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# California License To Be Sued: A Critique of Strict Liability Imposed on Business Owner Licensees From the Perspective of the Smog Check Industry

Zachary Young\*

## I. INTRODUCTION

*Respondeat superior*, “piercing the corporate veil,” and strict liability; the legal world at times can have the appearance of a mine field for a business owner—an appearance which many business owners would likely argue is representative of their realities. With so many legal avenues and theories designed to impose liability on business owners, one cannot help but ask a number of questions: What purpose do these theories serve? What policies do they promote? And perhaps most importantly, is it really necessary to be stacking the deck so heavily against business owners?

Consumer protection is the overarching goal justifying these theories of liability for business owners. The law assumes that “an [employer] is in a position to control the actions of [his or her employees].”<sup>1</sup> By holding the employers liable, the law seeks to control the employees indirectly. It assumes that employers will be motivated to use their control to ensure that their employees will also stay in compliance with the law.

However, there is no such thing as a free lunch. The cost of this benefit is the potential for business owners to be held liable absent any fault whatsoever. Even the assumption of control can be questioned. Can we really expect business owners to be able to prevent every single bad act of every single one of their employees? What if the employee violates the law while acting in good faith, should the employer still be liable? There are a number of concerns that these theories raise; however, even the United States Supreme Court has determined the benefits of these theories outweigh the costs. In the famous *Park*<sup>2</sup> case, the Court held the president of a food chain criminally liable for rodent contamination in one of the

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1. *Ford Dealers Ass’n v. Dep’t of Motor Vehicles*, 32 Cal. 3d 347, 353 n.8 (1982).

2. *United States v. Park*, 421 U.S. 658, 658 (1975).

company warehouses, despite lack of knowledge on the part of the president and the fact that he did not even work in the same state as the contaminated warehouse.

This same logic has carried into the field of business owner licensure. The courts have taken the same approach to prevent illegal conduct on the part of employees, stating “only through imposing liability on the licensee can such conduct be effectively controlled.”<sup>3</sup> Strict liability for employers has been justified by the principle that “the licensee, if he elects to operate his business through employees must be responsible to the licensing authority for their conduct in the exercise of his license . . . .”<sup>4</sup>

However, from the outset a distinction needs to be drawn between civil actions brought by a tort plaintiff and disciplinary actions brought by a regulatory agency. This article criticizes strict liability when used in disciplinary actions by regulatory agencies. In terms of tort actions, there is a need to make plaintiffs whole that is not present in disciplinary actions.<sup>5</sup> It makes sense to impose strict liability on business owners in tort actions for a couple of key reasons: First, tort plaintiffs often do not have the resources to trace fault within a business, making strict liability the only method by which a plaintiff can ensure that he or she is made whole; Second, business owners are generally the deep pockets and have the financial resources, typically through insurance, to make the plaintiff whole in tort actions. The need to make plaintiffs whole justifies imposing strict liability in these contexts, and business owners accept this fact by purchasing insurance and acknowledging that tort actions are often a cost associated with doing business. Putting tort actions aside, the rest of this article zeroes in squarely on imposing strict liability in disciplinary actions.

When it comes to licensing and disciplinary actions, the stakes are raised a bit. A business license represents someone’s livelihood. While supporters argue that strict liability does protect the public interest, the theory has the potential to infringe on an individual’s livelihood absent any fault on his or her part whatsoever. This doctrine has already been applied across the spectrum of industries. As a result of illegal activity on the part of employees, licensees have been punished in a number of industries ranging from pharmaceutical,<sup>6</sup> to alcoholic beverages,<sup>7</sup> to car sales,<sup>8</sup> to

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3. *Ford Dealers Ass’n*, 32 Cal. 3d at 362.

4. *Garcia v. Martin*, 14 Cal. App. 2d 785, 790 (2002).

5. *See Wisper Corp. v. Cal. Commerce Bank*, 49 Cal. App. 4th 948, 969 (1996) (“The primary purpose of our tort law is to make a plaintiff whole for damages suffered due to tortious actions by others.”).

6. *Randle v. Cal. State. Bd. of Pharmacy*, 20 Cal. App. 2d 254, 254 (1968).

7. *Garcia*, 14 Cal. App. 2d at 786 (holding bar owner liable, including revocation of his license, for the conduct of his female employees who solicited drinks for themselves from customers).

8. *Rob-Mac, Inc. v. Dep’t of Motor Vehicles*, 148 Cal. App. 3d 793, 793 (1983).

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horse racing<sup>9</sup> . . . yes, even horse racing has not been able to evade the mine field of strict liability. The question then becomes whether this is justified. Theoretically, at some point the benefit of protecting the public becomes overshadowed by the “injustice to an individual whose right to earn his livelihood in his chosen profession is lost because it is impossible for him to prevent a violation of the [law by his or her employees].”<sup>10</sup>

In the criminal law context, courts are extremely hesitant to revoke someone’s liberty, so much so that they require a showing of fault “beyond a reasonable doubt.”<sup>11</sup> Yet the law seems perfectly willing to jeopardize someone’s livelihood absent a showing of fault under any standard, much less one so high as to require lack of any reasonable doubt. Agencies have a number of punishments at their disposal to punish licenseholders including probation, suspension, and, in the worst of cases, revocation of licensure. Courts are comforted by the thought that the punishments are generally falling on “big evil corporations,” but that’s not always the case. Many of the business owners held strictly liable for the actions of their employees are small-business owners who upon punishment may lose their only source of livelihood without any direct fault on their part.

What if there were industries where the courts could direct liability solely to the person at fault? Would it still be appropriate to hold business owners liable if fault lies with one of their employees? In that situation, would there even be a benefit to application of the strict liability theory against the business owner?

This article seeks to critique and propose a leash on strict liability, to control this seemingly overbroad application of the law. It will critique the theory of strict liability from the perspective of the automotive smog check industry, where the law is relatively new and case law is in many areas in the early stages of development. However, the principles set forth can and should be applied to a number of industries; some of which, as we will see, have already begun limiting strict liability. Section II will discuss the background of the smog check industry and its governing law. Section III will critique the current state of the law and discuss the burdensome effect it places on business owners including smog station owners. Finally, Section IV will propose a bright line rule to limit strict liability and more effectively pursue public interests.

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9. *Sandstorm v. Cal. Horse Racing Bd.*, 31 Cal.2d 401, 403 (1948).

10. *Sandstorm*, 31 Cal.2d 401, 422 (1948) (Carter, J., dissenting).

11. *In Re Winship*, 397 U.S. 358, 361 (1970).

