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Amoco Oil Co. v. Environmental Protection Agency

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RECENT DEVELOPMENTS

AMOCO OIL CO. v. ENVIRONMENTAL PROTECTION AGENCY

VICARIOUS LIABILITY—*Clean Air Amendments of 1970— Contamination of unleaded gasoline—Branded oil refiners may not be held vicariously liable for the negligent contamination of unleaded gasoline by their lessee-retailers.* 543 F.2d 270 (D.C. Cir. 1976).

In a review of administrative regulations promulgated by the Environmental Protection Agency,[1] the Court of Appeals for the District of Columbia Circuit held, in a 2-1 decision, that the EPA could not impose vicarious liability on branded oil refiners[2] when contaminated unleaded gasoline was offered for sale by their lessee-retailers.[3] In so holding, the court effectively emasculated a regulation designed to implement the policies of section 211(c) of the Clean Air Amendments of 1970.[4] The majority based its decision on the belief that the regulations went "well beyond the bounds of traditional vicarious liability."[5] Thus, the decision raises the question of the appropriateness of using common law tests of vicarious liability in statutory situations which bear little resemblance to problems existing at common law, and where to do so tends to defeat the purposes of important social legislation.

The Background of the Case

When Congress enacted the Clean Air Amendments of 1970,[6] it plainly intended to combat more aggressively the problem of air pollution, notwithstanding the high cost to industry:

> A review of achievements to date . . . make[s] abundantly clear that the strategies which we have pursued in the war

1. 40 C.F.R. § 80.23(b)(2) (1976).

2. The term "branded refiner" refers to those refiners who distribute their brand name gasoline through retail outlets bearing their corporate or brand name.

3. Amoco Oil Co. v. EPA, 543 F.2d 270 (D.C. Cir. 1976).

4. 42 U.S.C. § 1857f-6c(c) (1970). *See* text accompanying notes 6-10 *infra.*

5. Amoco Oil Co. v. EPA, 543 F.2d 270, 275 (D.C. Cir. 1976).

6. 42 U.S.C. §§ 1857-1858a (1970) (amending 42 U.S.C. §§ 1857-1857*l* (Supp. V 1964)). For a good overview of federal air pollution legislation which began in 1955 with the Air Pollution Control—Research and Technical Assistance Act of 1955, ch. 360, 69 Stat. 322 (amended 1964), see Comment, *The Clean Air Amendments of 1970: Better Automotive Ideas from Congress,* 12 B.C. INDUS. & COM. L. REV. 571 (1971).

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> against air pollution have been inadequate in several important respects, and the methods employed in implementing those strategies often have been slow and less effective than they might have been.[7]

Section 211(c) gave to the Environmental Protection Administrator the authority, for the first time, to regulate or prohibit the sale "of any fuel or fuel additive for use in a motor vehicle or motor vehicle engine"[8] which would interfere with the operation of emission control devices developed to reduce air pollution caused by the automobile. The Act imposed a civil penalty of $10,000 per day for violations of any regulations issued pursuant to the statute.[9] This extensive authority was granted because of Congressional recognition that

> [a]utomotive pollution constitutes in excess of 60 percent of our national air pollution problem and such pollution is particularly dangerous in the highly urbanized areas of our country. Therefore, increased attention must be paid to that source of pollution by insisting on the kinds of motor vehicles and fuels which will reduce pollution to minimal levels.[10]

Pursuant to this authority, the EPA issued regulations in 1973[11] relating to the sale of unleaded gasoline suitable for use in vehicles equipped with emission control devices, as the functioning of these devices is impaired by the use of leaded gasoline.[12] Since leaded and unleaded gasoline are shipped in the same distribution system, however, the Agency was confronted at the outset with the problem of assuring that uncontaminated unleaded gasoline reached the pumps.[13] In order to effectuate the statutory purpose by insuring that the proper standards were met, the liability section of the regulations imposed strict liability on the oil

7. H.R. REP. No. 1146, 91st Cong., 2d Sess. 1, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5356. It has been noted that the 1970 Amendments represent a legislative policy which for the first time "forces technology to catch up with the newly promulgated standards." Comment, 12 B.C. INDUS. & COM. L. REV., *supra* note 6, at 581.

8. 42 U.S.C. § 1857f-6c(c) (1970). Prior to the 1970 Amendments, the law pertaining to the regulation of fuels required only registration with the EPA of designated fuels for the purpose of identifying their chemistry and their effects on the environment. 42 U.S.C. § 1857f-6c(a)(b) (Supp. V 1964). These provisions were retained in the 1970 Amendments. 42 U.S.C. § 1857f-6c(a)(b) (1970).

9. 42 U.S.C. § 1857f-6c(d) (1970).

10. H.R. REP. No. 1146, 91st Cong., 2d Sess. 6, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5356, 5361.

11. 40 C.F.R. Part 80 (1973).

12. Statement by the EPA, 38 Fed. Reg. 1254 (1973).

13. Statement by the EPA, 39 Fed. Reg. 13174 (1974).

refiners whenever contaminated unleaded gasoline was offered for sale at branded retail outlets, regardless of where in the distribution system the violation actually occurred.[14] The EPA justified imposing such liability on the ground that "the contamination of unleaded gasoline associated with transportation of the product can best be prevented by the major refiners who have control or the ability to control their distribution networks."[15]

The first challenge to the liability provisions came in 1974 when sixteen branded oil refiners submitted a petition for review to the Court of Appeals for the District of Columbia Circuit.[16] In an opinion by Judge Wright, the court struck down the liability provisions, noting that while the refiners "conceded that a presumption of liability would be reasonable,"[17] they "must have the opportunity to demonstrate freedom from fault"[18] in certain areas. The court observed that the refiners did not dispute the EPA's determination that they had the "ability to control" their distribution networks through lease and contract arrangements, which included provisions for extensive quality control procedures and the imposition of penalties when contamination occurred.[19] The refiners argued, however, that they should not be held liable for contamination caused by "an unpreventable breach of contract"[20] by distributors, jobbers or others in the distribution network whose facilities were neither leased nor owned by the refiner.[21] The court indicated its acceptance of this argument, holding that "[a] refiner which can show that its employees, agents, or *lessees* did not cause the contamination at issue, and that the contamination could not have been prevented by a reasonable program of contractual oversight, may not be held liable . . . ."[22]

This decision, which permitted imposing vicarious liability on the refiners for contamination caused by their lessees,[23] clearly

14. 40 C.F.R. § 80.23(a)(1) (1973). The term "branded retail outlets" refers to those service stations which purchase gasoline exclusively from a branded refiner and sell it under the refiner's brand name.

