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Obscenity: Blount v. Rizzi, 400 U.S. 410 (1971), United States v. 37 Photos, 402 U.S. 363 (1971), United States v. Reidel, 402 U.S. 351 (1971)

wholly unfit for the supervision of evidentiary rules. He observed that neither the clause itself, nor the historical understanding of it, offers solid guidance for adjudicating the appropriateness of rules of evidence.[40] His alternative, in light of the plurality's failure to articulate a standard for applying the confrontation clause, was to abandon it altogether in favor of testing federal-state rules of evidence under due process of law. Harlan concluded that the defendant had not been denied the fair trial that due process guarantees, yet he offered as prime support for this finding the fact that the declarant's incriminating statement was made against the conspiracy's interest,[41] hence demonstrating a degree of trustworthiness. Harlan's employment of the due process standard[42] thus relies on indicia of reliability, as did the plurality's confrontation standard, and reaches the same result. Any improvement over the lack of a definite standard in the plurality's approach is not evident.

The Supreme Court in *Dutton v. Evans* reached beyond principles espoused in previous decisions to uphold a nontraditional hearsay exception under the sixth amendment confrontation standard. Although the Court declined to equate the confrontation clause with the hearsay rule, its holding relies on traditional justifications for hearsay exceptions. This facial inconsistency reflects the lack of meaning in merely equating or not equating the two doctrines. Though *Dutton* relaxed the requirements needed to satisfy confrontation,[43] its importance is undercut by the Court's failure to provide a basis for future decision.

viewed the confrontation clause as requiring the production of available witnesses when reasonably possible. In *Dutton*, however, he perceived that this standard "would significantly curtail development of the law of evidence" and invalidate such justifiable and valuable hearsay exceptions as the business records exception. Indeed,"[i]f the hearsay exception involved in a given case is such as to commend itself to reasonable men, production of the declarant is likely to be difficult, unavailing, or pointless." 400 U.S. at 96.

[40] *Id.* at 95.

[41] Accomplishment of the main object of a conspiracy will seldom terminate the community of interest of the conspirators. Declarations against that interest evince some likelihood of trustworthiness. The jury, with the guidance of defense counsel, should be alert to the obvious dangers of crediting such testimony.

Id. at 99.

[42] Justice Marshall refused to adopt Justice Harlan's due process approach in part because it "concededly [had] nothing to do with the Confrontation Clause." *Id.* at 110 n. 11.

[43] *See* note 26 *supra*.

OBSCENITY

Blount v. Rizzi, 400 U.S. 410 (1971)
United States v. 37 Photos, 402 U.S. 363 (1971)
United States v. Reidel, 402 U.S. 351 (1971)

Last term the United States Supreme Court, in three cases dealing with obscenity, struck down administrative censorship of the mail, upheld administrative censorship in border searches, and upheld criminal sanctions for using the mail to distribute obscene materials. In *Blount v. Rizzi*[1] two federal statutes were claimed to be unconstitutional violations of first amendment free speech.[2] The Postmaster General instituted administrative proceedings against Tony Rizzi under 39 U.S.C. § 4006,[3] and upon the decision that certain magazines sold by Rizzi were obscene, an order to return mail and forbid payment was entered sixty-one days later on the basis of 39 U.S.C. § 4007.[4] On appeal to the district court, § 4006 was found to violate first amendment free speech and fifth amendment due process.[5] In *United States v. The Book Bin*[6] the district court

[1] 400 U.S. 410 (1971).

[2] United States Constitution amendment I: "Congress shall make no law . . . abridging freedom of speech, or of the press."

[3] 39 U.S.C. § 4006 (1964) authorized the Postmaster General to return mail to the sender or forbid payment of postal money orders for the sale of materials which were determined obscene by administrative proceedings which he initiated.

[4] 39 U.S.C. § 4007 (1964) authorized the Postmaster General to obtain a temporary restraining order and a preliminary injunction from a United States district court directing detention of the seller's incoming mail pending the administrative proceedings under § 4006, merely on a showing of probable cause that a violation of § 4006 had occurred.