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## II. BACKGROUND: THE SMOG CHECK INDUSTRY AND THE GOVERNING LAW

### A. THE SMOG CHECK INDUSTRY

Once every two years California car owners get to experience the joys of the smog check industry while satisfying the requirement of biennial smog tests.<sup>12</sup> California's smog check program was created in response to the Federal Clean Air Act which Congress passed in 1970 to create minimum standards for air quality.<sup>13</sup> Falling short of the federal floor for air quality, California implemented its smog check program in 1982.<sup>14</sup> In enacting the program, the Legislature declared "the people of the State of California have a primary interest in the quality of the physical environment in which they live, and that this physical environment is being degraded by the waste and refuse of civilization polluting the atmosphere."<sup>15</sup>

Perhaps in shame, perhaps as a challenge to itself, California recognized the long road to compliance that lay before it and declared itself the most heavily air polluted state in the nation.<sup>16</sup> The problem has always been obvious—automobiles stand alone as the greatest source of air pollution in the state.<sup>17</sup> In fact, a very small percentage of automobiles cause a disproportionate amount of the air pollution in California.<sup>18</sup> However, while the problem has been identified, the solution has never been as readily apparent.

Showing its commitment to change, California enacted a program with the most stringent new car emission standards in the nation and a vehicle inspection program that theoretically would result in most cars producing very little pollution.<sup>19</sup> The program seeks to solve California's air quality problems by ensuring that new cars are designed with emission standards in mind and also to ensure that older model cars do not pollute

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12. *Does my Car Need a Smog Check?*, SMOGTIPS.COM, [http://www.smogtips.com/need\\_inspection.cfm](http://www.smogtips.com/need_inspection.cfm) (last visited Mar. 11, 2011).

13. *California Smog Check Program*, SMOGTIPS.COM, [http://www.smogtips.com/smog\\_program.cfm](http://www.smogtips.com/smog_program.cfm) (last visited March 11, 2011).

14. *Id.*

15. CAL. HEALTH & SAFETY CODE § 39000 (West 2011).

16. *Id.* at § 44080.

17. *What Is a Gross Polluter Vehicle?*, SMOGTIPS.COM, [http://www.smogtips.com/gross\\_polluter.cfm](http://www.smogtips.com/gross_polluter.cfm) (last visited Mar. 11, 2011) ("It is estimated that 50% of the smog in the state of California is produced by motor vehicles.").

18. HEALTH & SAFETY CODE § 44080; Rebecca Kimitch, *Cheaper, Tougher Smog Checks Promise to Reduce Pollution, Supporters Say*, WHITTIER DAILY NEWS (California), Oct. 18, 2010 ("Currently 75 percent of car exhaust pollution comes from 25 percent of cars on the road.").

19. HEALTH & SAFETY CODE § 44080.

beyond a maximum level.<sup>20</sup>

Public participation and awareness have always been additional tools the Legislature intended to aid in the program's success.<sup>21</sup> In fact, a public information program was created which the legislature intended "to develop and maintain public support and cooperation for the motor vehicle inspection and maintenance program."<sup>22</sup> The program was designed to inform the public about the "damage caused by air pollution . . . [t]he contribution of automobiles to air pollution[,] the gross polluter<sup>23</sup> problem[,] . . . the importance of maintaining a vehicle's emission control devices in good working order[,] and the importance of the [smog check] program."<sup>24</sup>

Programs, such as the public information program, designed to operate within the smog check program as a whole, are funded by the smog check program itself. The state attempts to make the smog check program as self-reliant as possible by using funds from the Vehicle Inspection and Repair Fund.<sup>25</sup> The money in the Fund consists of revenue collected from fines imposed on licensees.<sup>26</sup> Theoretically, as long as there are violators who need to be educated, the program will have the money to do so through the fines collected by catching those violators.

While California initially had high hopes for its smog check program, the program never quite achieved its aspirations. Skeptics of the program have been quick to report that the program has only reduced emissions by half the amount predicted by the United States Environmental Protection Agency.<sup>27</sup> Through nearly three decades of the program's existence, California has altered it numerous times, sometimes as a result of pressure from the EPA,<sup>28</sup> in hopes of achieving better results.<sup>29</sup> As probably

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20. Amihai Glazer, Daniel B. Klein & Charles Lave, *Clean on Paper, Dirty on the Road: Troubles with California's Smog Check*, 29 J. TRANSP. ECON. & POL'Y, 85, 85 (1995), available at [http://www.bath.ac.uk/e-journals/jtep/pdf/Volume\\_XXIX\\_No\\_1\\_85-92.pdf](http://www.bath.ac.uk/e-journals/jtep/pdf/Volume_XXIX_No_1_85-92.pdf).

21. See HEALTH & SAFETY CODE § 44070.5.

22. HEALTH & SAFETY CODE § 44070.5.

23. A gross polluter is a car which greatly exceeds the maximum allowed emissions levels (usually by more than twice the maximum). *What Is a Gross Polluter Vehicle?*, *supra* note 17. Gross polluters represent only ten to fifteen percent of all vehicles, but contribute more than half of automobile-caused air pollution. *Id.*

24. HEALTH & SAFETY CODE § 44070.5.

25. *Id.* at § 44071.

26. *Id.* at § 44062.

27. Glazer, *supra* note 20, at 85 ("The US Environmental Protection Agency had estimated that such a programme could reduce emissions of [hydrocarbon] and [carbon monoxide] by 25 per cent. . . . The programme's effectiveness was, at best, half that predicted.")

28. Greg Lucas, *EPA Turns Up the Heat on State in Smog-Test War*, S.F. CHRONICLE, Jan. 8, 1994; *Whatever Happened To Give And Take?: EPA's Heavy-Handed Tactics In Disagreement On Smog Testing Are Riling California Officials*, L.A. TIMES, (Jan. 24, 1994), available at [www.articles.latimes.com/1994-01-24/local/me-14756\\_1\\_smog-testing](http://www.articles.latimes.com/1994-01-24/local/me-14756_1_smog-testing).

29. See Alex Roth, *New Smog Test Kicks In*, THE DAILY NEWS OF L.A., (June 9, 1998), available

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expected, these alterations have often had both supporters and opponents vehemently debating their expected results on the smog check program as a whole.<sup>30</sup>

Regardless of the overall effect these program alterations have had on California's smog check program, one problem has haunted the program since its inception. Fraud has been, and continues to be, one of the most troublesome problems related to the smog check industry.<sup>31</sup> Year after year, vehicles are passed despite emission levels well beyond the maximum limit.<sup>32</sup> One of the ways California has attempted to cut back on fraud has been to hold both the technicians and the smog check station owners liable for any incidents of fraud, regardless of fault. The rest of this article seeks to critique the State's use of a machete to do the job of a scalpel in remedying this admittedly complicated problem.

## B. THE GOVERNING LAW

The smog check industry is governed by the Bureau of Automotive Repair ("BAR") which lies within the California Department of Consumer Affairs.<sup>33</sup> BAR implements and enforces the laws governing the smog check industry against licensees in the industry, all in an effort to protect consumers. "Protection of the public" is, and always was, meant to be the highest priority for the BAR in "exercising its licensing, regulatory and disciplinary functions."<sup>34</sup>

Amidst BAR's licensing responsibilities is the licensure of smog check technicians (individuals who perform the actual smog tests) and smog check station owners (individuals who own facilities in which smog checks are performed), two distinct types of licenses. This licensing

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at [www.thefreelibrary.com/NEW+SMOG+TEST+KICKS+IN.-a083824822](http://www.thefreelibrary.com/NEW+SMOG+TEST+KICKS+IN.-a083824822) (discussing the effects of a stricter test being implemented in Los Angeles in 1998); Steve Geissinger, *Bay Area To Face Tougher Smog Test*, TRI-VALLEY HERALD (Pleasanton, California), (Sep. 27, 2002) (Governor Davis signs a bill in 2002 requiring stricter smog tests); Jeff Rowe, *Cash For Clunkers Hurt Some Smog Stations: Federal Program Cuts Into Test Business*, N. COUNTY TIMES (Escondido, California), (Apr. 14, 2010), [www.nctimes.com/business/article\\_afe2801c-ada9-5cd1-865d-3ca3b29482f4.html](http://www.nctimes.com/business/article_afe2801c-ada9-5cd1-865d-3ca3b29482f4.html) (discussing the effect of the "Cash for Clunkers" program on the smog check industry).

