Health and Safety

Safety First: “Childproof” Not Always the Safest Option

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Code Section Affected
AB 1100 (Ruskin); 2008 STAT. Ch. 5 (Effective April 14, 2008).

I. INTRODUCTION

Three-year-old Jenna Bullen was playing in her garage when she accidentally knocked over a portable gasoline container, spilling gasoline across the floor.1 Unfortunately, the nearby hot-water heater ignited the fumes, and Jenna sustained second-degree burns over ninety-five percent of her body.2 This all-too-common scenario has prompted legislative attempts to regulate child safety standards of portable gasoline containers at the state and federal level.3 However, these childproof standards4 have been neither practical nor safe when applied to certain types of gasoline containers called “safety cans.”5 Because the design needs of safety cans require a specialized venting system, such cans cannot be “childproofed” in accordance with the American Society for Testing and Materials (ASTM) standards.6 Chapter 5 exempts these safety cans from the strict childproof standards for portable gasoline containers, provided that they are clearly labeled “NOT CHILDPROOF.”7

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1. Robert Medley, Long Road for Young Burn Victim, DAILY OKLAHOMAN, July 8, 1999, at 1.
2. Id.
5. Telephone Interview with Peter Hartnett, Staff Member, Assembly Member Ira Ruskin (May 22, 2008) [hereinafter Hartnett Interview] (notes on file with the McGeorge Law Review).
7. CAL. HEALTH & SAFETY CODE § 13139(o)(2) (amended by Chapter 5).
II. BACKGROUND

A. The Importance of Labels

In 1961, California passed the Misbranded Hazardous Substances law focusing on child safety and labeling requirements.8 The law required appropriate labeling of hazardous substances intended for household use.9 These requirements include the “usual or chemical name” of the substance, the manufacturer, signal words such as “DANGER,” instructions on the use and storage of the substance, the word “Poison,” and the statement “Keep out of the reach of children.”10

The U.S. Consumer Product Safety Commission (CPSC) began examining the safety of portable gasoline containers in the 1980s.11 The initial subcommittee on the matter developed two safety standards, one regarding labeling requirements, and the other pertaining to safety performance requirements.12 However, the ASTM did not contemplate child-resistance when developing its initial requirements.13 Rather, the ASTM was concerned with general “consumer misuse” and thus focused on “cautionary warnings about use and storage of gasoline.”14 The ASTM’s labeling standard essentially required compliance with the Federal Hazardous Substances Act of 1960, which required hazardous substances—such as gasoline and other flammable substances—to be labeled.15

B. Childproofing and its Problems

When the California Air Resources Board (CARB)16 adopted spill-control regulations for gasoline containers,17 “manufacturers began to investigate

8. Id. § 108200 (West 2006).
9. Id.; see also id. § 108680(b)(3) (West 2006 & Supp. 2009) (“‘Household substance’ . . . [is] [a] substance intended for use as fuel when stored in a portable container and used in the heating, cooking, or refrigeration system of a residential dwelling.”).
10. Id. § 108200.
11. U.S. CONSUMER PRODUCT SAFETY COMM’N, supra note 3, at 1 (“In 1980, a subcommittee, [American Society for Testing Materials] F15.10, was formed to look specifically at the safety of gas cans.”).
12. Id. at 29.
13. Id. (“Child-resistance of gas cans was not party of these early deliberations.”).
14. Id.
15. Id. at 29-30.
16. See generally ARB 40th History, California Air Resources Board, http://www.arb.ca.gov/ knowzone/history.htm (last visited Oct. 15, 2008) (“ARB’s mission is to promote and protect public health, welfare and ecological resources through the effective and efficient reduction of air pollutants, while recognizing and considering the effects on the state’s economy.”).
17. U.S. CONSUMER PRODUCT SAFETY COMM’N, supra note 3, at 30 (“In September 1999, the California Air Resources Board (CARB) adopted emission and spill-control regulations for gas cans to reduce smog-forming pollution from gas cans.”).
incorporating child-resistance.”  

In July of 1999, the ASTM met with the CPSC to discuss the development of a child-resistant standard.  

In 2006, Chapter 473 added provisions to the California Health and Safety Code, requiring that all portable gasoline containers be made and sold with childproof caps. The law permitted manufacturers and sellers to “sell through existing supplies of portable gasoline containers” until April 1, 2008, when the prohibition of non-childproof cans would take effect. In early 2008, the State Fire Marshal notified state legislators that the law would ban the safety containers necessary for use in industrial settings. In response, the Legislature enacted Chapter 5 to ameliorate this situation.  

III. Chapter 5  

Chapter 5 exempts certain gasoline containers from the requirement of a child-resistant cap. Chapter 5 applies only to those containers that fall into the category “safety cans,” and requires that such cans are labeled appropriately so that consumers will know that the cans are not childproofed.  