15. Statement by the EPA, 38 Fed. Reg. 1254, 1255 (1973).

16. Amoco Oil Co. v. EPA, 501 F.2d 722 (D.C. Cir. 1974).

17. *Id.* at 748.

18. *Id.* at 749.

19. *Id.* at 748.

20. *Id.*

21. *Id.*

22. *Id.* at 749 (emphasis added).

23. *Id.* The EPA so interpreted the decision: "It is clear from the Amoco decision that branded refiners may be deemed in violation for the negligent acts of their lessees."

indicated that the court assumed a difference in the degree of control which the branded refiners could or should exercise over their lessee-retailers as compared with that which they could exercise over others in the distribution network whose facilities were not refiner-owned or leased. Furthermore, it seemed to have agreed with the EPA that refiner liability for the former "[extends] beyond contractual oversight."[24] In light of this decision, the EPA revised the liability section and promulgated new regulations relating to refiner liability for contamination of unleaded gasoline occurring at the retail level.[25] While the new regulations permitted the refiners numerous affirmative defenses,[26] they imposed liability when contaminated unleaded gasoline was offered for sale by directly-supplied retail dealers.[27] This liability could be avoided only if the "assets or facilities [of such dealers] are not substantially owned, leased, or controlled by the refiner."[28] In short, under the new regulations the branded refiners would always be vicariously liable for the negligent contamination of unleaded gasoline by their lessee-retailers.[29]

The majority in *Amoco Oil,* refusing to permit this result,[30] overlooked what was really at issue—the fact that the statutory purpose, *i.e.,* the reduction of automotive pollution through the prohibition of the sale of offending fuels, could be achieved only by assuring the purity of unleaded gasoline at the retail level. The EPA argued that this result could be attained only through extensive quality control and monitoring programs, and that the imposition of liability on branded refiners for violations occurring at their branded retail outlets would encourage all refiners to adopt

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Statement by the EPA, 39 Fed. Reg. 42356, 42358 (1974). Judge Wright, the author of the first *Amoco* opinion, believed that this was unquestionably the holding. Amoco Oil Co. v. EPA, 543 F.2d 270, 279 (D.C. Cir. 1976) (Wright, J., dissenting). *See* note 30 *infra.*

24. Statement by the EPA, 39 Fed. Reg. 42356, 42358 (1974).

25. 40 C.F.R. § 80.23 (1976).

26. Liability could be avoided if the violation was caused by a distributor, *id.* § 80.23(b)(2)(v), (vi); by an *indirectly* supplied retailer or by a reseller, *id.* § 80.23 (b)(2)(iii); by a *directly* supplied *independent* retailer, *id.* § 80.23(b)(2)(iv); or if the contamination was caused by sabotage or by intentional introduction of leaded gasoline into an automobile requiring unleaded gasoline, *id.* § 80.23(b)(2)(ii), (e)(i).

27. 40 C.F.R. § 80.23(a)(1), (b)(2)(iv) (1976).

28. 40 C.F.R. § 80.23(b)(2)(iv) (1976).

29. *Id.* Only a very small percentage of retail outlets are owner-operated (independent). Statement by the EPA, 39 Fed. Reg. 13174, 13175 (1974).

30. Amoco Oil Co. v. EPA, 543 F.2d 270, 279 (D.C. Cir. 1976). This Note does not consider the issue of collateral estoppel which was argued by the EPA. *Id.*, Brief for Respondent at 17-20. The issue was also presented by Judge Wright in dissent as a basis for disposing of the case. *Id.* at 279-80 (Wright, J., dissenting).

such necessarily costly programs.[31] The EPA's determination that the "refiner's responsibility extends beyond contractual oversight when the refiner owns or leases the branded station"[32] was grounded in the notion of "control" as it relates to the realities of the gasoline distribution system. While the nature of this marketing enterprise necessarily requires that the lessee-retailers exercise a relatively high degree of independence as to their customary activities, the refiners' ability to prevent the contamination of unleaded gasoline arises from the structure of the distribution system itself. In this system the branded product is transported from the refinery to retail outlets owned or leased by the refiner, placed in refiner-owned equipment and sold under the branded trademark.[33] The use of quality control techniques throughout the entire distribution system would insure a technical competence in handling both the product and the refiner-owned and supplied equipment, thus reducing the number of contamination incidents at the service station level. The EPA emphasized that at that level

> basic decisions respecting the conditions of sale of unleaded gasoline are being made by the owner or lessor of the station and not by the operator. . . . [T]he branded refiners are making the decisions whether to adopt a three-grade marketing system, installing a third pump and underground tank or whether to retain a two-grade marketing system . . . . Where a branded refiner owns or leases a service station, the refiner makes the investment in new equipment.[34]

Since the lessee-retailer is bound by contract to sell only the brand of his lessor-refiner, he is extremely dependent upon his refiner's quality control procedures both as to product and equipment.[35] Thus, regarding the specific problem of contamination, there exists an arguably sufficient degree of refiner control over

31. Statement by the EPA, 39 Fed. Reg. 13174, 13176-77 (1974). Such a program, which involves periodic testing at all points in the distribution system, had already been initiated by Amoco. *Id.* at 13176.

32. Statement by the EPA, 39 Fed. Reg. 42356, 42358 (1974). It should be noted that the EPA was bound by the 1974 decision to exclude the class of independent retailers (owner-operators) from the vicarious liability provisions. *See* Amoco Oil Co. v. EPA, 501 F.2d 722, 748-49 (D.C. Cir. 1974). Exclusion of this class, however, would not seriously have affected the new regulations since owner-operated stations comprise a very small percentage of the total branded outlets. *See* note 29 *supra.*

33. Statement by the EPA, 39 Fed. Reg. 13174, 13175-76 (1974). For a description of the gasoline distribution system, see *id.* at 13175.