30. Compare Kimitch, *supra* note 18 (supporting 2010 law which allows "the smog emitting levels of new cars to be measured using their on-board diagnostic systems rather than through tailpipe emissions"), with *Proposed Rule to Scale Back California's Smog Check*, SYSTEMIC FAILURE BLOG (Feb. 25, 2010), <http://systemicfailure.wordpress.com/2010/02/25/proposed-rule-to-scale-back-california-smog-check>.

31. Margot Roosevelt, "Widespread Fraud" In California's Smog Test Program, EARTH PROTECT BLOG (Feb. 25, 2010), <http://www.earthprotect.com/blogs/widespread-fraud-in-california-smog-test-program.html?blogger=plantit>.

32. *Id.*

33. *BAR Programs*, DEPARTMENT OF CONSUMER AFFAIRS, BUREAU OF AUTOMOTIVE REPAIR, [http://www.bar.ca.gov/03\\_BARPrograms/index.html](http://www.bar.ca.gov/03_BARPrograms/index.html) (last visited Feb. 1, 2011).

34. Automotive Repair Act, CAL. BUS. & PROF. CODE § 9880.3 (West 2011).

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system and the laws governing the smog check industry were meant to “ensure uniform and consistent tests and repairs by all qualified smog check technicians and licensed smog check stations throughout the state.”<sup>35</sup>

Turning first to smog check station owners, the owner of a smog check station must be licensed by BAR to operate that type of business.<sup>36</sup> There are three different types of smog station licenses, the names of which are good indicators for what they permit the licensees to do: test-only licensure, under which the station may only perform smog tests; repair-only, under which the station may only perform repairs on vehicles which have failed a smog test;<sup>37</sup> and test-and-repair, under which the station can perform both tests and repairs.<sup>38</sup> Each type of license is distinct and independent from the others, so the smog station owner has discretion about what area of the industry he wants to pursue.<sup>39</sup>

The California Legislature has also permitted the implementation of a “gold shield” program,<sup>40</sup> which BAR has implemented to make the smog check program more convenient for consumers.<sup>41</sup> The gold shield program allows certain licensed smog check stations that meet “higher performance standards to provide [additional] services to California consumers. In addition to the regular Smog Check inspection and repair services, Gold Shield stations can inspect and certify “Directed Vehicles,” issue certificates to ‘Gross Polluters,’ and perform state subsidized repairs through the Consumer Assistance Program.”<sup>42</sup> However, unless renewed, California’s gold shield program is scheduled to end in 2013.<sup>43</sup>

Smog station owners must meet a variety of requirements to obtain, and preserve, licensure from BAR. Prior to being granted a license, BAR must first inspect and confirm that the potential licensee’s facility complies with all the requirements of a licensed smog station. After the license has been granted, BAR also has the power to inspect the facility at any time during normal business hours.<sup>44</sup> After licensure, the station owner must post and keep posted all relevant licenses for his facility as well as the price ranges for services offered.<sup>45</sup> The owner must also display an identifying

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35. HEALTH & SAFETY CODE § 44036(a).

36. *Id.* at § 44014(a)-(b).

37. HEALTH & SAFETY CODE § 44036(b)-(c).

38. CODE REGS. tit. 16, § 3340.16.5 (2011).

39. HEALTH & SAFETY CODE § 44014(b),(d)-(e).

40. *Id.* at §§ 44014.2(a), 44014.4.

41. *Gold Shield Program Fact Sheet*, DEPARTMENT OF CONSUMER AFFAIRS, BUREAU OF AUTOMOTIVE REPAIR, [http://www.bar.ca.gov/80\\_BARResources/01\\_CAP&GoldShield/GoldShield\\_Stations.html](http://www.bar.ca.gov/80_BARResources/01_CAP&GoldShield/GoldShield_Stations.html) (last visited Mar. 11, 2011).

42. *Id.*

43. *Id.*

44. CODE REGS. tit. 16, § 3340.15 (2011).

45. *Id.*

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sign on the outside of his or her facility, the content of which is provided by BAR.<sup>46</sup>

Record keeping is also an important responsibility of the smog station owner. The owner licensee must keep records related to all transactions and also must have those records available for potential inspections by BAR.<sup>47</sup> Additionally, the owner must keep on-site information related to the station's current emission control system as well as service procedures.<sup>48</sup>

Finally, the owner licensee is also responsible for complying with a number of requirements related to the equipment used at his or her facility. There are some nuances in the equipment requirements for test-only stations<sup>49</sup> as opposed to test-and-repair stations<sup>50</sup> because of the different equipment used and the different tasks performed at each type of facility. However, there are a number of general requirements which apply to all types of facilities.<sup>51</sup> One such general requirement is that the facility may only use original equipment and replacement parts that have been certified by BAR.<sup>52</sup> Every facility must also use "computerized and tamper-resistant testing equipment" to help ensure accurate test results.<sup>53</sup>

A breach of any of these duties can put an owner's license in jeopardy. It is his or her responsibility to ensure that each of these requirements is met. As is the case with most industries involving licensure, even with compliance, a station license expires "one year from the last day of the month in which the license was issued unless renewed."<sup>54</sup> Each year the station owner must renew his or her license, which can prompt BAR to investigate the compliance of the facility before renewing that license.

As mentioned, not only must smog tests be performed at licensed smog facilities, those tests and any subsequent repairs must be performed by licensed smog technicians who are also regulated by BAR.<sup>55</sup> "No person shall perform, for compensation, tests or repairs of emission control devices . . . unless the person performing the test repair is a qualified smog check technician."<sup>56</sup>

There are a number of requirements applicants must comply with prior to being granted a smog check technician's license, including those

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46. CODE REGS. tit. 16, § 3340.22.

47. *Id.* at § 3340.15(f) (2011).

48. HEALTH & SAFETY CODE § 44030(b)(3).

49. CODE REGS. tit. 16, § 3340.16(a).

50. *Id.* at § 3340.16.5(a).

51. *Id.* at § 3340.17.

52. HEALTH & SAFETY CODE § 44036 (b)(1).

53. *Id.* at § 44030(b)(1).