Because safety cans are not child resistant, Chapter 5 mandates that these cans be labeled as such. The label must clearly state the words “NOT CHILDPROOF” in a prominent place on the can, in a legible font size, against a contrasting background, and in both English and Spanish.  

18. Id. at 31.  
19. Id. (stating that this meeting did result in a new standard, and in 2001, the ASTM issued the “Provisional Standard Specifications for Child-resistant Portable Gasoline containers for Consumer Use”).  
21. CAL. HEALTH & SAFETY CODE § 13139(a), (d) (amended by Chapter 5).  
22. Hartnett Interview, supra note 5.  
23. Id.; see also AB 1100, 2007 Leg., 2007-2008 Sess. (Cal. 2007) (as amended on Feb. 23, 2007, but not enacted) (noting that AB 1100 was introduced by Assembly Member Ira Ruskin on February 23, 2007, as a bill that would require the labeling of any food containing products of cloned animals. It was later completely re-tooled as an amendment to an existing fire-safety law in February 2008).  
24. CAL. HEALTH & SAFETY CODE § 13139(c)(1)-(2) (amended by Chapter 5); see also ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1100, at 2 (Apr. 4, 2008) (stating that Chapter 5 builds on a 2006 law, Chapter 473, which prohibited the sale of all gas containers that did not comply with child-resistant standards).  
25. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1100, at 2 (Apr. 4, 2008) (explaining that a “safety can” is one that contains specially-designed vents, which keep it from exploding upon exposure to fire or high temperatures).  
26. CAL. HEALTH & SAFETY CODE § 13139(c)(2) (amended by Chapter 5).  
27. Id. § 13139 (amended by Chapter 5).  
28. Id. § 13139(c)(2) (amended by Chapter 5) (requiring the font to be at least 12-point on cans that are larger than one quart, and at least eight-point for cans one quart and smaller).
IV. ANALYSIS OF CHAPTER 5

If the Legislature had been aware of the existence of safety cans at the time it drafted Chapter 473, it likely would have included Chapter 5’s provisions.\(^{29}\) Chapter 5’s exemption is not particularly controversial, as it deals with gasoline containers that would not ordinarily find their way into children’s hands.\(^{30}\) More importantly, Chapter 5 does not diminish Chapter 473’s goal of child safety because children are unlikely to encounter safety cans exempted by the law.\(^{31}\)

Assembly Member Ruskin’s office noted that safety cans “simply cannot meet the state’s existing child-resistance requirements and the OSHA venting requirements,” and should therefore be exempted from the child-resistance requirements.\(^{32}\) Because safety cans are used only in industrial settings, such as mines and laboratories, safety vents are more important than childproof caps.\(^{33}\)

Most incidents involving children and portable gasoline containers occur at the child’s home, when the child is playing alone in the garage or basement.\(^{34}\) Because safety cans are used in industrial settings, rather than the home, there is much less of a need for them to have childproof caps.\(^{35}\) Furthermore, because safety cans are used in dangerous settings, such as mines and laboratories, the specially-designed vents—which let pressure out of the can and protect from explosion—are far more valuable than the potential safety a childproof cap may provide.\(^{36}\)

Under California law, there are two tests for liability based on a product’s design defect: whether the benefits of the current design outweigh the risk of dangers inherent in that design, and whether the product performed as safely as expected by the ordinary consumer when used in a reasonably foreseeable manner.\(^{37}\) Regarding the safety cans affected by Chapter 5, the benefits of the

\(^{29}\) Hartnett Interview, \textit{supra} note 5 (noting that Assembly Member Ruskin became aware of the need for such an exemption after being contacted by the State Fire Marshal, who explained why the safety cans could not meet the child-resistant requirements of Chapter 473).

\(^{30}\) Id. (stating that there was no opposition to AB 1100 on file with the office).

\(^{31}\) Id.

\(^{32}\) \textit{Assembly Floor, Committee Analysis of AB 1100}, at 2 (Apr. 4, 2008).

\(^{33}\) Hartnett Interview, \textit{supra} note 5.

\(^{34}\) See \textit{U.S. Consumer Product Safety Comm’n, supra} note 3, at 19-20 (illustrating that twenty-six of the thirty-three gas can incidents involving children ages zero to four reported to the Consumer Product Safety Commission from 1991-2001 involved a fire being ignited after a child doused in gasoline came within reach of a lit pilot light of an appliance, such as a water heater or furnace).

\(^{35}\) Hartnett Interview, \textit{supra} note 5.

\(^{36}\) Id.; see also \textit{Assembly Floor, Committee Analysis of AB 1100}, at 2 (Apr. 4, 2008) (explaining how the safety cans are “designed to vent pressure when subjected to fire or high temperatures”).