[5] Rizzi v. Blount, 305 F. Supp. 634, 635 (C.D. Cal. 1970).

[6] 306 F. Supp. 1023 (N.D. Ga. 1970).

found both § 4006 and § 4007 unconstitutional on the same grounds.[7] The two cases were joined on appeal to the Supreme Court.

In a unanimous opinion written by Mr. Justice Brennan, the Supreme Court affirmed the finding of unconstitutionality. It held that the statutes failed to provide adequate procedural safeguards, as required by *Freedman v. Maryland*,[8] against restraining constitutionally protected speech from the mails.[9]

United States v. Thirty-seven (37) Photographs[10] upheld the constitutionality of 19 U.S.C. § 1305(a), which authorizes the administrative seizure of allegedly obscene materials and a determination of their obscenity during a border search. Thirty-seven photographs belonging to Milton Luros were seized when he attempted to bring them into the country for publication in *The Kama Sutra of Vatsyayana*, a book describing various positions for sexual intercourse.[11] Without deciding whether the photographs were obscene,[12] the district court found that the statute did not meet the procedural requirements of *Freedman v. Maryland* and violated the right to possess obscenity privately guaranteed by *Stanley v. Georgia*.[13]

The Supreme Court, in an opinion written by Mr. Justice White, reversed the decision of the district court 6-3. In Part I of the opinion, the Court acknowledged that § 1305(a) failed to satisfy the *Freedman* procedural requirements because it lacked a specific time limit between the seizure of the materials and a judicial determination of their obscenity.[14] Nevertheless, the statute was upheld. The Court reviewed various instances of reasonable prior restraint and then wrote a time limit into the statute to correct its procedural inadequacy—forfeiture proceedings within fourteen days of seizure and a judicial determination within sixty days of the initiation of proceedings.[15] In Part II of Justice White's decision, in which only the Chief Justice and Justices Brennan and Blackmun concurred, Mr. Justice White rejected the argument that the *Stanley v. Georgia* right of privacy applied in a border search.[16]

In *United States v. Reidel*[17] the appellee was indicted under 18 U.S.C. § 1461[18] for knowingly using the mails to deliver obscene matter, a booklet entitled *The True Facts About Imported Pornography*.[19] Reidel contended that he had mailed the booklet only to consenting adults. He also contended that the statute as applied to him was unconstitutional, since it prevented his delivery of obscene materials to consenting adults, who may, according to *Stanley*, constitutionally view such material privately.[20] Reidel argued that the right of privacy guaranteed by *Stanley* included the constitutional right to receive obscene material if one so desired, and thus a distributor had the right to send it. In an unreported opinion, the district court, assuming *arguendo* that the booklets were obscene, held that § 1461 was unconstitutional as applied to Reidel, since the statute violated the *Stanley* right of privacy.[21]

The Supreme Court reversed the lower court decision 7–2. The Court reiterated its previous holding that *Stanley* did not affect the decision in *Roth v. United States*[22] that obscenity was not speech protected by the first amendment.[23] Since *Stanley* dealt solely with obscenity in private hands, its protection did not apply to commercial distribution of obscene materials through the mail.[24]

The Supreme Court first met the obscenity issue squarely[25] in *Roth v. United States*, holding