54. CODE REGS. tit. 16, § 3340.10(c).

55. HEALTH & SAFETY CODE § 44014(a).

56. *Id.* at § 44032.

involving testing and training.<sup>57</sup> Similar to smog check stations, technicians can only test/repair classes and categories of vehicles for which they are deemed qualified by BAR.<sup>58</sup> Aspiring technicians must pass the tests and perform the training associated with the types of qualifications they seek.<sup>59</sup> Once granted, a technician's license is valid for two years<sup>60</sup> before renewal is necessary (as opposed to the station owner's license which expires every year).

For purposes of this article, the technician's responsibilities after licensure are much more relevant than those before licensure. A smog check technician has a number of responsibilities in a smog check station completely distinct from the station owner's responsibilities. While the station owner provides the equipment, the facilities with which to conduct the tests, and the customers, the technician is the one who actually performs the tests and repairs.

Once licensed, each technician is given a license number and access code.<sup>61</sup> Access codes are assigned by BAR and each is unique to the technician to whom it is assigned.<sup>62</sup> BAR requires that technicians protect the security of their access code.<sup>63</sup> In fact, disclosure of a technician's access code requires the technician to immediately contact BAR in order to have the access code changed.<sup>64</sup>

BAR's strong policy requiring privacy of access codes is to ensure that each smog test can be tracked to the technician who performs it. Before performing each and every smog test, a technician is required to enter both his license number and access code to gain access into the Emissions Inspection System.<sup>65</sup> "Each technician is responsible for the accuracy of the test."<sup>66</sup> Smog tests are a one person job. No one, including other licensed technicians and the station owner, may assist in performing the test.

While it's true that the smog check station, not the technician, issues the smog check certificate,<sup>67</sup> the technician is the only one who certifies compliance with all the laws, regulations, and procedures associated with

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57. HEALTH & SAFETY CODE at §§ 44045.5–45.6.

58. *Id.* at §§ 44014(b), (d)–(e).

59. CODE REGS. tit. 16, § 3340.28.

60. *Id.* at § 3340.29(e).

61. DEPARTMENT OF CONSUMER AFFAIRS, BUREAU OF AUTOMOTIVE REPAIR, SMOG CHECK INSPECTION PROCEDURES MANUAL, (Aug. 2009) (incorporated by reference in CAL. CODE REGS. tit. 16, § 3340.45).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. HEALTH & SAFETY CODE § 44010.

performing a smog check test.<sup>68</sup> Once the technician gives a stamp of approval and the certificate is issued, it is impossible to void that certificate.<sup>69</sup>

The laws governing the smog check industry lay out clear and discernable responsibilities for all those involved. For BAR, the question becomes who to hold liable when those laws are not complied with.

### C. LIABILITY FOR LICENSEE, SMOG CHECK STATION OWNERS

It makes sense that a governing agency should have the power to revoke a license when the licensee shirks his or her responsibilities, but should the agency have the power to hold a licensee responsible for the violation of another licensee? Whether you call it *respondeat superior*, piercing the corporate veil, or strict liability, that's exactly what governing agencies have begun to do—hold licensee business owners liable for their employees' conduct absent any fault on the part of the business owner.

Generally, American law does not impose “individual liability for an act which ordinary human care and foresight could not guard against.”<sup>70</sup> Furthermore, “it is also a general principle . . . that a loss from any cause purely accidental must rest where it chances to fall.”<sup>71</sup> However, above all these principles is the notion that statutes may impose obligations and responsibilities otherwise not present on individuals in the name of the “general welfare of society.”<sup>72</sup>

Based on this last principle, in order to protect consumers, BAR, by statute, has authority to take disciplinary action against smog station owner licensees for the actions of the “licensee, or any partner, officer, or director thereof” including the licensee's employees.<sup>73</sup> The statute specifically authorizes BAR to take disciplinary action against a smog station owner if any of the owner's employees, including the smog check technicians, violate any of the laws governing the smog check industry, is convicted of a crime substantially related to the qualifications necessary to perform the work, commits any act involving dishonesty, fraud, or deceit whereby another is injured, or attempts to violate the law.<sup>74</sup> This type of authority can be found in other industries as well. The laws governing the smog

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68. SMOG CHECK INSPECTION PROCEDURES MANUAL, *supra* note 61, at 26.

69. *Id.* at 3.

70. *Sandstorm v. Cal. Horse Racing Bd.*, 31 Cal.2d 401, 406 (1948) (quoting *City of Chicago v. Sturges*, 222 U.S. 313, 322 (1911)).

71. *Id.*

72. *Id.*

73. HEALTH & SAFETY CODE § 44072.2; *see also* CAL. BUS. & PROF. CODE § 9889.3 (2011) (containing similar language).

74. HEALTH & SAFETY CODE § 44072.2; *see also* BUS. & PROF. CODE § 9889.3 (containing similar language).

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check industry are not alone in granting this type of authority to agencies.<sup>75</sup> For example, the Board of Pharmacy has authority to hold pharmacy owners liable for the actions of pharmacists,<sup>76</sup> the Department of Motor Vehicles has authority to hold car dealership owners liable for the actions of their car salespersons,<sup>77</sup> and the Department of Alcoholic Beverage Control has authority to hold bar owners liable for the actions of their bartenders.<sup>78</sup>

A fraudulent certification of a polluting vehicle is one of the most serious violations of smog check law. Despite the fact that the technicians are the ones who perform the test, a smog station owner's license can be revoked if the owner's station fraudulently certifies a vehicle which his or her technician approved for certification.<sup>79</sup> A smog station owner must also be wary of contracting work out because he or she can even be liable for the performance of independent contractors.<sup>80</sup>

The result of all these legal avenues leading to liability for smog station owners is that an owner can be punished without having intentionally or negligently violated any law or regulation governing the industry. As punishment, BAR can impose a variety of sanctions against the smog station owner's license, including imposing probation upon terms and conditions set forth by BAR, suspending the license, or revoking the license.<sup>81</sup> Generally, after suspension of a license, BAR "may reinstate the license upon proof of compliance by the applicant with all provisions of the decision as to reinstatement."<sup>82</sup> However, after revocation of a license, the license cannot be reinstated or reissued for at least one year after the effective date of revocation.<sup>83</sup> If the misconduct involves a fraudulent certification, revocation is permanent, and "the license cannot be reinstated for any reason."<sup>84</sup>

Rest assured, there are some restraints on BAR's ability to impose punishments. By statute, BAR is required to consider a number of factors in deciding how severe a penalty to impose, including the seriousness of the violation, the good faith of the violator, and any history of previous

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75. See BUS. & PROF. CODE § 9884.7(a) ("The director . . . may deny, suspend, revoke, or place on probation the registration of an automotive repair dealer for any of the following acts or omissions related to the conduct of the business of the automotive repair dealer, which are done by the automotive repair dealer or any automotive technician, employee, partner, officer, or member of the automotive repair dealer." (emphasis added)).

76. See *Randle v. Cal. State. Bd. of Pharmacy*, 20 Cal. App. 2d 254, 261 (1968).

77. See *Rob-Mac, Inc. v. Dep't of Motor Vehicles*, 148 Cal. App. 3d 793, 799 (1983).

78. See *Garcia v. Martin*, 14 Cal. App. 2d 785, 788 (2002).

79. HEALTH & SAFETY CODE § 44072.10(c); CODE REGS. tit. 16, § 3340.24 (2011).

80. BUS. & PROF. CODE § 9884.9(b) (2011).

81. HEALTH & SAFETY CODE § 44072.4.

82. *Id.* at §44072.9.