\(^{37}\) Barker v. Lull Eng’g Co., 20 Cal. 3d 413, 435, 573 P.2d 443, 457 (1978). We hold that a trial judge may properly instruct the jury that a product is defective in design (1) if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if the plaintiff proves that the product’s design proximately caused his injury and the defendant fails to prove, in light of the relevant factors discussed above, that on balance the benefits of the challenged design outweigh the
current design—the specially-designed vents—outweigh the risk of dangers inherent in not having a childproof cap because of the settings in which they are used. As for the second test, presumably an ordinary consumer would know that gasoline is flammable and that children should not play around gas cans, regardless of whether there is a childproof cap. Aside from that, as discussed above, these safety cans are not intended for use in the home, but rather for industrial settings where children are not present.

Even though children rarely come into contact with safety cans, Chapter 5 still requires a warning label. In the rare instances when employees keep such containers in their personal vehicle or home, these labeling requirements serve as a precautionary measure alerting them to the fact that these containers are not childproof. This labeling requirement also comports with the California common law requirement that manufacturers warn of any dangerous propensities in their products or in the use of their products which the user of the product would not ordinarily discover. Even so, the labeling requirement of Chapter 5 dispenses with the liability that would otherwise likely arise from the manufacturer’s duty to warn under common law.

V. CONCLUSION

Chapter 5 is a simple and uncontroversial law, partly because it comports with the relevant tort law, but mainly because it does not substantively affect the public at large. Because safety cans are unlikely to end up in homes, and thus unlikely to end up in the hands of children, Chapter 5 does not hinder the goals of Chapter 473, nor does it put children like Jenna Bullen at any greater risk of injury. Indeed, this law furthers the ultimate goal of safety by recognizing that safety cans are actually safer without the childproof cap.

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38. Id.; Assembly Floor, Committee Analysis of AB 1100, at 2 (Apr. 4, 2008) (explaining how the safety cans are “designed to vent pressure when subjected to fire or high temperatures”).
39. Assembly Floor, Committee Analysis of AB 1100, at 2 (Apr. 4, 2008); Hartnett Interview, supra note 5.
41. Hartnett Interview, supra note 5.
42. Groll v. Shell Oil Co., 148 Cal. App. 3d 444, 448, 196 Cal. Rptr. 52, 54 (1983) (“Likewise, a manufacturer or a supplier of a product is required to give warnings of any dangerous propensities in the product, or in its use, of which he knows, or should know, and which the user of the product would not ordinarily discover.”).
43. Id.; Barker v. Lull Eng’g Co., 20 Cal. 3d 413, 435, 573 P.2d 443, 457 (1978).
44. Hartnett Interview, supra note 5.
45. Id.
46. Medley, supra note 1 (discussing the story of Jenna Bullen, who was burned over ninety-five percent of her body when fumes from an open portable gas container were ignited by the water heater’s pilot light in the garage where she was playing).
47. Hartnett Interview, supra note 5.
Chapter 207: California’s Fight Against Trans Fats

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Code Section Affected
AB 97 (Mendoza); 2008 STAT. Ch. 207.

I. INTRODUCTION

Cardiovascular diseases are the number one killer in America.\(^1\) Currently, they are responsible for over one-third of the deaths in America each year—more than cancer, HIV, and accidents combined.\(^2\) Over 1.2 million Americans suffer yearly from new or recurrent bouts of coronary heart disease, including heart attacks and angina.\(^3\) While multiple risk factors are associated with cardiovascular disease, a recent study suggests that close to a quarter-million of these events could be avoided each year by substituting unsaturated fats for artificially-produced trans fatty acids.\(^4\)

Trans fats have come to the forefront of America’s health and dietary concerns over the past decade.\(^5\) Today, a majority of Americans understand the negative health effects associated with trans fats,\(^6\) and the Food and Drug Administration (FDA) requires that manufacturers include trans fats in the dietary information listed on prepackaged foods.\(^7\) In response, manufacturers reformulated their recipes to exclude these fats.\(^8\) Many restaurants, however, do not provide any nutritional information. This leaves consumers who wish to avoid trans fats with few options short of inquiring into the chef’s ingredient list and cooking techniques.\(^9\)

\(^2\) Id. (stating that cardiovascular diseases killed 869,724 people in 2004).
\(^3\) Id. Over 450,000 deaths result from coronary heart disease every year, making it “the single leading cause of death in America today.” Id.
\(^4\) Dariush Mozaffarian et al., Trans Fatty Acids and Cardiovascular Disease, 354 NEW ENGL. J. MED. 1601, 1611 (2006).
\(^8\) Mozaffarian et al., supra note 4, at 1610.
Due to the rising health epidemic in America, the people of California enacted Chapter 207, the first statewide ban of trans fats in prepared foods.\textsuperscript{10} With the new restriction on trans fats, the Legislature hopes to improve the health of California’s citizens and ultimately save lives and reduce health-care expenses.\textsuperscript{11}

II. BACKGROUND

Although trans fats are generally thought of as unhealthy, there was a time not long ago when they were viewed as a healthier alternative to other types of fats.\textsuperscript{12} In the early part of the twentieth century, scientists developed methods to hydrogenate oils for human consumption, thereby making them solid at room temperature and less prone to spoilage.\textsuperscript{13} In 1911, Proctor and Gamble began marketing Crisco (hydrogenated oil) in the United States; its low cost and long shelf-life convinced many consumers to switch from lard.\textsuperscript{14} The partially hydrogenated oils in products like Crisco contained trans fats, just one of many types of fatty acids discussed below.

