish status, but assigned indeterminate confinement in institutions, they have been employing the "variety of valid forms,"227 which included "a program of compulsory treatment"228 that "might require periods of involuntary confinement,"229 outlined by Mr. Justice Stewart.

That "penal sanctions might be imposed for failure to comply with established compulsory treatment procedure"230 has been a suggestion followed by federal courts, also. Construing petitions from persons sentenced originally under unconstitutional laws to be invalid because of violations of probation has been questionable, but not challenged, however.

Another example of the variations in dealing with Robinson has been the stressing of the duty of Congress to repeal laws and to rewrite old ones when necessary. The possible cruelty

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228Ibid., 665.  229Ibid.  230Ibid.
of sentencing a mother of minor, dependent children to five years in prison for a first offense in a narcotics arrest has been rationalized by a court which said that its duty is to administer the laws that Congress has written in the Narcotic Control Act. Robinson has not been accepted as an overriding principle.

Whenever an alternative to freeing a person accused of a crime of status has been visible, the federal courts have taken that option. The basis for their ingenuity has been the majority opinion and the concurring opinion of Mr. Justice Douglas. Awareness of possible rejection by later courts and by the people in general caused the five justices to agree on an extensively reasoned decision. Mr. Justice Douglas tried to reinforce that opinion.

Having anticipated the objections, the Supreme Court justices prepared complex opinions with explicit ways to escape the simple rule of Robinson. Through this study of decisional impact and constitutional development, it has been indicated that greater adherence to the Eighth Amendment prohibition against cruel and unusual punishment would have been necessary to consistent federal and state court decisions since 1962 in cases involving questions of status if Robinson had been less conciliatory and more direct.

In conclusion, the Robinson case has been a means by which the complex system of interaction among the United States courts has been explored. By following one case from its beginning in
the state and federal courts through its decision in the Supreme Court and impact on lower federal and state courts, the process of interpretation, growth and reinterpretation of the Eighth Amendment has been observed.

The study has emphasized that one Supreme Court decision is neither the first nor the last opinion on a contemporary issue before the nation. The research has shown that legal decision-making involves reaction to precedent as well as action on new problems in a vital communication between the judges, who are formulating opinions, and the people within this constitutional government.
V

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APPROVAL SHEET

The thesis submitted by Mary Anne Ross Jones has been read and approved by the director of the thesis. Furthermore, the final copies have been examined by the director and the signature which appears below verifies the fact that any necessary changes have been incorporated, and that the thesis is now given final approval with reference to content and form.

The thesis is therefore accepted in partial fulfillment of the requirements for the degree of Master of Arts.

14 May 1970

Date

Signature of Adviser