[7] *Id.* at 1028.
[8] 380 U.S. 51 (1965).
[9] 400 U.S. at 417, 418.
[10] 402 U.S. 363 (1971).
[11] *Id.* at 365–366.
[12] The Supreme Court did not determine the obscenity *vel non* of the materials in any of the three cases discussed in this note. Some Justices, particularly Mr. Justice Harlan, have suggested that this issue—the obscenity of the material in each case—is of constitutional dimension. *See, e.g.*, Roth v. United States, 354 U.S. 476, 496 (1957) (Harlan, J., dissenting). *See also*, Engdahl, *Requiem for Roth: Obscenity Doctrine Is Changing*, 68 MICH. L. REV. 185 (1969). *But see* Ginzburg v. United States, 383 U.S. 463, 476 (1966) (Black, J., dissenting).
[13] 394 U.S. 557 (1969). *See* United States v. Thirty-seven (37) Photographs, 309 F. Supp. 36 (C.D. Cal. 1970).
[14] 402 U.S. at 368.
[15] *Id.* at 373–74.
[16] *Id.* at 376. Harlan, J., concurred in the judgment and in Part I of the opinion. Stewart, J., concurred in the judgment and in Part I of the opinion. Black, Douglas, and Marshall, JJ., dissented.
[17] 402 U.S. 351 (1971).
[18] 18 U.S.C. § 1461 (1964) provides that anyone who knowingly uses the mails for delivery of any obscene matter or any matter advertising or dealing with abortion or contraception shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each subsequent offense.
[19] 402 U.S. at 353.
[20] *Id.*
[21] *Id.*
[22] 354 U.S. 476 (1957).
[23] 402 U.S. at 354.
[24] *Id.* at 355.
[25] Prior to *Roth* the Court had decided the obscenity *vel non* of particular materials or conduct, but it had

that obscenity is not constitutionally protected speech.[26] Subsequent cases defined obscenity[27] and established additional factors to be considered in a determination of whether specific matter was obscene.[28] Among these were *Freedman v. Maryland*,[29] which established procedural requirements for administrative censorship, and *Stanley v. Georgia*,[30] which carved out a substantive exception to *Roth* for obscenity possessed in one's home.

In *Freedman*, the Supreme Court unanimously struck down a state statute[31] which required the submission of motion pictures to a board of censors for prior approval before public showing. The petitioner, convicted of violating the statute, challenged its constitutionality. The Court held that the Maryland statute violated first amendment freedom of speech since it lacked the procedural safeguards necessary to prevent censorship of protected speech.[32] The Court required the following safeguards for prior administrative restraint:[33] the burden of initiating judicial review and proving the unprotected nature of the material rests on the censor; to prevent the censor's decision from achieving finality, there must be prompt judicial review; the statute must limit the time

never reached the broader issue of the status of obscenity as a class of speech, *i.e.*, whether it came under the protection of the first amendment. In Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), the Court held the expression "son of a bitch" to be obscene.

> [T]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. at 571, 572.

In Doubleday & Co. v. New York, 335 U.S. 848 (1948), the Court affirmed without opinion a lower court determination that Edmund Wilson's *Memoirs of Hecate County* was obscene. The decision was four to four with Mr. Justice Frankfurter, a personal friend of Wilson's, not sitting.

In Butler v. Michigan, 352 U.S. 380 (1956), the Court ruled a state statute protecting children from obscenity unconstitutionally overbroad in its application to the entire adult public.

See generally Kalven, *The Metaphysics of The Law of Obscenity*, 1960 SUP. CT. REV. 1; Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960); Lockhart & McClure, *Literature, The Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295 (1954).

[26] 354 U.S. at 485. *Cf.* Beauharnais v. Illinois, 343 U.S. 250 (1952) (criminal libel unprotected by first amendment); Dennis v. United States, 341 U.S. 494 (1951) (balancing state security against free speech); Schenck v. United States, 249 U.S. 47 (1919) (clear and present danger test).

Professor Kalven discussed the limits which New York Times, Inc. v. Sullivan, 376 U.S. 254 (1964), placed on *Beauharnais'* absolute holding, and correctly forecast that *Roth* would be similarly limited, as it later was by Stanley v. Georgia. *See* Kalven, *The New York Times Case: A Note On "The Central Meaning of The First Amendment,"* 1964 SUP. CT. REV. 191. *But see* Brennan, *The Supreme Court and the Meiklejohn Interpretation of The First Amendment*, 79 HARV. L. REV. 1, 10 (1965) (Radical shifts in judicial doctrine are rare). *See generally* Engdahl, *supra* note 12; Laughlin, *A Requiem For Requiems: The Supreme Court At The Bar of Reality*, 68 MICH. L. REV. 1389 (1970).

[27] *See, e.g.*, Memoirs v. Massachusetts, 383 U.S. 413 (1966); Jacobellis v. Ohio, 378 U.S. 184 (1964). The criteria for determining whether certain material was obscene set by *Roth* included: 1) appeal to prurient interest in sex; 2) patently offensive to contemporary community standards; 3) utterly without redeeming social importance. 354 U.S. at 484, 485, 487.