A. What are Trans Fats?

Animal fats and vegetable oils are composed of fats known as triglycerides.\textsuperscript{16} All fats contain three long hydrocarbon chains comprised of carbon and hydrogen atoms.\textsuperscript{17} Fats are distinguished by the shape and composition of their hydrocarbon chains.\textsuperscript{18} Saturated fat, for example, contains the maximum amount of hydrogen per carbon atom in the chain, and is thus “saturated” with

\textsuperscript{10} See CAL. HEALTH & SAFETY CODE § 114377 (enacted by Chapter 207) (providing numerous limitations on the use of trans fats in prepared foods).
\textsuperscript{12} Okie, supra note 5, at 2018.
\textsuperscript{15} But see Press Release, Crisco, supra note 14 (“Crisco oils and sprays have always contained zero grams trans fat . . . .”).
\textsuperscript{17} Id. Triglycerides break down into three fatty acids and a glycerol molecule. Id.
\textsuperscript{18} Id.
Whereas unsaturated fats do not contain the maximum number of hydrogen atoms per carbon because they contain one or more carbon-carbon double bonds. The most observable effect of these double bonds is on the melting point of the fat: generally, a higher level of unsaturation, results in a lower melting point for the fat. Therefore, unsaturated fatty acids, such as those in olive oil, are liquid at room temperature, whereas saturated fatty acids like coconut oil may be a solid at room temperature.

A partially hydrogenated fat, such as the original formulation of Crisco, adds hydrogen to remove some of the double bonds, thus making unsaturated fats solid at room temperature. During the hydrogenation reaction, many double bonds are destroyed; however, the proper consistency requires that some be left intact. Of these remaining double bonds, many are “cis” double bonds, but some become “trans” double bonds. The only physical difference between the two types of bonds is the geometric configuration of the molecule: cis bonds contain two hydrogen atoms on the same side of a double bond, while trans bonds have hydrogen on opposite sides. This minor distinction, however, makes a significant difference between healthy unsaturated fats like olive oil, which contain cis-bonds, and the unhealthy trans fats.


20. The Structure and Function of the Cell Membrane, supra note 19 (explaining that unsaturated fats may contain up to four double bonds).

21. Lipids & Fats, supra note 16 (stating that additional factors significantly contribute to the melting point, including carbon chain length, and shape of double bonds).


23. Crisco’s formula was recently altered to remove the partially hydrogenated trans fats. See Press Release, Crisco, supra note 14.


25. Shurtleff & Aoyagi, supra note 13 (noting that different numbers of double bonds create different melting points for the fatty acids).

26. Id.


B. Discovery of Harmful Effects and Subsequent Regulation

Recent studies show that eating five grams of trans fats per day, for ten years, increases the chance of cardiovascular disease by twenty-five percent. The FDA estimates that, on the average, Americans eat over five grams of trans fats each day—approximately 4.7 pounds of trans fats per year. With new studies coming out all the time, the health effects of trans fat consumption seems ominous at best; however, it was not always this way.

Scientists have studied the health effects of trans fats for the past half-century. In 1961, a study linked trans fat to a modest elevation of cholesterol. A study in 1975, however, refuted those findings. In the 1980’s, many doctors urged consumers to switch from the saturated fats in butter to margarine, which contains partially hydrogenated fats, including trans fats.

By 1990, artificial trans fats were linked to the elevation of “bad” cholesterol or low-density lipoproteins (LDL) and the reduction of “good” cholesterol or high-density lipoproteins (HDL). Subsequent studies linked trans fats to an increased risk of coronary heart disease. By 2001, the scientific community recognized trans fats as harmful, a recognition that soon spread to the general public. Foreign countries like Denmark banned trans fats altogether. Additionally, some manufacturers removed trans fats from products such as margarine.

In 2003, the government began to regulate trans fats when the FDA announced that food labels must list the amount of artificial trans fats by January 2006. In 2006, New York City announced a city-wide ban of artificial fats in restaurants. The following year, California enacted legislation banning trans fats from public schools.