34. Statement by the EPA, 39 Fed. Reg. 13174, 13177 (1974).

35. *Id.* at 13176.

lessee-retailers to justify imposing vicarious liability on the refiners for the contamination of unleaded gasoline caused by those retailers.

The Majority Opinion—The Application of the Traditional Common Law Test of Vicarious Liability

In striking down the liability provision as "arbitrary,"[36] the majority applied the common law "control" test to determine whether the relationship between the refiners and their lessee-retailers justified the imposition of vicarious liability. The familiar doctrine of vicarious liability, or respondeat superior, permits the imputation of another's negligence to one who has not himself been negligent.[37] The relationship most often associated with the doctrine is that of master and servant (or, in more modern terminology, employer-employee), and the test of this relationship is whether the nonnegligent party has control over, or the right to control, the acts of the negligent party.[38] This control, whether or not it is exercised, must be related to the manner and means of performing the details of the work involved in the relationship.[39] If, however, the control, or the right thereto, relates only to the results ordered and not to the manner of performance, the relationship is deemed to be one of employer-independent contractor, and liability may not be imputed to the employer.[40]

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36. The Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1970), authorizes the reviewing court to "set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See* note 44 *infra.*

37. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 26.2 (1956); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 69 (4th ed. 1971). For a history of the doctrine, see T. BATY, VICARIOUS LIABILITY (1916).

38. 1 RESTATEMENT (SECOND) OF AGENCY § 220(1) (1958); F. HARPER & F. JAMES, *supra* note 37, at § 26.3; W. PROSSER, *supra* note 37, at § 70; Stevens, *The Test of the Employment Relation,* 38 MICH. L. REV. 188 (1939). The right to control has also been used as one of many justifications for the doctrine of vicarious liability. F. HARPER & F. JAMES, *supra* at 1366; W. PROSSER, *supra* at 459. However, since the issue in the present case does not involve the validity of the doctrine, but concerns only the test of the relationship which may give rise to the imposition of liability, the right to control will be considered throughout in this latter aspect.

The doctrine of vicarious liability has been treated thoroughly in the literature. *See, e.g.,* T. BATY, VICARIOUS LIABILITY (1916); Douglas, *Vicarious Liability and Administration of Risk,* 38 YALE L.J. 584 (1929); Klemme, *The Enterprise Liability Theory of Torts,* 47 U. COLO. L. REV. 153 (1976); Laski, *The Basis of Vicarious Liability,* 26 YALE L.J. 105 (1916).

39. *See* 1 RESTATEMENT (SECOND) OF AGENCY § 220(1) (1958). It has been noted that in industry today actual control is largely fictitious. Steffen, *Independent Contractor and the Good Life,* 2 U. CHI. L. REV. 501, 507 (1935).

40. 2 RESTATEMENT (SECOND) OF TORTS § 409, Comment *b* (1965); F. HARPER & F. JAMES, *supra* note 37, at § 26.11; W. PROSSER, *supra* note 37, at § 71; Harper, *The Basis*

On the basis of these general common law rules, the *Amoco Oil* majority found that the relationship between the branded refiners and their lessee-retailers did not, in and of itself, present sufficient evidence of control by the refiners to impose vicarious liability on them,[41] and that in this respect the regulations "alter the settled law between lessor and lessee as to their respective responsibilities in tort so as to make the refiner liable for *independent* lessees as though they were mere subservient employees."[42] Finding no authority in section 211(c) of the Clean Air Act of 1970[43] for such an exercise of discretion,[44] the majority insisted upon a case-by-case examination of the indicia of control whenever the refiner would be able to raise the defense of lessee-retailer negligence for the contamination of unleaded gasoline,[45] and required that there be shown "a demonstrated link between a lease agreement and a degree of actual control"[46] before vicarious liability could be imposed on the refiner. While the court reserved the question of the extent of control which would be sufficient to impose vicarious liability on the refiners, it is clear that the court applied the traditional common law "control" test of the employment relationship.[47]

Frequently, third-party damage suits are brought against branded refiners for personal injuries sustained through the negli-

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of the Immunity of An Employer of An Independent Contractor, 10 IND. L.J. 494 (1935); Morris, *The Torts of An Independent Contractor,* 29 ILL. L. REV. 339 (1934); Steffen, *supra* note 39, at 501. A list of factors distinguishing the employee from the independent contractor is found in 1 RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958).

41. Amoco Oil Co. v. EPA, 543 F.2d 270, 276 (D.C. Cir. 1976).

42. *Id.* at 275.

43. 42 U.S.C. § 1857f-6c(c) (1970).

44. The court did not find that the EPA had acted beyond the scope of its authority. Indeed, the EPA had the authority under § 211(c) of the Clean Air Act of 1970, 42 U.S.C. § 1857f-6c(c) (1970), to regulate or prohibit the sale of offending fuels. The court believed, however, that the liability provisions were an arbitrary means to accomplish this end. *See* text accompanying note 36 *supra.* The majority clearly indicated its position by adopting as its standard of review subparagraph (A) of 5 U.S.C. § 706(2) (1970) (Administrative Procedure Act), which directs the reviewing court to "set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The court stated, "That standard justifies the disposition we make of this case." Amoco Oil Co. v. EPA, 543 F.2d 270, 274-75 n.11 (D.C. Cir. 1976). If the court had found that the EPA exceeded its statutory authority, it would have adopted as its standard of review subparagraph (C) of 5 U.S.C. § 706(2) (1970), which directs the reviewing court to "set aside agency action . . . found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

45. Amoco Oil Co. v. EPA, 543 F.2d 270, 276 (D.C. Cir. 1976).

46. *Id.*

47. *Id.* at 277 & n.20.

