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suicide. The same court went on to state that, in the absence of a suicide-attempt criminal statute, the patient refusing treatment could be free from all criminal conduct. Therefore, in a jurisdiction with a statute prohibiting the aiding of suicide, but with no statute against the attempt, a physician could be subject to arrest; while the patient who requested the euthanasia is free from such a threat. It would appear the physician would be subject to criminal charges, in those jurisdictions prohibiting the attempt or aiding of a suicide, regardless of the criminal status of the patient. In the future, states which desire to legalize euthanasia not only must release physicians from homicide liability, but also from liability extending from criminal suicide-aiding laws; in order to avoid a catastrophic conflict.

CONCLUSION

The criminal laws concerning the suicide act and attempt have never been numerous, while those prohibiting the aiding of suicide are more widespread. In recent years, at least four states have abolished the suicide act and attempt as crimes.[49] In the few states retaining such violations, there have been no recent prosecutions for these crimes. Granted the mental state of many suicides, it would be doubtful whether the danger of criminal liability would be an effective deterrent. However, the laws concerning aid to suicides do punish conduct which is not in the public interest and, as such, these laws should be retained and not removed; as, for the most part, the laws dealing with the suicide act and attempt have been.

DONALD M. WRIGHT

Ravin v. State: Marijuana Use in the Home Protected by Right of Privacy

INTRODUCTION

The Supreme Court of Alaska recently announced a progressive, enlightened and unprecedented ruling in *Ravin v. State*.[1] The extensive well-written opinion, declaring that possession and use of marijuana in the home by adults is protected by the constitutional right of privacy, is a vanguard among the cases in which the right of privacy has been

49. New Jersey, North Carolina, North Dakota and South Dakota.

1. 537 P.2d 494 (Alas. Sup. Ct. 1975).

argued, heretofore unsuccessfully. The Alaska court is the first court in the nation to rule on the constitutional arguments which underlie the use and possession of marijuana in the home.

It is becoming increasingly apparent that the trend of public opinion and policy favors dissolving the prohibition of marijuana. Recent tests of independent medical associations and reports of various organizations indicate that the state may not have a compelling interest to protect society or the individual from a natural substance which has less potential for harm than alcohol.

Ravin, the petitioner, attacked the constitutionality of Alaska's statute prohibiting possession of marijuana by asserting, *inter alia*, that the State had violated his right to privacy under both the federal and Alaska constitutions. Petitioner contended that his constitutionally protected right to privacy compels the conclusion that the State of Alaska is prohibited from penalizing the private possession and use of marijuana.

Ravin contended that there exists under the federal and Alaska constitutions a fundamental right to privacy, the scope of which is sufficiently broad to encompass and protect the possession of marijuana for personal use. Given this fundamental constitutional right, the State would then have the burden of demonstrating a compelling state interest in prohibiting possession of marijuana. Petitioner further argued that the evidence demonstrates that marijuana is a relatively innocuous substance, particularly as compared with other less-restricted substances (e.g. alcohol), and nothing even approaching a compelling state interest was proven by the State.[2] Ravin urged the court to recognize that whatever harm resulting from marijuana use is far outweighed by the negative aspects of enforcement. He noted that while over 400,000 persons were arrested for marijuana related crimes in 1973, 81% of them had no previous criminal records.[3]

The Alaska court traced the constitutional origins of the right to privacy by reviewing the United States Supreme Court cases which have shaped a fundamental constitutional right of privacy which had not been enumerated by the framers of the Constitution: *Griswold v. Connecticut*,[4] a modern recognition of the existence of "zones of privacy;" *Stanley v. Georgia*,[5] a reaffirmation that "a man's home is his castle;" *Paris Adult Theatre I v. Slaton*;[6] an emphatic statement that the protection afforded by *Stanley* was restricted to the home; and *Roe v. Wade*,[7] where the right to privacy was based on the right to personal

2. *Id.* at 497.
3. *Id.* at 508.
4. 381 U.S. 479 (1965).
5. 394 U.S. 557 (1969).
6. 413 U.S. 49 (1973).
7. 410 U.S. 113 (1973).

autonomy. The Alaska court then discussed the recent amendment to the Alaska Constitution, which placed the right of privacy among the specifically enumerated rights.[8] The privacy amendment was intended to give recognition and protection to the home which has a special significance in Alaska. This was an important element in the court's reasoning used in reaching its conclusion.