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31. See, e.g., Mozaffarian et al., supra note 4 (discussing various deleterious effects of trans fats).
32. See Okie, supra note 5, at 2018.
33. See id. at 2018-19.
34. Id. at 2018.
35. Id.
36. Id.
37. Id. at 2019.
38. See, e.g., Mozaffarian et al., supra note 4 (discussing various deleterious effects of trans fats).
39. See CAL. EDUC. CODE § 49431.7(b) (West Supp. 2008) (“In 1997, a New England Journal of Medicine study found eating one gram of trans fats a day for a decade increased the risk of cardiovascular disease by 20 percent.”).
41. Id. (stating that in 1994 Unilever announced it would remove trans fats from its margarines).
42. 21 C.F.R. § 101.9(c)(2)(ii).
Due to recent discoveries linking trans fats to serious health problems, many manufacturers drastically reduced the trans fat content of their products. Through advances in chemistry and development processes, the maker of Crisco recently eliminated trans fats from its formula. However, only four percent of America’s consumption of trans fats comes directly from shortenings like Crisco. A substantial majority arises from commercial baked goods and fried foods, such as chips and French fries.

Increasing regulation and public awareness of trans fats has led many chain restaurants to remove partially hydrogenated oils from their menus. For example, McDonalds recently began using oils without artificial trans fats to cook deep fried foods. Interestingly, McDonalds switched to partially hydrogenated oils in the 1980’s following a wave of public awareness of the negative effects of saturated fats. By the time the Legislature enacted Chapter 207, many national chain restaurants either eliminated, or were in the process of eliminating, trans fats from their menus.

III. CHAPTER 207

Chapter 207 regulates the use of fats by retail food facilities in three distinct ways. First, Chapter 207 requires the facilities to maintain labels for any food containing fats, oil, or shortening, which is stored, distributed, served, or used by the facility.

Second, Chapter 207 regulates the use of trans fats in retail food facilities. Specifically, Chapter 207 bans foods and food additives that contain more than half a gram per serving of artificial trans fats derived from partial hydrogenation of vegetable oil. Food facilities must cease the use, storage, and distribution of

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44. See CAL. EDUC. CODE § 49431.7 (banning schools from making available, serving, or preparing foods with trans fats as of July 1, 2009).
46. New York City Passes Trans Fat Ban, supra note 30.
47. See id. (noting that 40% of trans fats come from commercial baked goods).
48. See id. (“Already, McDonald’s Corp. has been quietly experimenting with more than a dozen healthier oil blends . . . .”).
50. See Okie, supra note 5, at 2018 (“In the 1980’s . . . . CSPI led a successful campaign to get McDonald’s to switch from beef tallow to vegetable oil for frying its french fries.”).
52. CAL. HEALTH & SAFETY CODE § 114377 (enacted by Chapter 207).
53. Id. §§ 114377(b)-(d) (enacted by Chapter 207).
54. Id. § 114377(d) (enacted by Chapter 207).
these food products by 2010.\textsuperscript{55} Finally, Chapter 207 provides two exceptions to the \textit{trans} fat ban.\textsuperscript{56} First, public school cafeterias are exempt because California previously enacted legislation banning the use of \textit{trans} fats in these facilities.\textsuperscript{57} Second, Chapter 207 does not apply to foods that are sold or served in sealed, original packaging from the manufacturer.\textsuperscript{58}

\section*{IV. Analysis of Chapter 207}

Chapter 207 addresses health concerns associated with \textit{trans} fats by eliminating them from foods prepared in California restaurants.\textsuperscript{59} In support of this law, Governor Schwarzenegger issued a press release, announcing that California’s position as a leader in promoting health and nutrition warranted imposition of such a ban.\textsuperscript{60} However, support for the ban was not universal. AB 97, the bill creating Chapter 207, passed through the California State Assembly largely along party lines—only two Republican members voted for the measure.\textsuperscript{61} Not one Republican Senator voted for the bill.\textsuperscript{62} In signing the bill into law, however, Governor Schwarzenegger cited it as a “strong step toward creating a healthier future for California.”\textsuperscript{63}

Both supporters and opponents of Chapter 207 agree that excess consumption of artificial \textit{trans} fats is harmful.\textsuperscript{65} While the disagreement may boil down to the philosophical question of who should regulate this type of consumption—the individual or the State—\textsuperscript{66} the arguments set forth by both