gence of their lessee-retailers.[48] The law relating to the respective legal responsibilities in tort of refiner and retailer is, however, "settled,"[49] as the majority suggests, only in the sense that the courts are agreed that in deciding these cases all of the facts will be scrutinized in order to determine the relationship between the parties.[50] The generally accepted test for determining refiner liability is "whether the oil company has retained the right to control the details of the day-to-day operation of the service station; control or influence over results alone being viewed as insufficient."[51] The courts are also in agreement that the terms of the lease will not be dispositive if the evidence in fact indicates control by the oil company.[52] The courts are not in agreement, however, as to the relative weight to be accorded the pertinent factors. And, while the majority of the decisions have found that the lessee-retailer is an independent contractor, thus relieving the oil company of liability, the courts have failed to adopt any general principle other than the "control" test for deciding these cases.[53] At least one court has acknowledged:

> The legal relationships arising from the distribution systems of major oil-producing companies are in certain respects unique. . . . "This distribution system has grown up primarily as the result of economic factors and with little relationship to traditional legal concepts in the field of master and servant, so that it is perhaps not surprising that attempts by the court to discuss the relationship in the standard terms have led to some difficulties and confusion."[54]

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48. *See* cases cited at notes 51-53 *infra.*

49. Amoco Oil Co. v. EPA, 543 F.2d 270, 275 (D.C. Cir. 1976).

50. *See* cases cited at notes 51-53 *infra.*

51. Hoover v. Sun Oil Co., 212 A.2d 214, 216 (Del. Super. 1965).

52. Brenner v. Socony Vacuum Oil Co., 236 Mo. App. 524, 158 S.W.2d 171 (1942); Texaco v. Layton, 395 P.2d 393 (Okla. 1964); Willman v. Texaco, Inc., 535 S.W.2d 774 (Tex. Civ. App. 1976).

53. *Compare* Brenner v. Socony Vacuum Oil Co., 236 Mo. App. 524, 158 S.W.2d 171 (1942) *and* Humble Oil & Refining Co. v. Martin, 148 Tex. 175, 222 S.W.2d 995 (1949) *with* Smith v. Cities Service Oil Co., 346 F.2d 349 (7th Cir. 1965); Hoover v. Sun Oil Co., 212 A.2d 214 (Del. Super. 1965); Cawthon v. Phillips Petroleum Co., 124 So.2d 517 (Fla. Dist. Ct. App. 1960); Manis v. Gulf Oil Corp., 124 Ga. App. 638, 185 S.E. 2d 589 (1971); Elbers v. Standard Oil Co., 331 Ill. App. 207, 72 N.E.2d 874 (1947); Chevron Oil Co. v. Sutton, 85 N.M. 679, 515 P.2d 1283 (1973); Coe v. Esau, 377 P.2d 815 (Okla. 1963); Texas Co. v. Wheat, 140 Tex. 468, 168 S.W.2d 632 (1943); Foster v. Steed, 19 Utah 2d 435, 432 P.2d 60 (1967). One commentator has noted that "[t]he myriad factual combinations possible with varying degrees of economic control complicate the problem of forecasting the result in any particular situation." Comment, *Master and Servant—The Filling Station Operator as an Independent Contractor,* 38 MICH. L. REV. 1063, 1072 (1940).

54. Hoover v. Sun Oil Co., 212 A.2d 214, 215 (Del. Super. 1965) (*quoting* Annot., 83

This confusion in the cases has been criticized not only for the resultant lack of predictability, but also because the independent contractor doctrine is falling into disfavor as an anachronism in the modern economic sphere.[55] Commentators note that this is especially true with respect to the "unique" character of the gasoline distribution system.[56] Indeed, a recent decision by a Maryland court, which permitted evidence of a refiner-retailer agency relationship to go to the jury in a personal injury case, purports to find an emerging trend toward rejecting the independent contractor immunity in refiner-retailer tort cases in favor of using the agency principle of apparent authority:

A.L.R.2d 1282, 1284 (1962)).

55. Harper, 10 IND. L.J., *supra* note 40, at 499-500; Morris, *supra* note 40. There are 14 exceptions to the general rule that an employer is not vicariously liable for the torts of an independent contractor. 2 RESTATEMENT (SECOND) OF TORTS §§ 416-429 (1965). These exceptions "have so far eroded the 'general rule,' that it can now be said to be 'general' only in the sense that it is applied where no good reason is found for departing from it." *Id.* § 409, Comment *b.* These exceptions fall into two general categories, the so-called nondelegable duty doctrine and the doctrine of inherently dangerous work, and they have been developed for policy reasons which deny to the employer the independent contractor immunity in cases in which it is felt that the employer has a responsibility which he alone has the duty to discharge properly. "There has been a rather marked tendency, especially in recent years, to extend the scope of many of the rules [of vicarious liability for the torts of independent contractors]. The law is still obviously undergoing a process of development toward limits which are still uncertain." *Id.*, Introductory note at 395. Prosser observes that "[i]t is difficult to suggest any criterion by which the non-delegable character of such duties may be determined, other than the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another." W. PROSSER, *supra* note 37, at 471.

While it would seem desirable to bring the gasoline contamination problem within the scope of the nondelegable duty doctrine, this result is foreclosed by the 1974 decision in Amoco Oil Co. v. EPA, 501 F.2d 722, 748-49 (D.C. Cir. 1974). There, the court refused to impose liability on the refiners for contamination caused by several classes of contractors within the distribution system. *See* text accompanying notes 16-22 *supra.* In short, the court did not respond to the EPA's argument that "there is a positive duty on the major brand refiner to prevent any violation of the unleaded gasoline standard at his retail outlets. . . ." Statement by the EPA, 38 Fed. Reg. 1254, 1255 (1973).

56. Comment, 38 MICH. L. REV., *supra* note 53; Note, *Tort Liability of Oil Companies for Acts of Service Station Operators,* 3 VAND. L. REV. 597 (1950). *See also* note 57 *infra.* The authors of a leading treatise note that:

> Questions arise mainly where an enterprise makes regular use of individuals (*e.g.*, salesmen or newsboys) or units that would ordinarily be regarded as subordinate to it (such as the filling stations of the great oil companies), in order to get something done which would ordinarily be regarded as a part of its enterprise. . . . [I]t is here that immunity for the conduct of independent contractors tends most to thwart allocation of losses to responsible enterprises, and therefore that the defense of independent contractor meets mounting disfavor.