[28] Ginzburg v. United States, 383 U.S. 463 (1966), established that the method of distributing materials, pandering to the buyer's prurient interest, may be evidence contributing to a determination that the material is obscene. Redrup v. New York, 386 U.S. 767 (1967) held that the sale of books and magazines was protected by the first amendment where (1) the materials were not obscene under the three-pronged test of Roth, and (2) it was not contended that the material reached juveniles or unwilling adults, or was sold by means of pandering. Ginsberg v. New York, 390 U.S. 629 (1968) recognized a valid state interest in protecting minors from obscene materials.

[29] 380 U.S. 51 (1965).

[30] 394 U.S. 557 (1969).

[31] MD. ANN. CODE art. 66A, § 2 (1957):

> It shall be unlawful to sell, lease, lend, exhibit, or use any motion picture film or view in the State of Maryland unless the said film or view has been submitted by the exchange, owner, or lessee, of the film or view and duly approved and licensed by the Maryland State Board of Censors. . . .

[32] 380 U.S. at 61. The Supreme Court has dealt with many similar cases of prior administrative restraint. *See, e.g.*, Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968) (striking down city motion picture censorship ordinance); A Quantity of Books v. Kansas, 378 U.S. 205 (1964); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Manual Enterprises v. Day, 370 U.S. 478 (1962); Marcus v. Search Warrant, 367 U.S. 717 (1961); Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957) (cited by the Court as a model statute of constitutional prior restraint); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Near v. Minnesota, 283 U.S. 697 (1931).

[33] 380 U.S. at 58-60.

> The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint.

Id. at 58. *See* Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518 (1970); Note, *Prior Adversary Hearings On The Question of Obscenity*, 70 COLUM. L. REV. 1403 (1970); Note, *The Requirement and Techniques for Holding an Adversary Hearing Prior to Seizure of Obscene Material*, 48 N.C. L. REV. 830 (1970).

between restraint and judicial determination to the shortest possible fixed period.

In *Stanley v. Georgia*, the Supreme Court reversed the defendant's conviction for possession of obscene material, holding that the first and fourteenth amendments prohibit making mere private possession of obscene material a crime. Although the decision in *Stanley* did not limit *Roth's* holding that obscenity is unprotected speech,[34] the Court's recognition of the right to possess obscene materials in one's home without reprisal in effect created an exception to *Roth*.[35] *Stanley* did not say whether there is a first amendment right to receive the obscene material, or whether there is a constitutional right to distribute such materials to consenting adults.[36]

In *Blount v. Rizzi*, the Supreme Court held that 39 U.S.C. § 4006 failed to meet the procedural safeguards announced in *Friedman*. The Postmaster General was not required to seek a prompt judicial determination of the obscenity of the magazines before banning them from the mail, nor was there any assurance of prompt judicial review of the administrative proceedings.[37] In addition, the Court found that the requirement of mere probable cause to believe that § 4006 had been violated was constitutionally insufficient to support a mail detention order under § 4007, so there was a violation of due process.[38]

In *Thirty-seven Photographs*, however, although the district court had held that 19 U.S.C. § 1305(a) violated both free speech and due process,[39] the Supreme Court upheld the statute's validity by judicially imposing fourteen-day and sixty-day time limits on the administrative restraint. Justice White distinguished *Thirty-seven Photographs* from *Freedman*, where a state statute was at issue which he claimed the Court had no authority to rewrite, and *Blount v. Rizzi*, where the statute had so many infirmities that a complete revision would have been required.[40] Mr. Justice Black, dissenting, believed that the statute in *Thirty-seven Photographs* should have been struck down. He criticized the Court's rewriting of the statute as judicial legislation, and found its action inconsistent with its exercise of judicial restraint in *Freedman* and *Blount v. Rizzi*.[41] Moreover, the two Justices differed in their interpretations of the legislative intent behind each of the two federal statutes.[42]

With respect to the lower court determination that § 1305(a) violated the Supreme Court's decision in *Stanley v. Georgia* by proscribing the importation of obscene matter for private use, Part II of Justice White's plurality decision held that *Stanley* did not apply to border searches.[43] White viewed the distinction between importation for commercial purposes or private use as irrelevant to the case at hand, since Luros' importation was for commercial purposes. He upheld the power of Congress to forbid the importation of obscene material for any purpose.[44] Only four Justices,

[34] 394 U.S. at 568.