83. *Id.*

84. *Id.* at § 44072.10(d).

violations.<sup>85</sup> This helps to ensure uniform punishments for similar violations.<sup>86</sup> Even so, with this kind of power, often the easiest thing for the agency to do is to punish anyone and everyone involved regardless of who may actually be at fault.<sup>87</sup>

Among the multitude of cases demonstrating the strict liability theory of punishing business owner licensees, *Rob-Mac, Inc. v. Department of Motor Vehicles* is illustrative.<sup>88</sup> There, the DMV imposed probation on Rob-Mac's automobile dealer license for the action of its employee. The President of Rob-Mac had entered into a business agreement with an individual named Barry Litsey.<sup>89</sup> Rob-Mac provided funds to Litsey who then purchased vehicles and sold them wholesale to dealers, the profits of which were to be split 50/50.<sup>90</sup> On one particular occasion, Litsey purchased seven vehicles which he later discovered had reset odometers (in violation of the law). Litsey proceeded to sell the vehicles anyway, without telling the buyers or Rob-Mac.<sup>91</sup> Upon hearing of the reset odometers, the President of Rob-Mac informed the buyers and even ordered a refund for one of the cars (it is unclear as to why all seven cars were not refunded).<sup>92</sup> Despite Rob-Mac's good faith effort to rectify the situation the court and BAR held the company president liable.<sup>93</sup> The court reasoned it was not unfair to impose punishment because there was no evidence Rob-Mac had taken affirmative steps to prevent the violation from occurring and the public interest in the matter justified any unfairness.<sup>94</sup> It's interesting to note that the court did not provide any advice or examples of steps that could and should have been taken by Rob-Mac, nor does it give any explanation whatsoever as to why Rob-Mac should have suspected any illegal conduct on the part of its employee.

This seemingly unfair result has been justified time and again by the principle that "the licensee, if he elects to operate his business through employees must be responsible to the licensing authority for their conduct in the exercise of his license . . . . By virtue of the ownership of a . . . license such owner has a responsibility to see to it that the license is not

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85. HEALTH & SAFETY CODE §§ 44050(b), 44056.

86. See DEPARTMENT OF CONSUMER AFFAIRS, BUREAU OF AUTOMOTIVE REPAIR, GUIDELINES FOR DISCIPLINARY PENALTIES AND TERMS OF PROBATION (2010), available at [http://www.bar.ca.gov/80\\_BARResources/09\\_Enforcement/Disciplinary\\_Penalties\\_Pt\\_1.html](http://www.bar.ca.gov/80_BARResources/09_Enforcement/Disciplinary_Penalties_Pt_1.html) (providing framework for penalties in order to "foster uniformity").

87. See *Setliff Bros. Serv. v. Bureau of Auto. Repair*, 53 Cal. App. 4th 1491, 1494-95 (1997) (BAR revoked business license of smog station owner as well as licenses of employees).

88. See *Rob-Mac, Inc. v. Dep't of Motor Vehicles*, 148 Cal. App. 3d 793, 799 (1983).

89. *Rob-Mac, Inc.*, 148 Cal. App. 3d 793, 798 (1983).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 800.

94. *Id.* at 799-800.

used in violation of the law.”<sup>95</sup> The employer shall be liable even though he or she “did not authorize [the employee’s actions] and did not have actual knowledge of the activities.”<sup>96</sup>

Courts have reasoned that if business owners were correct in arguing they should not be held liable for the actions of their employees, “effective regulation would be impossible. [The employer] could contract away the daily operations of his business to independent contractors [or employees] and become immune to disciplinary action by the licensing authority.”<sup>97</sup> Moreover, there are some business entities, subject to agency regulations, that can only act through agents and employees.<sup>98</sup> “Thus to speak of the ‘liability of the licensee’ without referring to the liability of the licensee’s employees and agents would often be a meaningless abstraction and would make the enforcement of administrative regulations a virtual impossibility.”<sup>99</sup>

At the most basic level, we can see that what the agency has done is delegate some of its regulatory responsibilities to the employer. However, this delegation appears to be acceptable to the courts. As one court stated, “[l]egislation for regulatory purposes, which dispenses with the condition of awareness of wrongdoing and places the burden of acting at his peril on a person otherwise innocent ‘but standing in personal relation to a public danger’ . . . is a traditional means of regulation.”<sup>100</sup>

For those still uncomfortable with the notion that a licenseholder can be punished without any fault whatsoever, the courts are quick to point out that licensure is a privilege. “Any smog check station or technician’s license granted by the department is a privilege and not a vested right.”<sup>101</sup> Courts have applied this principle to justify punishments against all types of licenses.<sup>102</sup>

But, regardless of licensing’s status as a right rather than a privilege, there are those who have not felt comfortable with the state of the law—imposing strict liability on licensee business owners. Is it really fair to hold a smog station owner liable for the acts of the employed technicians?

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95. *Ford Dealers Ass’n v. Dep’t of Motor Vehicles*, 32 Cal. 3d 347, 352 (1982) (quoting *Cornell v. Reilly*, 127 Cal. App. 2d 178, 186-87 (1954)).

96. *Randle v. Cal. State Bd. of Pharmacy*, 20 Cal. App. 2d 254, 261 (1968) (citing *Presto v. Alcoholic Beverage Etc. Appeals Bd.*, 179 Cal. App. 2d 262, 265 (1960)).

97. *Camacho v. Youde*, 95 Cal. App. 3d 161, 163 (1979).

98. *Cal. Ass’n of Health Facilities v. Dep’t of Health Serv.*, 16 Cal. 4th 284, 291 (1997).

99. *Cal. Ass’n of Health Facilities*, 16 Cal. 4th 284, 291 (1997).

100. *Sandstorm v. Cal. Horse Racing Bd.*, 31 Cal.2d 401, 406 (1948) (quoting *People v. Scott*, 24 Cal.2d 774, 782 (1944)).

101. HEALTH & SAFETY CODE § 44072.11.

102. *Garcia v. Martin*, 14 Cal. App. 2d 785, 788 (2002). (“[T]here is no inherent right in a citizen to sell intoxicants . . . and a license to do so is not a proprietary right . . . . It is but a permit to do what would otherwise be unlawful.” (quoting *State Bd. of Equalization v. Superior Court*, 5 Cal. App. 2d 374, 377 (1935))).

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Protection of the public is a worthy goal, but does it justify such an unfair result? Is the current system even the best way to pursue that goal?