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\item \textsuperscript{55} \textit{id.} § 114377(b)(1) (enacted by Chapter 207); see also \textit{id.} § 114377(b)(2) (enacted by Chapter 207) (noting that Chapter 207 delays this ban for food products used in the deep-frying of yeast dough or cake batter for an additional year).\textsuperscript{56} \textit{id.} §§ 114377(c), (e) (enacted by Chapter 207).\textsuperscript{57} \textit{id.} § 114377(e) (enacted by Chapter 207); \textit{CAL. EDUC. CODE} § 49431.7 (West Supp. 2008).\textsuperscript{58} \textit{CAL. HEALTH & SAFETY CODE} § 114377(c) (enacted by Chapter 207). Violations of the enumerated provisions in Chapter 207 are punishable by a fine ranging from twenty-five to one thousand dollars. \textit{id.} § 114377(f) (enacted by Chapter 207).\textsuperscript{59} \textit{See id.} § 114377 (enacted by Chapter 207) (providing limitations on the use of \textit{trans} fats in prepared food).\textsuperscript{60} Press Release, Office of the Governor, Governor Schwarzenegger Promotes Health and Nutrition by Signing Nation-Leading Trans Fat Bill (July 25, 2008), available at http://gov.ca.gov/index.php?print-version/press-release/10291 (on file with the \textit{McGeorge Law Review}).\textsuperscript{61} \textit{See UNOFFICIAL BALLOT, ASSEMBLY FLOOR VOTE FOR AB 97} (July 14, 2008) (listing the “ayes” and “noes” for Assembly Bill 97).\textsuperscript{62} \textit{See id.} (listing Aghazarian and Garcia, two republican Assembly Members, as voting for AB 97).\textsuperscript{63} \textit{See UNOFFICIAL BALLOT, SENATE FLOOR VOTE FOR AB 97} (July 2, 2008) (providing a listing of “aye” votes; no republican senators are listed).\textsuperscript{64} Press Release, Office of the Governor, \textit{supra} note 60.\textsuperscript{65} \textit{See, e.g.}, Letter from Glennah Trochet, President, Cal. Conference of Local Health Officers, to Tony Mendoza, Assembly Member, Cal. State Assembly (Aug. 1, 2007) (on file with the \textit{McGeorge Law Review}) (supporting Chapter 207); Letter from Cal. Restaurant Ass’n et al., to Senate Health Committee (July 1, 2007) [hereinafter CRA Letter] (on file with the \textit{McGeorge Law Review}) (opposing Chapter 207, but recognizing that \textit{trans} fats are harmful).\textsuperscript{66} \textit{See} Michelle M. Mello, David M. Studdert & Troyen A. Brennan, \textit{Obesity—The New Frontier of}
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sides are more pragmatic: the effectiveness of a mandatory ban and the economic burdens on small businesses. 67

A. Potential Financial Impact of the Ban

One opponent of Chapter 207 argues that the trans fat ban will create a disproportionate burden on small ethnic-food establishments. 68 Such establishments use shortening to cook many of their dishes and may not have the resources to convert to a different cooking fat. 69 Although cities and even small countries have implemented a similar ban, 70 some worry that the sheer population of California will cause a spike in demand for alternative fats that cannot be met. 71

The Grocery Manufacturer’s Association predicted a six billion pound shortage for a type of trans-fat-free oil in 2007 and urged that any ban on trans fat be implemented in phases. 72 Several other groups, however, note that trans–fat–free shortenings and cooking oils are available in excess of California’s consumption and are basically cost-neutral. 73 Additionally, cooking-oil producers are attuned to developing legislation and are “expanding rapidly to meet the growing demand.” 74

Due to the extended period of time before the actual ban takes place in California, 75 the relative success of the transition in New York City, 76 and the

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67. See CRA Letter, supra note 65. (describing that only the larger food establishments (e.g. McDonalds, Taco Bell, etc.) have already “fully or partially eliminated trans fat[s] or are committed to doing so”).

68. See id. (noting that smaller restaurants lack the resources to change oil formulations).

69. Id.

70. See Okie, supra note 5, at 2018 (noting that New York City and Denmark have implemented similar bans).

71. See GROCERY MFR. ASS’N, BAN ON TRANS FATS UNNECESSARY AND UNFEASIBLE (on file with the McGeorge Law Review) (predicting a shortfall for alternative oils in 2007).

72. Id.

73. See, e.g., Letter from Gerald P. Mcneill, Vice President of Research & Mktg., Loders Crooklaan, to Stephen L. Joseph, Frytest.com LLC (Mar. 26, 2007) (on file with the McGeorge Law Review) (stating that there is no limit to oil supplies and it is cost neutral); Letter from Sally Beaton, Managing Dir., U.S. Food Group, to Tony Mendoza, Assembly Member, Cal. State Assembly (Mar. 23, 2007) [hereinafter U.S. Food Letter] (on file with the McGeorge Law Review) (stating that U.S. Food Group would be able to quickly distribute alternative oils).

74. U.S. Food Letter, supra note 73.

75. CAL. HEALTH & SAFETY CODE § 114377(c) (enacted by Chapter 207) (stating that ban does not take effect until 2010).

assurances that costs will not be adversely affected, it appears unlikely that the impact of the ban on small business, such as local restaurants, will be substantial.

B. Potential Health Impact by the Ban

This article considers two types of evidence in examining the health benefits of the trans fat ban. First, the actual health effects on other populations that have implemented similar bans may give sound evidence as to the practical effects of the ban. Second, studies that have hypothesized or predicted the deleterious effects of trans fats may suggest potential benefits of such a ban. The latter evidence, however, is disputed by some of Chapter 207’s opponents as not reflective of the real world effects of a ban.