[35] The decision in *Stanley* was based on the first amendment (privacy and freedom of thought), rather than the fourth amendment. 394 U.S. at 565. *Cf.* Griswold v. Connecticut, 381 U.S. 479 (1965); Mapp v. Ohio, 367 U.S. 643 (1961); N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958); Boyd v. United States, 116 U.S. 616 (1886).

[36] Karalexis v. Byrne, 306 F. Supp. 1363 (D. Mass. 1969) extended Stanley v. Georgia to give first amendment protection to commercial distribution of certain admittedly obscene material, specifically the film "I Am Curious (Yellow)." *See* Katz, *Privacy and Pornography: Stanley v. Georgia*, 1969 SUP. CT. REV. 203; Comment, *Karalexis v. Byrne And The Regulation of Obscenity: "I Am Curious (Stanley)"*, 56 VA. L. REV. 1205 (1970); Note, *First Amendment: The New Metaphysics of The Law of Obscenity*, 57 CALIF. L. REV. 1257 (1969): Note, *Prior Adversary Hearings On The Question Of Obscenity*, 70 COLUM. L. REV. 1403 (1970); Note, *Stanley v. Georgia: A First Amendment Approach To Obscenity Control*, 31 OHIO ST. L.J. 364 (1970).

[37] 400 U.S. at 420–21.

[38] *Id.*

[39] 309 F. Supp. at 38.

[40] The obstacle in *Freedman* and *Teitel* was that the statutes were enacted pursuant to state rather than federal authority . . . and we lack jurisdiction authoritatively to construe state legislation. [Citation omitted] In *Blount*, we were dealing with a federal statute and thus had power to give it an authoritative construction; salvation of that statute, however, would have required its complete rewriting in a manner inconsistent with the expressed intentions of some of its authors. For the statute at issue in *Blount* not only failed to specify time limits within which judicial proceedings must be instituted and completed; it also failed to give any authorization at all to the administrative agency, upon a determination that material was obscene, to seek judicial review.

402 U.S. at 369–70.

[41] *Id.* at 383–87.

[42] Mr. Justice White argued that the legislative intent of 19 U.S.C. § 1305(a) was for an immediate judicial hearing. He further argued that at the time of the enactment of 39 U.S.C. §§ 4006–07, the Postmaster General desired only an administrative determination of obscenity. 402 U.S. at 370–71.

Mr. Justice Black noted that the word "immediately" was struck from a proposed amendment, and was not part of § 1305(a). Black denied that the isolated statement of the Postmaster General constituted the legislative intent behind § 4006 and § 4007. He would therefore have reversed both cases. *Id.* at 384–86. *See generally* 72 CONG. REC. 5420–5424 (1930).

[43] 402 U.S. at 376.

[44] That the private user under *Stanley* may not be prosecuted for possession of obscenity in his

however, Chief Justice Burger and Justices Brennan, White, and Blackmun, concurring in Part II of White's opinion, would define the Congressional power to authorize administrative censorship in a border search in cases of importation for private use. Mr. Justice Harlan, concurring in the judgment and Part I of the opinion, denied that Luros had standing to raise the overbreadth argument based upon the *Stanley* right of privacy,[45] and would reserve the issue until such a case arose. Justice Stewart, concurring in the judgment and Part I of the opinion,[46] and Justice Marshall, dissenting, would seem to allow the importation of obscene material by individuals for their own use. Justices Black and Douglas, dissenting, would allow an absolute privilege under the first amendment to import obscene material for any purpose.[47]