The court examined the cases in other jurisdictions which have considered the privacy argument,[9] and the Supreme Court holdings which involve the sanctity of the home.[10] It concluded that the citizens of the State of Alaska have a basic right to privacy in their homes under Alaska's constitution. This right to privacy would encompass the possession and ingestion of substances such as marijuana in a purely personal, non-commercial context in the home unless the State could meet its substantial burden and show that proscription of possession of marijuana in the home is supportable by achievement of a legitimate state interest.[11]

The Alaska court also examined extensive evidence, consisting of expert witnesses familiar with various medical and social aspects of marijuana use and numerous written reports and books.[12] It found that there is no firm evidence that marijuana, as presently used in this country, is generally a danger to the user or to others, but added that neither is there conclusive evidence that it is harmless.[13] The court concluded from the evidence presented that, although the state has a legitimate concern with avoiding the spread of marijuana use to adolescents, as well as a legitimate concern with the problem of driving under the influence of marijuana, these interests are insufficient to justify intrustions into the rights of adults in the privacy of their own homes.[14]

The Alaska court strictly qualified its opinion by stating that neither the federal nor Alaska constitution affords protection for the buying or selling of marijuana, nor absolute protection for its use or possession in public. Also unprotected is possession at home of amounts of marijuana indicative of intent to sell rather than just for personal use.[15] The court also wished to make it clear that they were not condoning the use of marijuana in conjunction with its holding that possession of

8. Alas. Const. Art. I § 22. "The right of the people to privacy is recognized and shall not be infringed."
9. 537 P.2d at 501-502.
10. *Id.* at 503-504.
11. *Id.* at 504.
12. *Id.* at 504, n.43.
13. *Id.* at 508.
14. *Id.* at 511.
15. *Id.*

marijuana by adults at home for personal use is constitutionally protected.[16]

BACKGROUND

The broad basis for the Alaska Supreme Court's decision in *Ravin v. State* is founded on the United States Supreme Court's pronouncements on the right of privacy which initiated with *Griswold v. Connecticut*.[17] The subsequent decisions expanded this concept in two lines of cases: one involving the right of privacy in the home, and the other concerning the right of privacy for the individual. A review of these major cases will provide an insight to the Alaska court's rationale in *Ravin*.

RIGHT OF PRIVACY IN THE HOME

In *Griswold*, the Supreme Court struck down as unconstitutional, a state statute which barred the dispensation of birth control information to married persons. The Court concluded that because of the nature of the intimate marital relationship and the sanctity of the home, state intrusion to enforce the statute was unwarranted. The United States Supreme Court first recognized the existence of constitutional zones of privacy in this case.

Four years later, the Supreme Court, in *Stanley v. Georgia*,[18] combined the concept of the privacy of the home, derived from *Griswold*, with peripheral first amendment rights to invalidate a state statute that prohibited possession of obscene materials in one's own home.

Although the Court had held previously that obscenity is not protected by the first amendment,[19] *Stanley* did not disturb this holding. In *Stanley*, however, the distinction between commercial distribution of obscene matter and the private enjoyment of it at home was the deciding factor; and the Court emphasized that the right involved in viewing obscenity takes on an added dimension when done in the privacy of the home.[20]

The *Stanley* holding was subsequently refined by the companion cases of *Paris Adult Theatre I v. Slaton*[21] and *United States v. Orito*,[22] two cases involving commercial obscenity. The Supreme Court explicity rejected the comparison of a theater to a home in *Paris Adult Theatre I*, and found a legitimate state interest in regulating the use of obscene

16. *Id.*
17. 381 U.S. 479 (1965).
18. 394 U.S. 557 (1969).
19. *See*, Roth v. U.S., 354 U.S. 476 (1957).
20. 394 U.S. at 564.
21. 413 U.S. 49 (1973).
22. 413 U.S. 139 (1973).