### III. OVERBURDENSOME AND INEFFICIENT

As explained in the previous section, the majority of judges and courts approve, or at least follow, the strict liability theory for business owner licensees; however, there are just enough court opinions and dissenters going against the grain that a faint cry alleging “Injustice!” can be heard in the background. For example, in the California Supreme Court one justice expressed his disgust with this seemingly unjust application of the law: “[the law], as here applied, violates every precept of justice as established by the Constitution and laws of the United States and this state. It is unconstitutional and out of harmony with the American system of justice, and may appropriately be labeled as ‘un-American.’”<sup>103</sup> The American system of justice has always been based on a pursuit of fairness; however:

Under this rule an innocent person may be condemned and punished without evidence that he did, or intended to do, or permitted to be done, any wrong whatsoever. In fact, this result could be obtained even if it were conclusively shown that such innocent person did everything possible to prevent the violation of such rule or was overpowered by a wrongdoer and rendered helpless while the unlawful act was being consummated. . . . The suspended axe falls and the innocent victim is decapitated. “Oh! [justice], what crimes are committed in thy name.”<sup>104</sup>

Before deciding whether to offer a stamp of approval versus a label of “un-American,” it makes sense to uncover the goals and reasoning behind the imposition of strict liability on business owners, such as smog station owners, for the conduct of their employees. The obvious goal is protection of consumers—to ensure that a licensee does not “[exercise] his privilege in derogation of the public interest.”<sup>105</sup>

Once a violation has occurred, “the purpose of the proceeding is to determine the fitness of the licensee to continue in that capacity and thus to protect society by removing, either temporarily or permanently, from the licensed business or profession, a licensee whose methods of conducting his business indicate a lack of those qualities which the law demands.”<sup>106</sup> The goal is to protect consumers from “incompetent practitioners.”<sup>107</sup> The proceeding is not meant “to punish but to afford protection to the public

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103. *Sandstorm v. Cal. Horse Racing Bd.*, 31 Cal.2d 401, 406 (1948) (Carter, J., dissenting).

104. *Sandstorm*, 31 Cal.2d 401, 409 (1948) (Edmonds, J., concurring) (alteration in original).

105. *Camacho v. Youde*, 95 Cal. App. 3d 161, 163 (1979).

106. *W. Coast Home Improvement Co., Inc. v. Contractor’s State License Bd.*, 72 Cal. App. 2d 287, 295 (1945).

107. *Fahmy v. Med. Bd. of Cal.*, 38 Cal. App. 4th 810, 814 (1995).

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upon the rationale that respect and confidence of the public is merited by eliminating from the ranks of practitioners those who are dishonest, immoral, disreputable, or incompetent.”<sup>108</sup>

Even applying these commendable principles, it is difficult to conceive how a smog station owner who is neither negligent nor intentionally shirks his or her responsibilities can be considered a danger to the public merely because as an employer he happened to hire an employee who eventually would violate the law.<sup>109</sup> The fact that a smog check technician fails to fulfill his or her responsibilities under the law is not necessarily indicative that the smog check station owner has also failed his or her responsibilities. Courts should always keep in mind that imposition of strict liability affects a licensee’s chosen method of livelihood. It is difficult to justify this type of encroachment absent a showing of even negligence.

Courts try to justify imposing strict liability to the business owner licensee “based on the assumption that a licensed [employer] is in a position to control the actions of [his or her employees].”<sup>110</sup> But is this assumption really justifiable? After all, theoretically there are at least a few employees out there who will intentionally violate the laws. Admittedly there may be some negligence on the part of the employer who hires an employee with a history of violations, but there always has to be a first time. The imposition of strict liability becomes a game of Russian roulette where the lucky winner (or loser) is the one who unfortunately hires the “bad” employee before that employee has any record of illegal conduct. The legal system becomes nothing more than a game of chance.

This is especially true in industries like the smog check industry where the employer must be separated from the work of his or her employees. In the smog check industry, the smog station owner cannot help the technician perform the tests. In fact, it would be illegal for him or her to do so. Only the technician who has signed into the Emission Inspection System via his license number and access code may perform the test.<sup>111</sup> And yet, the employer will be liable if the test is not performed correctly, even though he or she may have provided an adequate environment and adequate

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108. *Borror v. Dep’t of Inv.*, 15 Cal. App. 3d 531, 535 (1971).

109. *See Sandstorm v. Cal. Horse Racing Bd.*, 31 Cal.2d 401, 416 (1948) (Carter, J., dissenting) (arguing against the majority’s imposition of strict liability on a licensed horse trainer, “It is difficult to understand how a trainer who is neither negligent nor intentionally a wrongdoer can be said to lack qualifications to be a trainer—to be a danger to the public—merely because he happened to be a trainer when a horse was doped through no fault of his or by some one over whom he had no control whatsoever.”).

110. *Ford Dealers Ass’n v. Dep’t of Motor Vehicles*, 32 Cal. 3d 347, 353 (1982).

111. DEPARTMENT OF CONSUMER AFFAIRS, BUREAU OF AUTOMOTIVE REPAIR, SMOG CHECK INSPECTION PROCEDURES MANUAL (Aug. 2009) (incorporated by reference in CAL. CODE REGS. tit. 16, § 3340.45).

equipment to perform the test.

Moreover, employees are humans just like the rest of us. They make mistakes just like the rest of us, despite good faith effort on the part of everyone involved.<sup>112</sup> “In such a case there is nothing an employer can do to protect himself, as the act of the employee is one which depends entirely upon use of his own faculties and senses and it is impossible for the employer to determine with any degree of accuracy whether the faculties and senses of the employee are functioning properly and accurately during all his working hours.”<sup>113</sup> The imposition of strict liability “deprives the licensee in question of any possible defense.”<sup>114</sup>

Furthermore, the overarching goal of this whole system is protection of the consumers; however, there is no evidence that the imposition of strict liability actually supports this goal. If an employer completely lacks control to prevent a violation by one of his or her employees, how can it be said that imposing liability on him or her will prevent future similar violations? If a smog check station owner complies with all of his or her responsibilities in providing equipment and facilities so that a technician can properly perform a test, what goal could possibly be served by imposing liability on the owner? What would we tell him or her to do differently? Surely, there has to be a way to avoid liability for those willing to make a concentrated effort to do so.

What is even more alarming is the fact that this game of chance, as to whether an employer has hired the wrong employee or will have an employee make a mistake, can actually result in revocation of licensure—a loss of someone’s livelihood, just like that, without any fault whatsoever. A number of statutes explicitly allow for revocation of licensure,<sup>115</sup> despite the seriousness of revocation as a punishment.<sup>116</sup> Even courts imposing strict liability have been willing to concede that license revocation is “the imposition of the most severe administrative penalty possible.”<sup>117</sup>

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112. It should be noted that the law is designed to have mercy in punishing the good faith errors of smog check technicians. “Whenever the department determines, through investigation, that a previously qualified smog check technician may lack the skills to reliably and accurately perform the test or repair functions within the required qualification, the department may prescribe for the technician one or more retraining courses which have been certified by the department . . . . Upon a later completion of the prescribed department certified retraining course, the department may reinstate the smog check technician’s qualification.” CAL. HEALTH & SAFETY CODE § 44031.5(c) (2002). Rather than unfairly punishing the smog station owner, the courts should be inclined to push for retraining of the technicians. Once again, this seems to better support the overall goal of protecting the public because the result is better trained technicians.