In *Reidel*, although the appellee argued that he mailed obscene materials only to consenting adults, the Court nevertheless affirmed his conviction. The seven-member majority did not address Reidel's claim, but reversed the decision of the district court solely on the basis that *Stanley's* protection of the right to view obscenity privately did not apply to obscenity otherwise unprotected under the first amendment and sent commercially through the mail. Even Justice Marshall, who dissented in *Thirty-seven Photographs*, concurred in the judgment against Reidel. While he favored the right to import obscenity for private use, he agreed with the majority in *Reidel* that to send obscene material through the mail is, ipso facto, commercial distribution, and may constitutionally be prevented.[48] Only Justice Black, dissenting and joined by Justice Douglas, argued that to refuse willing adults the right to receive obscene materials effectively scuttles their right to view them privately, as guaranteed by *Stanley*.[49]

Following the *Roth* decision, the Supreme Court asserted a vigilance for first amendment safeguards concerning prior restraint in *Freedman* and private possession of obscenity in *Stanley*. *Blount v. Rizzi* followed *Freedman's* example by striking down unlimited administrative censorship of the mail. *Thirty-seven Photographs*, on the other hand, upheld administrative censorship of the importation of obscenity for commercial distribution when appropriate safeguards are employed, and *Reidel* upheld criminal sanctions for sending obscenity through the mail, regardless of the nature of its intended use.

Regarding the issues raised by *Stanley v. Georgia*, *Thirty-seven Photographs* and *Reidel* effectively end speculation that the right to possess obscenity privately somehow includes a right to distribute it commercially, even to consenting adults. The only question the Court did not answer was whether *Stanley* protects the importation of obscenity for private use.[50] The Court is closely divided on the issue, and may split five to four or six to three either way, with Justice Harlan and Justice Black's replacements casting the deciding votes. Justice Harlan is the only member of the *Thirty-seven Photographs* court who did not register his opinion on importation for private use.[51] The Supreme Court, however, has recognized that Congressional power in the area of border searches has few limitations. It is possible that, given the Court's broad language in *Thirty-seven Photographs* and *Reidel*, the Court may create an exception to the

home does not mean that he is entitled to import it from abroad free from the power of Congress to exclude noxious articles from commerce. *Id.*

[45] *Id.* at 377–78.

[46] I would not in this case decide, even by way of dicta, that the Government may lawfully seize literary material intended for the purely private use of the importer. The terms of the statute appear to apply to an American tourist who . . . returns home with a single book in his luggage, with no intention of selling it, or otherwise using it, except to read it. If the Government can constitutionally take the book away from him as he passes through customs, then I do not understand the meaning of Stanley v. Georgia.

Id. at 379.

[47] *Id.*

[48] *Id.* at 360–61.

[49] Since the plurality opinion offers no plausible reason to distinguish private possession of obscenity from importation for private use . . . perhaps in the future [*Stanley*] will be recognized as good law only when a man writes salacious books in his attic, prints them in his basement, and reads them in his living room.

Id. at 382. *See* Redrup v. New York, 386 U.S. 767 (1967); Lamont v. Postmaster General, 381 U.S. 301 (1965); Smith v. California, 361 U.S. 147 (1909).

[50] The Supreme Court has noted probable jurisdiction in a case which raises the issue of importation of obscenity for private use. In United States v. Twelve 200-Foot Reels, *prob. juris. noted*, 403 U.S. 930 (1971), the district court held 19 U.S.C. § 1305(a) to violate the first and fifth amendments. *See* 9 BNA CRIM. L. REPTR. 4073.

[51] Chief Justice Burger and Justices Brennan and Blackmun joined Part II of Justice White's opinion in *Thirty-seven Photographs*, where he denied that *Stanley* protected private importation of obscenity. 402 U.S. at 376. Justice Stewart showed reluctance to so interpret *Stanley*, though he concurred in the judgment. *Id.* at 379. Justice Marshall felt the same, and dissented. *Id.* at 361. Justices Black and Douglas also dissented. *Id.* at 381–82. Justice Harlan reserved comment on private importation. *Id.* at 378; *cf.* United States v. Reidel, 402 U.S. at 357 (concurring opinion of Harlan, J.).