matter in local commerce and places of public accommodation. Mr. Chief Justice Burger, speaking for the Court, stated that the privacy right encompasses and protects the personal intimacies of the home and that *Stanley v. Georgia*, which was decided on this basis ". . . was hardly more than a reaffirmation that 'a man's home is his castle.' "[23]

The fact that Stanley's activities took place in the privacy of his home is the reason for the added dimension in the case, the Supreme Court noted. They also pointed out that there exists a "myriad" of activities which may be lawfully conducted in the privacy and confines of the home, but may be prohibited in public.[24] The added dimension was also present, not only because the home is a particularly intimate locus of activity; but also because the activities involved implicate individuals' "beliefs, their thoughts, their emotions and their sensations," focal values of the "right to be let alone."[25]

RIGHT OF PRIVACY FOR THE INDIVIDUAL

While *Stanley v. Georgia* and *Paris Adult Theatre I v. Slaton* focused on the home as the locus where protected activity may occur; *Eisenstadt v. Baird*[26] and *Roe v. Wade*[27] developed another of *Griswold*'s primary themes—the right of personal autonomy. In these cases, the Supreme Court had to decide whether the Constitution protected the individual's ability to make a decision crucial to his or her personal life, and whether the State could limit that ability.[28]

In *Eisenstadt v. Baird*, the Supreme Court held that Massachusetts' statute permitting married persons to obtain contraceptives to prevent pregnancy, but prohibiting distribution of contraceptives to single persons for that purpose violates equal protection. The Court, after discussing the right of privacy in *Griswold*, emphatically said that ". . . if the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or begat a child."[29]

The Supreme Court held in *Roe v. Wade*, that the Texas criminal abortion statutes prohibiting abortions at any stage of pregnancy except

23. 413 U.S. at 66.
24. United States v. Orito, 413 U.S. 139, 142-143 (1973).
25. 394 U.S. at 564. The Court quoting with approval the famous dissent of Justice Brandeis in Olmstead v. United States, 277 U.S. 438, 478 (1928).
26. 405 U.S. 438 (1972).
27. 413 U.S. 49 (1973).
28. Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U.L. REV. 670, 693 (1973).
29. 405 U.S. at 453.

to save the life of the mother are unconstitutional. In the discussion of the right of privacy, it was found that the right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. Only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" are included in this guarantee of personal privacy. The Court concluded that this right of privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[30]

Mr. Justice Douglas, in his concurring opinion in *Roe*, further explained what the right of privacy includes:

> . . . a catalogue of these rights includes customary, traditional, and time-honored rights, amenities, privileges, and immunities that come within the sweep of the 'Blessings of Liberty' mentioned in the preamble to the Constitution. Many of them, in my view, come within the meaning of the term 'liberty' as used in the Fourteenth Amendment.
>
> *First is the autonomous control over the development and expression of one's intellect, interests, tastes, and personality.* These are rights protected by the First Amendment and in my view absolute.[31] [Emphasis original]

In the context of these cases, the essence of privacy is the notion that certain basic decisions about how one will conduct his or her life—whether on a day-to-day basis or in a long-term sense—are reserved to the individual. If the state wishes to place restrictions on these decisions, it must show a compelling interest in relation to its police powers to do so.

TESTS USED TO DETERMINE WHETHER AN INTEREST IS PROTECTED

The cases which have been previously discussed, point out a two-pronged approach to use in viewing the right of privacy—first, that an illegal activity may be protected when unwarranted state enforcement of the prohibited activity would be an encroachment of the fundamental right of privacy attached to the home; and second, the state must have a compelling interest when intruding into personal decisions which comprise the constitutionally protected personal autonomy of the individual. Several tests have been established by the Supreme Court and suggested by others which aid in the determination of whether the concept of the right of privacy is broad enough to protect a particular interest—such as possession and use of marijuana in the home.

The fundamental rights test is frequently used, and was first adopted

30. 410 U.S. at 153.
31. *Id.* at 210-11.

to facilitate analysis of equal protection claims, excluding all but rights which were deemed "fundamental."[32] The Supreme Court has already identified in various cases a group of rights labeled as privacy rights. The Court has denominated these rights as "fundamental" or "implicit in the concept of ordered liberty."[33] Under this test, only rights which were classified as fundamental could claim any measure of constitutional protection, and rights not labeled as such were thereby excluded.