F. HARPER & F. JAMES, *supra* note 37, § 26.11, at 1402-03.

> We well recognize the significance of this result. We are aware also that traditionally oil companies have been protected from liability by reciprocal leases and simultaneous dealer agreements which have provided a moat between the company and its "independent" operator which could not be bridged by *actual* agency, express or implied. The use of apparent agency to ford that moat is at best an "emerging doctrine," . . . and is not always accepted by courts when it has been offered.[57]

Thus, the *Amoco Oil* majority not only imports into the regulatory scheme the somewhat discredited independent contractor doctrine, but also creates an administrative nightmare by requiring the case-by-case scrutiny of the refiner-lessee relationship which occurs in personal injury cases. This kind of examination, which can range from a determination of the refiner's control over the cleanliness of the rest rooms to its control over the financial operations of the station, is unsuited to the needs of efficient regulatory procedure. By importing this unsettled law into the administrative scheme, the majority indicated an insensitivity to the statutory purpose as well as to the possible scope of the vicarious liability rules.

The Dissent—The Statutory Purpose Must be Served

In his dissent, Judge Wright vigorously questioned the majority's reliance on the traditional common law test of vicarious liability, noting that the test is not "cast in concrete,"[58] and that liability does not have to depend in every case "upon the familiar dichotomy between employee and independent contractor."[59] Judge Wright made a critical distinction—indeed, it is the crux of the issue—when he observed:

> [The common law test] may well be a serviceable distinction when applied to exonerate the refiner of responsibility for most negligent torts committed by a lessee-retailer or the lessee's employees. But it simply does not apply here. EPA is not trying to hold refiners liable for every personal injury caused by lessees

57. Mabe v. B.P. Oil Corp., 31 Md. App. 221, 356 A.2d 304, 312 (1976). *See* Gizzi v. Texaco, Inc., 437 F.2d 308 (3d Cir. 1971); Sanders v. Clark Oil Refining Corp., 57 Mich. App. 687, 226 N.W.2d 695 (1975); Johnston v. American Oil Co., 51 Mich. App. 646, 215 N.W.2d 719 (1974); Note, 3 VAND. L. REV., *supra* note 56, at 605-06. *Contra,* Miller v. Sinclair Refining Co., 268 F.2d 114 (5th Cir. 1959); Apple v. Standard Oil, Div. of Am. Oil Co., 307 F. Supp. 107 (N.D. Cal. 1969); Sherman v. Texas Co., 340 Mass. 606, 165 N.E.2d 916 (1960).

58. Amoco Oil Co. v. EPA, 543 F.2d 270, 281 (D.C. Cir. 1976) (Wright, J., dissenting).

59. *Id.*

> or their employees. Its regulations are narrowly focused on one specific evil, and in this limited area, because of the realities of the gasoline distribution system . . . vicarious liability of refiner-lessors is a sensible and permissible control strategy.[60]

Judge Wright clarified his dissent, which rested on policy grounds, by referring to the violation at issue as a " 'new tort,' "[61] one which was a product of the clash between technology and the public health and welfare.[62] While admitting that the common law vicarious liability rules were "relevant,"[63] he refused to consider them "dispositive,"[64] and saw no reason why a more realistic standard of vicarious liability should not be used to define the legal responsibilities of refiner and lessee-retailer for this specific statutory purpose.[65] Noting that the issue of liability in the consumer products field has undergone pronounced changes due to the willingness of the courts to respond to the changing economic and technological environment, he urged that similar considerations apply in the present case.[66] Freed from the restrictions of the rules of common law vicarious liability in tort, the EPA would be permitted to fulfill the statutory purpose by establishing standards of liability appropriate to this particular offense:

> Perhaps the key to the majority's misapprehension of the real issues in this case lies in its failure to appreciate this distinction between applying given standards and establishing new ones. It repeatedly acts as though Congress had directed EPA to *apply*—lock, stock, and barrel—the traditional standards of vicarious liability. . . .
>
> One may scan the Clean Air Act in vain for any hint that Congress meant EPA to take such a crabbed view of its role.[67]

Judge Wright believed that the control exercised by the branded refiners over their distribution networks in relation to the lessee-stations was sufficient to fall within the relevant vicari-

60. *Id.*
61. *Id.* Judge Wright noted that the tort label might not be appropriate because the common law vicarious liability rules would apply if a consumer sued for damage to his emission control device caused by contaminated unleaded gasoline. *Id.* n.8.
62. *Id.* at 281.
63. *Id.* n.7.
64. *Id.*
65. *Id.* at 282.
66. *Id.*
67. *Id.* at 284 n.12.

ous liability rules for purposes of this regulatory measure.[68] He reasoned that it was not necessary to hold lessee-retailers "fully independent for all purposes"[69] merely because they are often found to be independent for purposes of allocating liability for personal injuries.[70]

The Independent Contractor and the Statutory Purpose Doctrine—Retreat from the Common Law

With the advent of the social legislation of the 1930's, the employment relationship became the focus of judicial concern in an area other than vicarious liability. It became necessary to provide a definitional standard whereby working people would or would not be included within the protection of legislation such as social security, workmen's compensation, fair labor standards and labor relations. Although this legislation differs in substance and scope from the regulatory scheme presently under consideration, the ways in which courts and commentators have dealt with the barrier to statutory fulfillment presented by the common law "control" test are apposite. The cases which will be considered provide, by analogy, an insight into the potential scope of the common law vicarious liability rules as they might be applied to this specific public interest statute as implemented by the EPA regulations.

In a recent case arising under the Fair Labor Standards Act,[71] the Court of Appeals for the Fifth Circuit held that "[t]he terms 'independent contractor,' 'employee,' and 'employer' are not to be construed in their common law senses when used in federal social welfare legislation."[72] This doctrine first appeared in a series of Supreme Court cases decided in the 1940's in which the Court announced the "economic reality" test as being a more realistic criterion designed to effectuate the statutory purpose of employee protection.[73] The Court recognized the fact that while the "control" test was relevant to a determination of the employ-

68. *Id.* at 282.

69. *Id.* at 284. The majority considered the lessee-retailers to be independent. *See* text at note 42 *supra.*

70. *Id.* at 283-84.