California is not the first to ban artificial trans fats, and an analysis of other cities and countries may provide insight regarding potential health benefits of trans fat bans. Unfortunately, other bans are still in their infancy, and thus have not yet provided conclusive health results. New York City’s ban on trans fat in frying and baking was effective in 2007 and 2008 respectively. Denmark, the first country to ban artificial trans fats, began the program in 2004. While health data is not yet available, the program’s efficacy is evidenced by the difference in trans fat content in McDonald’s fries and Chicken Nuggets. In Denmark, the meal contains less than one gram of artificial trans fat, whereas the same meal in New York and Atlanta contains more than ten grams. However, such data is quickly becoming obsolete now that McDonald’s is converting to trans–fat–free oils.

Although no concrete data is available from other locations that have banned artificial trans fats, many Chapter 207 supporters note that merely analyzing the

77. See U.S. Food Letter, supra note 73 (“[Alternate oils] ha[ve] been shown in many studies to save . . . customers money due to [their] long fry life.”).
78. See generally Okie, supra note 5 (discussing the potential benefits of the New York City trans fat ban).
79. See id. at 2019 (“Prospective cohort studies suggest that a high trans fat intake is associated with a much greater increase in heart disease rates . . . .”).
80. CRA Letter, supra note 65.
82. See New York City Passes Trans Fat Ban, supra note 30 (describing the new trans fat ban after its implementation in 2006).
83. Id.
84. Okie, supra note 5.
86. Id.
87. See McDonald’s Finally Picks Trans-Fat-Free Oil, MSNBC, Jan. 30, 2007, http://www.msnbc.msn.com/id/16873869/ (on file with the McGeorge Law Review) (noting McDonald’s shift towards trans-fat-free oils); McDonald’s article, supra note 49 (same).
available data shows that the ban is likely to save lives. For example, the Harvard School of Public Health estimates that a reduction of \textit{trans} fats prevents between 72,000 and 228,000 heart attacks each year in the United States—of these, approximately 50,000 are fatal. Assuming the homogeneity of these fatalities, these numbers amount to over 6,000 deaths in California. Of course, the elimination of \textit{trans} fats in restaurants will not eliminate deaths: restaurants may simply replace the banned fats with unhealthy saturated fats. Additionally, opponents of Chapter 207 note that these projected benefits are unrealistic, as only twenty-five percent of meals are consumed in restaurants. Therefore realizing the estimated benefits of the ban will require more than the elimination of artificial \textit{trans} fats in restaurants.

While the ban on artificial \textit{trans} fats may not be the silver bullet ensuring good health for all Californians, it will eliminate from restaurants a product that is universally acknowledged as unhealthy. Although actual health benefits may be unknown, one thing is certain: the ban will not negatively affect Californians’ health.

\textbf{C. Future Trans Fat Bans}

After California passed the ban on artificial \textit{trans} fats, other states and cities introduced similar legislation. For example, a bill in Connecticut passed the Senate but was never raised for a vote in the House. One of Connecticut’s largest cities elected not to wait, and implemented its own ban this past year. Similarly, legislation was introduced in Massachusetts but stalled; meanwhile, the city of Boston decided to implement its own ban. While California remains

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88. See, e.g., Letter from Harold Goldstein, Executive Dir., Cal.Ctr. for Pub. Advocacy, to Tony Mendoza, Assembly Member, Cal. State Assembly (Mar. 21, 2008) (on file with the McGeorge Law Review) (describing the research conducted by the Harvard School of Public Health).

89. \textit{Id}.

90. U. S. Census Bureau, State and County Quick Facts, http://quickfacts.census.gov/qfd/states/06000.html (last visited Nov. 7, 2008) (on file with the McGeorge Law Review). This information is based on estimates of California and United States populations of 36,457,549 and 299,398,484, respectively. \textit{Id}.

91. CRA Letter, supra note 65.

92. \textit{Id}.


94. \textit{See id.} (noting the health hazards associated with trans fats).

95. \textit{See infra} notes 96-98 and accompanying text.


97. \textit{See id.} (describing how Stamford, Connecticut imposed artificial \textit{trans} fat ban at restaurants).

the only state with a restaurant *trans* fat ban, California’s new law may encourage more cities and states to consider similar measures.\(^99\)

V. CONCLUSION

Prior to Chapter 207, California only regulated *trans* fat content in public schools.\(^{100}\) Now, all food service facilities will be prohibited from using artificial *trans* fats in their food or food preparation by 2010, and deep fried yeast dough and cake batter must not contain these fats by 2011.\(^{101}\) Although the negative health effects of *trans* fats are well documented, the effect of bans similar to that imposed by Chapter 207 remains to be quantified.\(^{102}\) However, data does suggest that implementation of the ban will be possible, and many establishments have eliminated *trans* fats from their menus already.\(^{103}\)


\(^{100}\) CAL. HEALTH & SAFETY CODE § 114377(e) (enacted by Chapter 207); CAL. EDUC. CODE § 49431.7 (West Supp. 2008).