The inherent ambiguity of the fundamentality test created problems, since few human activities are definitely fundamental or nonfundamental. Such a standard is necessarily vague, and the classification of a right as fundamental or not is virtually outcome-determinative.[34]

If a court determines that a privacy right is fundamental, the state should have to show that its infringement is necessary to promote a compelling governmental interest. As stated by the United States Supreme Court: "Where there is a significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest which is compelling."[35]

The "rational basis" test is ordinarily applied when governmental action interferes with an individual's freedom in an area which is not characterized as fundamental. This test is not as stringent as the fundamentality test. In such cases it is necessary to determine whether the legislative enactment has a reasonable relationship to a legitimate governmental purpose.[36]

The current Supreme Court apparently has found the dichotomous approach of the fundamentality test unworkable and has been reaching for some middle ground. When a state classification has impinged on certain nonfundamental personal interests, the Court has applied the lower level rational-basis test more rigorously, examining whether the classification does in fact promote a legitimate state end.[37]

In *Roe v. Wade*,[38] Justice Blackmun took a broad view of what constitutes precedent for finding the right of privacy. Using the Supreme Court cases which have involved privacy rights, Blackmun has sketched a sphere of constitutionally protected rights, involving contraception, home, family and the rearing of children.[39] He suggests that the underlying concerns of these cases should be consulted, rather than the specific

32. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60-63.
33. Derived from Palko v. Connecticut, 302 U.S. 319, 325 (1937), cited in Roe v. Wade, 410 U.S. 113, 152-53 (1973).
34. 48 N.Y.U.L. REV. at 702.
35. 410 U.S. at 155.
36. 537 P.2d at 497.
37. Eisenstadt v. Baird, 405 U.S. 438.
38. 410 U.S. 113 (1973).
39. 48 N.Y.U.L. Rev. at 704.

holdings, when a privacy argument is advanced. In particular, does the claimed right depend on values deemed important in those cases? Does it commonly involve the home? Does it concern values associated with the home, such as seclusion, intimacy or the pleasures of associating with family or close friends? Is it a right of personal autonomy? More particularly, does it involve autonomous decisions that shape an individual's personal life, whether in a long-term or short-term sense?[40] Questions of this nature should always be asked when attempting to determine whether a particular interest is constitutionally protected.

Another suggested test states that if a plaintiff or defendant can show that the statute involved will not in fact promote evident and legitimate state interests, the burden should be shifted to the state to identify its legitimate interests, or to show that there is good reason to believe that the measure will in fact achieve its intended purpose. To determine whether the means chosen by the state are rationally related in fact to the realization of a legitimate end, the court should use the "means test."[41] The Alaska court used a variation of this test in *Ravin.*

All of these tests present guidelines which a court can use in determining whether a particular interest should be protected by the right of privacy.

THE RIGHT TO POSSESS MARIJUANA IN THE HOME

The similarity of possession and use of marijuana in the privacy of the home and the possession of obscene matter in the home which was involved in *Stanley v. Georgia,*[42] leads to an analysis of whether the nature of the use of marijuana is such that would serve as a compelling state interest to intrude into the privacy of the home to enforce the prohibition against its use.

If an individual uses marijuana in his own home, his activity closely resembles the conduct protected in *Stanley.* Although smoking marijuana is not the same as viewing obscenity, The Supreme Court has emphatically asserted that *Stanley* has nothing to do with the first amendment.[43] *Stanley* traces the distinction between commercial and private personal use and should be viewed as a supplement to the fourth amendment, giving added protection to the values of seclusion and repose centered around the home. Therefore, if *Stanley* protects a qualified right to engage in activity in the privacy of one's home legally, which would be illegal if performed elsewhere; the right to use marijuana in such a manner should also, logically, be protected.

40. *Id.*
41. 48 N.Y.U.L. REV. at 705.
42. 394 U.S. 557 (1969).
43. *See,* United States v. 12 200-Ft. Reels of Super 8 MM Film, 413,126 (1973).

While the use of marijuana does not appear to be connected to notions of family planning and homelife, the subject matter of some of the major privacy decisions; it is connected with the ability to set one's own lifestyle, which is associated with the right of personal autonomy.