71. 29 U.S.C. §§ 201-219 (1970).

72. Mednick v. Albert Enterprises, Inc., 508 F.2d 297, 299 (5th Cir. 1975).

73. Bartels v. Birmingham, 332 U.S. 126, 130 (1947) (Social Security Act); Rutherford Food Corp. v. McComb, 331 U.S. 722, 726-27 (1947) (Fair Labor Standards Act); United States v. Silk, 331 U.S. 704, 713 (1947) (Social Security Act); NLRB v. Hearst Publications, Inc., 322 U.S. 111, 124-29 (1944) (National Labor Relations Act).

ment relationship, it would, standing alone, seriously constrict the interpretation of that relationship and thus defeat the legislative purposes sought to be achieved by excluding those who should be covered. The new criterion was variously stated, but the essence of it was framed by the Court in *NLRB v. Hearst Publications, Inc.:*

> Unless the common-law tests are to be imported and made exclusively controlling, without regard to the statute's purposes, it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the special situation.[74]

The Court observed that the common law "control" test for determining vicarious liability in tort "has been by no means exclusively controlling in the solution of other problems."[75] The effect of the new doctrine was to include within the coverage of the statutes people who, in traditional common law terms, were not employees but who fell rather into some intermediate class having characteristics of both employees and independent contractors.[76] This category included those usually referred to as borderline cases.[77]

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74. 322 U.S. 111, 127 (1944). In subsequent cases the Court restated the proposition, stressing that "in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service. . . . *It is the total situation that controls.*" Bartels v. Birmingham, 332 U.S. 126, 130 (1947) (emphasis added). *See* United States v. Silk, 331 U.S. 704, 719 (1947).

75. NLRB v. Hearst Publications, Inc., 322 U.S. 111, 120-21 (1944).

76. One state court noted that under its Unemployment Compensation Law "[t]he most independent of independent contractors therefore are not included in the class of individuals entitled to benefits, but a class of individuals, who under [the] strict common law concept of independent contractorship were other than employees, are entitled." Globe Grain & Milling Co. v. Industrial Comm'n, 98 Utah 36, 40, 91 P.2d 512, 514 (1939).

77. *Compare* Bartels v. Birmingham, 332 U.S. 126 (1947) (bandleaders) *and* United States v. Silk, 331 U.S. 704 (1947) (unloaders), *with* United States v. Silk, 331 U.S. 704 (1947) (driver-owner truckers). The Court consolidated *Silk* with *Harrison v. Greyvan Lines, Inc.* The unloaders in *Silk* were found to be employees, while the truckers in both *Silk* and *Greyvan Lines* were found to be independent contractors. Justices Black, Douglas and Murphy dissented as to the truckers, on the grounds that the new doctrine required a finding that these workers were also employees. United States v. Silk, 331 U.S. at 719. Justice Rutledge would have remanded the cases as to the truckers for reconsideration by the lower courts in light of the new doctrine, observing that "the District Courts and the Circuit Courts of Appeals determined the cases largely if not indeed exclusively by applying the so-called 'common law control' test as the criterion. This was clearly wrong, in view of the Court's present ruling." *Id.* at 721.

Congress subsequently undermined the Court's decisions by amending the legislation in the area of social security and labor relations to require that the employment relationship be determined by reference to the common law rules, while leaving unchanged the legislation in the fair labor standards area.[78] There is to this day, however, considerable disagreement over the effect of the legislative amendments and, for example, at least four circuits choose to follow some variation of the reasoning of *NLRB v. Hearst Publications, Inc.*,[79] *United States v. Silk*,[80] and *Bartels v. Birmingham*,[81] deciding close cases arising under the social security laws with reference to the broader criteria announced therein.[82] Even as to the "control" test itself, as one of the deter-

78. The pertinent sections now read:

29 U.S.C. § 203(e) (1970) (Fair Labor Standards Act):

> "Employee" includes any individual employed by an employer. . . .

26 U.S.C. § 3121(d)(2) (1970) (Federal Insurance Contributions Act):

> [T]he term "employee" means . . . any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee. . . .

26 U.S.C. § 3306(i) (1970) (Federal Unemployment Tax Act):

> [T]he term "employee" has the meaning assigned to such term by section 3121(d). . . .

29 U.S.C. § 152(3) (1970) (Labor Management Relations Act):

> The term "employee" shall include any employee . . . but shall not include . . . any individual having the status of an independent contractor. . . .

Under the Federal Insurance Contributions Act, certain borderline classes of workers, who would have been considered independent contractors at common law, are now specifically included within the coverage of the Act. 26 U.S.C. § 3121(d)(3) (1970). These are agent and commission drivers, salesmen, and home workers. This specific inclusion applies to all but full-time life insurance salesmen and home workers under the Federal Unemployment Tax Act. 26 U.S.C. § 3306(i) (1970).

The amendments to the social security laws were a result of congressional concern that the Supreme Court's guidelines would prove to be too vague and would lodge too much discretion with the administrative agencies in determining coverage under the social security laws. United States v. W.M. Webb, Inc., 397 U.S. 179, 187 (1970). This concern is inapposite to the issue presented to the court in the present case. For a discussion of the legislative amendments in the social security area, reaching the conclusion that they did not restrict the scope of the Supreme Court's decisions, see Ringling Bros.—Barnum & Bailey Combined Shows, Inc. v. Higgins, 189 F.2d 865, 867-69 (2d Cir. 1951).

79. 322 U.S. 111 (1944).

80. 331 U.S. 704 (1947).

81. 332 U.S. 126 (1947).