113. *In Re Marley*, 39 Cal. 2d 525, 532 (1946) (Carter, J., dissenting).

114. *Sandstorm v. Cal. Horse Racing Bd.*, 31 Cal.2d 401, 406 (1948) (Carter, J., dissenting).

115. *Ford Dealers Ass’n v. Dep’t of Motor Vehicles*, 32 Cal. 3d 347, 352 (1982).

116. *Id.* at 351.

117. *Harris v. Alcoholic Beverage Control Appeals Bd.*, 62 Cal. 2d 589, 595 (1965) (reversing the agency’s decision to revoke licensure because revocation was too strict a penalty).

While the courts have sought comfort in the assurance that the strictest penalties are reserved for the most serious violators, any penalty that is undeserved is unfair. An unjust result is no more acceptable simply because it is only a little unjust, or not as unjust as it could have been. Moreover, more likely than not, smog check station owners would be unwilling to concede that undeserved penalties less than revocation are “only a little unjust.”

Even assuming a small penalty such as a citation is imposed, this may have a greater impact than suspected. Under the California Public Records Act,<sup>118</sup> the public has access to all citations issued to smog check stations.<sup>119</sup> The purpose of this access is to warn consumers about stations that have been disciplined by BAR, and if that goal is realized, a public citation will likely result in the loss of potential customers.

In the current economic recession many small businesses, such as smog stations, cannot afford to miss out on any potential customers. Small businesses are the stalwart of the state’s employment opportunities.<sup>120</sup> They make up 99.2% of the state’s employers and provide 51.6% of California’s private sector jobs,<sup>121</sup> and yet, many of the state’s small business owners do not expect to be in business in California beyond the recession.<sup>122</sup> Small businesses generally do not have the extra resources to afford missing out on potential customers, or taking the hit of a public citation. From the outset, small businesses have a tougher time and bear a heavier financial burden to meet regulatory requirements than do larger businesses with more resources.<sup>123</sup> Strict liability standards against small business owners will not only jeopardize their survival, but will cost the state jobs, resulting in increased unemployment,<sup>124</sup> and a blow to competition within the industry.<sup>125</sup>

Even the courts which take comfort in the notion that licensing is a privilege may be making an unwarranted assumption. Licensing was not always viewed as a privilege that could be taken away without fault. A number of courts before the 1940s openly acknowledged licensing as a

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118. CAL. GOV’T CODE §§ 6250–70.

119. *Inquire Before You Hire!*, DEPT. OF CONSUMER AFFAIRS, BUREAU OF AUTOMOTIVE REPAIR, <http://www.inquirebeforeyouhire.ca.gov> (last visited Mar. 12, 2011).

120. U.S. SMALL BUSINESS ADMINISTRATION, OFFICE OF ECONOMIC RESEARCH, *Small Business Profile: California*, (2011), available at <http://www.sba.gov/sites/default/files/files/ca10.pdf>.

121. *Id.*

122. Jan Norman, *Are California Firms Closing or Leaving?*, ORANGE COUNTY REGISTER, (Mar. 8, 2011, 1:15 PM), <http://www.ocregister.com/articles/california-291073-small-business.html>.

123. Nicole V. Crain & W. Mark Crain, U.S. SMALL BUSINESS ADMINISTRATION, OFFICE OF ADVOCACY, *The Impact of Regulatory Costs on Small Firms*, (Sep. 2010), available at <http://www.sba.gov/advocacy/853/2016>.

124. *Calif. Unemployment Rate Dips Slightly In January*, BLOOMBERG BUSINESSWEEK, (Mar. 4, 2011), available at <http://www.businessweek.com/ap/financialnews/D9LOJM900.htm>.

125. *Belsinger v. District of Columbia*, 436 F.2d 214, 221 (D.C. Cir. 1970).

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property right. In the context of medical licensing, a court noted “[t]he right to practice medicine, once granted, becomes a property right which cannot be taken away except for reasons which supply at least some reasonable grounds for believing that the one who has been licensed is no longer fit to continue in the practice.”<sup>126</sup> “The right to practice medicine is, like the right to practice any other profession, a valuable property right, in which, under the constitution and laws of the state, one is entitled to be protected and secured.”<sup>127</sup> Even as recently as 1990, courts have discussed licensing as a right. Licensing cases “have distinguished between the denial of an application for a license (nonvested right) and the suspension or revocation of an existing license (vested right). Once an agency has exercised its expertise and issued a license, the agency’s subsequent revocation of that license . . . affects a vested right.”<sup>128</sup>

While there are of course a number of incentives cited by enforcement bodies to impose strict liability standards, courts and agencies have an incentive to preserve strict liability because it makes their lives easy. It is much easier to go straight to the top and always have someone to hold accountable rather than work to uncover who is actually at fault, and this is exactly what has occurred. For example, the D.C. Circuit criticized the Electrical Board for its laziness in imposing punishment against the personal license of a business owner, rather than the employees who violated the law and the corporation itself.

The Electrical Board has taken no action whatsoever against the employees of the Maintenance Corporation who made such installation, nor against the Maintenance Corporation itself. For all this record shows, the Maintenance Corporation and the persons doing the unauthorized acts are perfectly free to continue the same . . . . In its misplaced zeal the Board wound up imposing a penalty against an individual who . . . was not responsible for the acts complained of . . . while the demonstrated miscreants go scot free.<sup>129</sup>

*Respondeat superior*, piercing the corporate veil, and strict liability, it is clear these legal principles have worn out their welcome; stretched and forced into areas of the law they do not belong. As the D.C. Circuit cleverly put it, “a moment’s reflection shows that if, indeed, [piercing the corporate veil] was the basis for the Board’s action, the *wrong* corporate veil was pierced. *Hamlet* illustrates the danger of piercing curtains. At least Shakespeare’s character had the right curtain, although he stabbed the wrong man; here the [Board], while sure in its own mind of its mark,

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126. Barrett v. Bd. of Osteopathic Exam’rs, 4 Cal. App. 2d 135, 139 (1935).

127. Hewitt v. State Bd. of Med. Exam’rs, 148 Cal. 590, 593 (1906).

128. Clerici v. Dep’t of Motor Vehicles, 224 Cal. App. 3d 1016, 1023 (1990).

129. *Belsinger*, 436 F.2d at 218.

pierced the wrong veil and invoked the wrong remedy against the wrong victim.”<sup>130</sup>

#### IV. A PROPOSAL: FAULT AND LIABILITY, TOGETHER AGAIN

There is no doubt that strict liability is imposed to protect the interests of the public; “but not everything done ‘in the interest of the public is valid for that reason.’”<sup>131</sup> Moreover, the imposition of strict liability on a smog station owner does not protect the interests of the public because absent at least a showing of negligence, it does not motivate (nor should it) the licensee to behave any differently than he or she did the first time. This system imposes a burden on smog station owners while there is no benefit to the owners, the public, or anyone else to offset that burden. It is a cost-benefit balance, but all of the weight has fallen on one side of the scale.