> Furthermore, when a "consenting adult" uses marijuana only to alter his own consciousness and does not engage in antisocial behavior, he indulges in autonomous conduct that does not affect others. In such a situation, attention should be paid to the state's interest in interfering with his conduct, to see if it is rationally related in fact to a valid public purpose.[44]

A survey of the law in other jurisdictions demonstrates that there is some concurrence with Alaska's finding that the right of privacy which surrounds the home is broad enough to protect the use of marijuana in the home.

The Hawaii Supreme Court decided in *State v. Kanter*,[45] that a legislative classification of marijuana as a "narcotic" was rational and did not violate equal protection standards. However, two of the justices wrote opinions which discussed the right to privacy. Justice Abe asserted that a person does have a right to smoke marijuana, derived from the "fundamental right of liberty to make a fool of himself." Abe continued in a more serious vein that marijuana might be harmful to the user, but the state could not prohibit its use in the home without showing harm to the general public.[46]

Justice Levinson, in his dissent, found that the right to privacy "guarntees to the individual the full measure of control over his own personality consistent with the security of himself and others."[47] The experiences generated by the use of marijuana are mental in nature, he explained, and thus among the most personal and private experiences possible. So long as conduct does not produce detrimental results, the right of privacy protects the individual's conduct designed to affect these inner areas of the personality. Levinson concluded that the State had failed to show any harm to the user or to others from the private, personal use of marijuana; so the statute infringed on the right to personal autonomy.

In *People v. Sinclair*,[48] a Michigan case, a conviction for possession of marijuana was overturned by a unanimous court, though not on the issue of right of privacy. Justice T. G. Kavanagh, rested his opinion on the basic right of the individual to be free from government intrusions.

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44. 48 N.Y.U.L. Rev. at 754.
45. 53 Haw. 327, 493 P.2d 306, *cert. denied*, 409 U.S. 948 (1972).
46. *Id.* at 336-37, 493 P.2d at 312.
47. *Id.* at 342, 493 P.2d at 315.
48. 387 Mich. 91, 194 N.W.2d 878 (1972).

He found the marijuana possession statute to be " . . . an impermissible intrusion on the fundamental rights to liberty and the pursuit of happiness, and is an unwarranted interference with the right to possess and use private property."[49] He noted the basic freedom of the individual to be free to do as he pleases so long as his actions do not interfere with the rights of his neighbor or of society. ". . . 'Big Brother' cannot, in the name of public health, dictate to anyone what he can eat or drink or smoke in the privacy of his own home."[50]

The Second Circuit recently handed down a decision affirming convictions for possession of two tons of marijuana with intent to distribute it, but intimated that they might be receptive to the argument by the proper party that the private possession and use of marijuana is protected by the right of privacy.[51] The Supreme Court of New Jersey has held that any prison sentence whatsoever imposed for first offense possession of marijuana for personal use should be suspended.[52]

The American Bar Association, National Conference of Commissioners on Uniform State Laws, National Advisory Commission on Criminal Justice Standards and Goals, and the Governing Board of the American Medical Association all have recommended decriminalization of possession of marijuana.[53] In 1973, Oregon adopted a civil penalty of up to $100 for a simple possession. Legislatures in Alaska, California, Colorado, Maine and Ohio passed civil penalty measures this year, indicating a trend toward decriminalization of simple possession of marijuana.[54]

SIGNIFICANCE OF THE CASE

The decision handed down in *Ravin v. State* is one which has no precedent in these United States. *Ravin* marked the first time that the highest court of any state has held that a person has a constitutionally guaranteed right to smoke marijuana in his own home. The Alaska Supreme Court has offered a model opinion, and has established concrete guidelines with which to challenge statutes, both federal and state, which arbitrarily prohibit simple possession and use of marijuana, even in the privacy of one's own home.