82. Coddens v. Weinberger, 505 F.2d 765 (10th Cir. 1974); Texas Carbonate Co. v. Phinney, 307 F.2d 289 (5th Cir. 1962); Ben v. United States, 139 F. Supp. 883 (N.D.N.Y. 1956), *aff'd per curiam*, 241 F.2d 127 (2d Cir. 1957); Westover v. Stockholders Publishing Co., 237 F.2d 948 (9th Cir. 1956); Ringling Bros.—Barnum & Bailey Combined Shows, Inc. v. Higgins, 189 F.2d 865 (2d Cir. 1951). *Contra*, Air Terminal Cab, Inc. v. United States, 478 F.2d 575 (8th Cir. 1973) (retaining the "control" test).

minatives of the employment relationship, there is an indication of a continuing relaxation of the rigidity of the common law standard. The 1970 decision of the Supreme Court in *United States v. W.M. Webb, Inc.*,[83] has been interpreted as holding that the standard for the control factor should be the "degree of control that is commonly exercised in that business."[84] There is no question that the "economic reality" test is accepted by the courts in determining the employment relationship under the Fair Labor Standards Act.[85]

The majority in *Amoco Oil Co. v. EPA*[86] struck down the vicarious liability provisions because it believed that the relationship between the branded refiners and their lessee-retailers did not satisfy the common law "control" test.[87] It is clear, however, that this threshold standard has been judicially eroded, and has been found to be "by no means exclusively controlling"[88] in dealing with problems other than vicarious liability in tort. The courts have used two separate but related approaches: They have redefined the test and have examined closely the purpose for

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The circuit courts appear to take the view that the "economic reality" test is merely a restatement of the proposition that the "total situation," and not just the right of control, must determine the existence of the employment relationship. *See, e.g.*, Avis Rent A Car System, Inc. v. United States, 503 F.2d 423, 430 (2d Cir. 1974); Flemming v. Huycke, 284 F.2d 546, 547 (9th Cir. 1960). A leading case in the Court of Claims, however, distinguishes the two tests, substituting instead the doctrine that the employment relationship is to be determined by the common law rules realistically applied. Illinois Tri-Seal Prods., Inc. v. United States, 353 F.2d 216, 226, 228 (Ct. Cl. 1965). *See also* McCormick v. United States, 531 F.2d 554, 558 (Ct. Cl. 1976). This interpretation is followed by at least two circuits: Coddens v. Weinberger, 505 F.2d 765 (10th Cir. 1974); Texas Carbonate Co. v. Phinney, 307 F.2d 289 (5th Cir. 1962). An examination of the factors considered by all of these courts indicates, however, that whatever the label applied to the test, it is some variant of the doctrine of *Hearst, Silk* and *Bartels*. The *Texas Carbonate* court observed that "[a]lthough the determination [of the employment relationship] is to be made by common law concepts, a realistic interpretation of the term "employee" is to be adopted, and doubtful questions should be resolved in favor of employment *in order to accomplish the remedial purposes of the legislation involved.*" Texas Carbonate Co. v. Phinney, 307 F.2d at 292 (emphasis added). This complex subject is covered in Broden, *General Rules Determining the Employment Relationship Under Social Security Laws: After Twenty Years An Unsolved Problem*, (pts. 1-2), 33 TEMPLE L.Q. 307, 381 (1960). For a good review of the effect of the amendments in the labor relations field, see Jacobs, *Are "Independent Contractors" Really Independent?*, 3 DEPAUL L. REV. 23 (1953).

83. 397 U.S. 179 (1970).

84. McCormick v. United States, 531 F.2d 554, 558 (Ct. Cl. 1976).

85. *See, e.g.*, Mednick v. Albert Enterprises, Inc., 508 F.2d 297 (5th Cir. 1975); Hodgson v. Taylor, 439 F.2d 288 (8th Cir. 1971); Shultz v. Mistletoe Express Serv., Inc., 434 F.2d 1267 (10th Cir. 1970).

86. 543 F.2d 270 (D.C. Cir. 1976).

87. *Id.* at 276.

88. NLRB v. Hearst Publications, Inc., 322 U.S. 111, 120-21 (1944).

which the test is to be used. The court in *Amoco Oil* could have drawn on this body of precedent to reach a different result. The complexities of the modern economic and technological world demand at least this much.

The continued vitality of the doctrine of *Hearst* and *Silk* is also demonstrated by a growing dissatisfaction with the common law test of the employment relationship in the area of workmen's compensation, an area which traditionally has used the "control" test to determine coverage.[89] Once again there has been a recognized need to use more realistic criteria because "the test of the employment status should be relevant to the purpose for which status is being tested."[90] The "relative nature of the work" test, which is essentially a variant of the "economic reality" test, has been suggested as a viable alternative to the "control" standard in the workmen's compensation field.[91] At present, it appears that only the New Jersey courts have openly adopted the concept,[92] but at least one authority believes that the trend is clearly discernible.[93] Reasoning that any test must be relevant to the scope of the legislation involved, and urging adoption of the suggested standard, Judge Conford's dissenting opinion in *Marcus v. Eastern Agricultural Association, Inc.*, which was adopted by the Supreme Court of New Jersey on review, observed:

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89. *See, e.g.*, Bieluczyk v. Crown Petroleum Corp., 134 Conn. 461, 58 A.2d 380 (1948); Mid-Continent Petroleum Corp. v. Vicars, 221 Ind. 387, 47 N.E.2d 972 (1943); Dawson v. Clark Oil and Refining Corp., 410 S.W. 2d 353 (Mo. App. 1966). *But see* Bowser v. State Indus. Accident Comm'n, 182 Ore. 42, 185 P.2d 891 (1947). While the court in *Bowser* used the "control" test, it cited *Silk* for the proposition that social legislation is to be liberally construed to effect the statutory purpose and observed: "That different results or conclusions have been arrived at from the same state of facts is only natural. It depends, to some degree, upon the purpose sought to be accomplished by the act being administered." Bowser v. State Indus. Accident Comm'n, *id.* at 45, 185 P.2d at 892. A leading authority on workmen's compensation refers to the doctrine of *Hearst* and *Silk* as the "newer way" of arriving at a determination of the employment relationship. 1A A. LARSON, WORKMEN'S COMPENSATION LAW § 43.41 (1973).

90. 1A A. LARSON, *supra* note 89, at § 45.32(a).

91. *Id.* at §§ 43.50, 44.20.

92. Rossnagle v. Capra, 127 N.J. Super. 507, 318 A.2d 25 (1973), *aff'd per curiam*, 64 N.J. 549, 318 A.2d 20 (1974); Marcus v. Eastern Agricultural Ass'n, Inc., 58 N.J. Super. 584, 157 A.2d 3 (1959) (Conford, J., dissenting), *rev'd*, 32 N.J. 460, 161 A.2d 247 (1960). The reversal in *Marcus* was on the grounds of Judge Conford's dissent in the lower court.