The smog check industry is one where both the employer and the employee are licensed. They both hold separate and distinct licenses. In that context, the agency has the luxury of punishing the licenseholder who is actually at fault. There are several industries where only the employer is licensed. There are also a number of industries where the employer does not have separate responsibilities beyond those of the employees’ responsibilities; where “the only way in which [the employer] can act is through the individuals who act on its behalf.”<sup>132</sup> Admittedly in those contexts a strict liability regime makes more sense because the agency cannot impose punishment against employees’ licenses that do not exist.<sup>133</sup>

Even in those contexts, there are some potential issues with fairness; however, that battle is for another day and another article. As a starting point, we must begin to scale back strict liability in those areas that are most unfair. The imposition of strict liability should be prohibited where both employer and employee are licensed, such as in the case of the smog check industry. The courts should only impose liability on the business owner if there is a showing of fault or at least negligence. Instead punishments should be directed at the licenseholder who is at fault, and only the licenseholder who is at fault.

The public interest would be better protected under this regime. Rather than being tempted to take the “easy way out” and impose liability through strict liability, agencies like BAR will be forced to focus their attention on the actual violators. The violators themselves are the ones in

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130. *Belsingier*, 436 F.2d at 221.

131. *Sandstorm v. Cal. Horse Racing Bd.*, 31 Cal.2d 401, 406 (1948) (Edmonds, J., concurring) (citing *McFarland v. Am. Sugar Ref. Co.*, 241 U.S. 79 (1916)).

132. *United States v. Park*, 421 U.S. 658, 668 (1975) (quoting *United States v. Dotterweich* 320 U.S. 277, 281 (1943)).

133. *Arenstein v. Cal. State Bd. of Pharmacy*, 265 Cal. App. 2d 179, 182 (1968).

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need of motivation to alter their behavior and the best way to do that is through direct punishment, rather than indirect punishment through the employer.

Courts have also been concerned with the idea that employers will be completely immune if they can hide behind their employees; however, that concern is not applicable in many industries including the smog check industry. As discussed, there are a number of responsibilities that fall squarely and solely in the lap of the smog station owner and vice versa with the smog check technicians. For example, a faulty certification could be due to inadequate equipment, suggesting liability on the employer, or due to bad faith on the part of the technician, in which case only the technician should be liable.

Even in situations where the California Supreme Court has imposed strict liability on employers, the court has hinted at the unfairness of the doctrine's application in this context. In dictum the court stated "where [an employer] is able to demonstrate unusual circumstances that negate the presumption of control, it might be unfair to hold that [employer] liable for the [actions of his or her employees]."<sup>134</sup> The court has been willing to concede the necessary scaling back of the rule, but has not yet motivated itself to do exactly that. The court has briefly discussed what types of "unusual circumstances" would suffice: "[m]ere lack of knowledge would not suffice . . . . [An employer] might be able to defend against an action . . . by demonstrating that it made every effort to discourage [the violating actions]; had no knowledge of [the actions]; and, when so informed, refused to accept the benefits of [those actions]."<sup>135</sup> However, the court was quick to abandon the responsibility of fully developing an exception, declaring "the court need not decide the exact dimensions of a possible exception to that general rule."<sup>136</sup>

The court is making the task more difficult than it has to be. A simple, easy to apply, bright-line rule would be to prohibit the imposition of strict liability on an employer absent a showing of fault, if the actual violator employee can instead be held liable. For no apparent reason, one California court abandoned the general rule of strict liability and indeed adopted this exact reasoning without ever stating an actual rule.

In contrast with the *Rob-Mac* case discussed in the previous section, California should shift gears and head in the direction the court wandered into in *Hansell v. Santos Robinson Mortuary*.<sup>137</sup> In *Hansell*, the defendant, Santos Mortuary, was a licensed funeral director.<sup>138</sup> Santos was hired by a

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134. *Ford Dealers Ass'n v. Dep't of Motor Vehicles*, 32 Cal. 3d 347, 353 (1982).

135. *Ford Dealers Ass'n*, 32 Cal. 3d 347, 353 (1982).

136. *Id.*

137. *Hansell v. Santos Robinson Mortuary*, 64 Cal. App. 4th 608, 608 (1998).

138. *Id.* at 612.

number of families to perform services related to caring for decedents including removal of the body from the place of death, preparation of the body, preparation of memorial services, completion of certificates and permits, and arrangements for the cremation of the bodies.<sup>139</sup> Santos contracted out the cremation duties to a licensed crematory, Pleasant Hill.<sup>140</sup> Santos itself was not licensed to perform the crematory services and thus it would have been illegal for it to have performed those services. It was discovered later on that the crematory, Pleasant Hill, violated a number of laws when conducting the cremations including performing multiple cremations in the same chamber at the same time.<sup>141</sup> The issue before the court was whether Santos could be held liable for the crematory's actions.

The court refused to hold Santos liable when "the undisputed fact is that defendant mortuaries did not themselves violate the statute. They did not perform any crematory act, nor were they licensed to do so."<sup>142</sup> The court noted that "cremation activity is a separately licensed activity in which non-licensed persons, such as funeral directors, have no say."<sup>143</sup> Similar to the situation with smog station owners, Santos did not even have a right to oversee the cremation activities and it would have been illegal for Santos to have performed the cremations itself.<sup>144</sup> The court also refuted the idea that Santos was completely immune. The mortuary had a number of duties to perform, potentially including a duty to use care in selecting which crematory to hire.<sup>145</sup> Santos could and would have been liable if it had not complied with any of those duties; however, imposition of liability for a duty largely out of the control of the mortuary was unacceptable.

The principles used by the court in the *Hansell* case support a bright line rule limiting liability and should be expressly and fully adopted in the California legal system. The rule ensures a more focused and more effective pursuit of the public interest by targeting those who are actually at fault and either forcing those individuals to change or preventing them from further harming consumers. Moreover, it eliminates the unnecessary and excessive burdens currently imposed on business owners. Removing innocent, law abiding licensees from the industry only hurts the industry.

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139. *Hansell*, 64 Cal. App. 4th at 612.

140. *Id.*

141. *Id.*

142. *Id.* at 613.

143. *Id.*

144. *Id.* at 612.

145. *Id.* at 616. *See also* 35 Cal. Jur. 3d Funeral Directors and Embalmers § 11 ("Once a mortuary has exercised due care in contracting for cremation services by a licensed facility, the mortuary should be entitled to rely upon the crematory for the proper performance of cremation activities.").

## V. CONCLUSION

Protection of the public is a worthy goal of the American legal system, very few would dispute that. However, the courts and legislators should be careful not to arbitrarily impose costs and burdens in the name of the public interest when those burdens are excessive, and especially when those burdens are not the most effective way to actually protect the public. This arbitrary application of the runaway strict liability doctrine is exactly what has leaked into the American legal system. The courts and legislators need to take a second, and third, look, if necessary, to answer the question whether the law, as is, represents the best policy for protecting the public or whether it is better described as lawmakers taking the “easy way out.” The courts have exchanged their sharp shooting rifles, perfect for pinpointing liability on the guilty, for a handful of grenades which punish anyone left at the scene of the crime, both innocent and guilty alike.

“Oh! [public interest], what crimes are committed in thy name.”