The petitioner Ravin has presented a successful argument, involving the right to privacy, which is in line with major Supreme Court cases using the same argument. The rationale of the Alaska court, upon which

49. 194 N.W.2d at 896.
50. *Id.*
51. United States v. Kiffer, 477 F.2d 349 (2d Cir. 1973) at 352.
52. State v. Ward, 57 N.J. 75, 270 A.2d 1 (1970).
53. Ravin v. State, 537 P.2d at 512.
54. Nelson, *Pot Smoking in Home Question on High Court Slate*, Durham Morning Herald, Sept. 11, 1975 at 22A.

its conclusion is based, was adequately substantiated by using the reasoning from pertinent Supreme Court opinions involving the right of privacy. The court expressed its disapproval of the tests which have been traditionally used to determine whether an interest should be protected from unwarranted governmental intrusion and devised a more workable test which requires a "close and substantial" means-end relationship.[55]

The recent amendment to Alaska's constitution, which specifically enumerated privacy as a fundamental right, especially in the situs of the home, gave the necessary impetus to the court's decision that the right of privacy is broad enough to protect simple possession and use of marijuana within the home. Since the decision dealt with the Alaska Constitution, and not the United States Constitution, it is, consequently, not subject to appeal to the Supreme Court.

The court stated that there were two important limitations on this facet of the right to privacy. First, the court is in agreement with the Supreme Court which has strictly limited the *Stanley* guarantee to the possession for purely private, noncommercial use in the home. And secondly, this right must yield when it interferes in a serious manner with the health, safety, rights and privileges of others or with the public welfare. Also, no one has an absolute right to do things in the privacy of his home which will affect himself or others adversely.[56]

CONCLUSION

The protection afforded in *Ravin* is strictly confined to the home. The fundamental right of privacy surrounding the home was deemed broad enough to encompass the use of marijuana. However, only the confines of the home offer such a protection. The buying or selling of marijuana is not protected, neither is there protection for its use or possession in public. Also unprotected are amounts of marijuana indicative of commercial purposes.[57] Even qualified in this manner, the *Ravin* opinion is a major breakthrough for the proponents of the decriminalization of marijuana, whose main arguments have advocated use in the privacy of one's own home.

The Supreme Court case of *Stanley v. Georgia* suggests that there is a certain type of activity which, while socially disapproved, is not so damaging to society as to justify state disruption of the seclusion of the home. If *Stanley* is to be of any significant use in a context other than obscenity—if it can be used to protect a range of activities of a similar nature—the "privacy of the home" may prove to be a potent constitu-

55. Ravin v. State, 537 P.2d at 498.
56. *Id.* at 504.
57. *Id.* at 511.

tional right; as the Supreme Court of Alaska has shown in *Ravin* where the right to privacy was expanded to even protect the use of marijuana.[58] Therefore, state interest in invading the home to prevent the use of marijuana must be motivated by some perceptible need to protect the public at large or to protect the individual user against a genuine threat to his health and welfare; and no such interest was shown in this case.

In a recent law review article it was suggested that a society that allows its citizens some freedom to pursue sensual happiness with minor harm to themselves might choose a regulatory scheme similar to that used for control of alcohol. It was further stated that

> . . . the preferable solution is no doubt legislative and there are some signs that reform is coming. But until that time close judicial scrutiny of existing laws might at least afford some protection to what many agree is a protectable interest: The right of an individual, in the privacy of his home, to indulge in conduct that is harmful, if at all, only to himself.[59]

The Supreme Court of Alaska should be commended for taking the initial bold step in holding that the right of privacy which surrounds the home is so dear as to protect even the possession and use of marijuana. This opinion can be a model and can serve as a resource guide for writing the privacy argument to include protection of private use of marijuana in other jurisdictions.

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58. 48 N.Y.U.L. REV. at 693.
59. *Id.* at 760.

Donaldson v. O'Connor: Constitutional Right to Treatment for the Involuntarily Civilly Committed

I. INTRODUCTION

The law has deemed it in the best interests of society to commit the mentally ill. In effect, to remove a certain segment of the population that is not able to adequately cope with the realities of day to day living. That segment is so small,[1] and the line of proof between sanity and insanity so nebulous,[2] that the individual liberties guaranteed to each citizen within that group have become jeopardized.

1. In 1972, 404,000 patients were admitted to state mental institutions: 41.8 percent were involuntarily committed. Note, *Developments in the Law, Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1193 (1974).

2. The Supreme Court is not sure that "mental illness" can be defined easily: "As-