93. Larson has observed in general that "[t]here is therefore beginning to be evinced in the decisions a sort of unexpressed conviction that, if the proper scope of workmen's compensation and other remedial enactments is not to be defeated, a different criterion based on the realistic nature of the work must be given more weight." 1 A A. LARSON, *supra* note 89, at § 45.10. *See also id.* § 43.54.

> Patently, where the type of work requires little supervision over details for its proper prosecution and the person performing it is so experienced that instructions concerning details would be superfluous, a degree of supervision no greater than that which is held to be normally consistent with an independent contractor status might be equally consistent with an employment relationship. In such a situation the factor of control becomes inconclusive, and reorientation toward a correct legal conclusion must be sought by resort to more realistically significant *criteria.*[94]

The cases in the field of social legislation clearly indicate that the statutory purpose doctrine compels judicial flexibility. Surely, it is improper to suggest that because certain categories of people are included in the class of employees for purposes of social welfare legislation, their employers would be, in all cases, vicariously liable in tort for any and all of their negligent acts. No such proposition need, nor indeed should, follow. This principle applies with equal force to the legislation presently under consideration. To hold branded oil refiners vicariously liable, under this specific regulatory scheme, for the contamination of unleaded gasoline by their lessee-retailers would not alter the legal responsibilities of refiner and retailer in the law of negligence generally.[95] In the leading case on chain store taxation, wherein it was held that a refiner "controlled" its filling stations for purposes of the chain store tax, the court observed:

> [T]he determination by the courts that a particular sort of control was meant by the lawmaking body in dealing with one set of circumstances does not require that the same conclusion be reached when a different legislative purpose is to be accomplished.
>
> . . . .
>
> . . . We are not called upon to decide the question of tort liability under the agreements in this case . . . and it does not necessarily follow that the plaintiff is liable for the torts of the dealers merely because it has such a control over the stations as to subject it to the chain store tax.[96]

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94. 58 N.J. Super. 584, 597, 157 A.2d 3, 10 (1959) (Conford, J., dissenting), *rev'd,* 32 N.J. 460, 161 A.2d 247 (1960).

95. This point was the crux of Judge Wright's dissent in Amoco Oil Co. v. EPA, 543 F.2d 270, 281 (D.C. Cir. 1976) (Wright J., dissenting). *See* text accompanying note 60 *supra. See also* note 61 *supra.*

96. Gulf Refining Co. v. Fox, 11 F. Supp. 425, 430-31 (S.D.W. Va. 1935), *aff'd,* 297 U.S. 381 (1936). *See* Comment, 38 MICH. L. REV., *supra* note 53, at 1067.

These cases reflect primarily a displeasure with the common law "control" test when it tends to defeat the statutory purpose, and most commentators appear to agree with this assessment.[97] Thus, the law in this area has indeed been in retreat from the rigidity of the common law. It suggests very clearly that the independent contractor immunity should not be raised as a bar to the fulfillment of specific statutory purposes of overriding social importance. The authors of a leading treatise have observed that:

> On the whole the tendency has been to resolve doubts in favor of the application of such legislation by extending the class of servant or employee at the expense of the independent contractor in close cases. And while the policies behind these various statutes and rules may not all be the same, no lawyer will be surprised to find that these decisions have influenced each other so as to broaden the class of employees in vicarious liability cases as well.[98]

It is not suggested here that the majority in *Amoco Oil* should have affixed the label "employee" on the lessee-retailers and so have decided the case in traditional terms. Indeed, the flaw in the court's reasoning lies in the fact that the majority was transfixed by the common law rules of vicarious liability in tort and by the need to decide the issue in those traditional terms. Any attempt to analyze the problem in such a way must end in a frustration of the desired result. Rather, the better way would have been to look to the outer limits of the relevant common law rules, as Judge Wright urged in dissent and as the social legislation cases indicate can be done. Labels can be traps, and it has been observed that:

> The realistic judge . . . will not fool himself or anyone else by basing decisions upon circular reasoning from the presence or absence of corporations, conspiracies, property rights, titles, contracts, proximate causes, or other legal derivatives of the judicial decision itself. Rather, he will frankly assess the conflicting human values that are opposed in every controversy, appraise the social importance of the precedents to which each claim appeals, [and] open the courtroom to all evidence that

97. Broden, *supra* note 82; Jacobs, *Are "Independent Contractors" Really Independent?*, 3 DEPAUL L. REV. 23, 42 (1953); Stevens, *The Test of the Employment Relation*, 38 MICH. L. REV. 188 (1939); Wolfe, *Determination of Employer-Employee Relationships in Social Legislation*, 41 COLUM. L. REV. 1015 (1941).

98. F. HARPER & F. JAMES, *supra* note 37, at 1404.

> will bring light to this delicate practical task of social adjustment. . . .[99]

To label the lessee-retailer an "independent contractor," the violation at issue a "tort," and the dispositive test that of common law "control," serves only to mask the delicate practical task of social adjustment which faced the court in *Amoco Oil.* The cases that have been examined clearly indicate that it is possible to retain the relevant common law rules and at the same time reshape the tests in order to prevent an undesirable result. Thus, sound policy reasons require that inquiry be made into the meaning of control or the right to control within a given context. The question which should have been asked by the *Amoco Oil* majority is: Control for what purpose? When so posed, it compels the result that ought to have been reached. For the purpose of regulating the sale of unleaded gasoline, the control exercised by the branded refiners over their lessee-retailers—based upon the realities of the gasoline distribution system and the nexus between those realities and the statutory purpose—is clearly sufficient to justify the imposition of vicarious liability on the refiners when contaminated unleaded gasoline is offered for sale at their lessee-stations. This question should have been resolved in the context of the Clean Air Act in order to fulfill the statutory purpose, of which the regulations are a necessary and reasonable part.

Joan A. King

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99. Cohen, *Transcendental Nonsense and the Functional Approach,* 35 COLUM. L. REV. 809, 842 (1935).