\(^{101}\) See *supra* notes 52-58 and accompanying text.

\(^{102}\) See *supra* notes 4-5, 29, 42-44, 88-92 and accompanying text.

\(^{103}\) See *supra* notes 49, 51, 76, 87 and accompanying text.
Chapter 554: Protecting California’s First Responders

Michael Riter

Code Sections Affected
AB 2737 (Feuer); 2008 STAT. Ch. 554.

I. INTRODUCTION

On February 8, 2001, Detective Elliot Stabler severely cut his hand while inspecting the Win-Mick Auto Repair shop for clues to help his unit solve a double-homicide. Shortly thereafter, he traced his suspicions to Gloria Palmaira’s apartment, where he found Gloria unconscious in her bathtub after she had attempted suicide by cutting her wrists. Detective Stabler pulled Gloria out of the blood-filled bathtub, drenching his recently-cut hand. After regaining consciousness, Gloria confessed to both murders and confirmed that she was HIV positive. The following week, Detective Stabler experienced nausea and vomiting due to the anti-HIV medication he was placed on to prevent the possible progression of HIV exposure or infection. Fortunately for Detective Stabler, the results of his HIV and hepatitis C tests came back negative.

While Detective Stabler is a fictional character on Law & Order: Special Victims Unit, his situation is far from fictitious. In fact, California’s police officers experience similar situations almost every day. Prior to the Legislature’s enactment of Chapter 554, a person like Gloria Palmaira would not have been required to submit to a blood test if she did not wish to disclose her HIV status because she did not interfere with Detective Stabler’s ability to take her into custody. California law did not permit involuntary blood testing of individuals

1. Law & Order: Special Victims Unit: Victims (NBC television broadcast Feb. 9, 2001).
2. Id.
3. Id.
4. Id.
6. Id.
8. See Kevin Johnson, Officers at Risk of AIDS Given a Tough Choice, L.A. TIMES, Dec. 14, 1992, at A1 (“[L]aw enforcement officers, firefighters and paramedics . . . . have [all] been exposed to blood products or bodily fluids from people considered to be possible carriers of HIV.”).
9. See id. (stating that exposure of Orange County first responders to HIV “occur every other day”).
10. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2737, at 1 (Apr. 8, 2008) (describing existing law as requiring interference with official duties of a police officer to compel a blood test).
unless they interfered with the official duties of first responders and were formally charged with a crime.\textsuperscript{11} Thus, first responders were often left without vital information needed to protect their health.\textsuperscript{12}

The infection rates for diseases like the human immunodeficiency virus (HIV) and hepatitis viruses have reached such a proportion that the State of California has statutorily declared “that [acquired immune deficiency syndrome] AIDS . . . and other communicable diseases pose a major threat to the public health and safety.”\textsuperscript{13} In California alone, there have been 27,980 HIV cases reported in the past two years.\textsuperscript{14} Since 1983, close to 150,000 AIDS cases were reported.\textsuperscript{15} Between March and April 2008, nearly 1,500 new HIV/AIDS cases were documented in the state.\textsuperscript{16} Additionally, nationwide, about four million people currently have or previously had hepatitis C,\textsuperscript{17} and about 10,000 to 12,000 people die from hepatitis C every year.\textsuperscript{18}

Chapter 554 seeks to provide first responders with quicker and more frequent access to information about possible on-the-job exposure to HIV and hepatitis B and C.\textsuperscript{19} To achieve this goal, Chapter 554 expands the circumstances under which California’s first responders, including “[a]ny peace officer, firefighter, or emergency medical personnel,”\textsuperscript{20} may request that a court compel an arrestee to submit to blood tests\textsuperscript{21} to determine the arrestee’s HIV and hepatitis B and C status.\textsuperscript{22}

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\item \textsuperscript{11} \textit{See id.} at 4 (stating that former law only allowed involuntary blood tests under a “fairly restrictive condition”).
\item \textsuperscript{12} \textit{See id.}
\item \textsuperscript{13} \textsc{Cal. Health \\ & Safety Code } \S 121050 (West 2006).
\item \textsuperscript{15} \textit{Id.} (reporting that 149,349 total AIDS cases have been reported in California since March 1983).
\item \textsuperscript{16} \textit{Id.} (reporting that HIV/AIDS cases totaled 177,329 in April 2008 and 175,830 as of March 2008).
\item \textsuperscript{17} \textit{See National Digestive Diseases Information Clearinghouse, Chronic Hepatitis C: Current Disease Management, http://digestive.niddk.nih.gov/diseases/pubs/chronichepc/} (last visited Feb. 4, 2009) [hereinafter \textsc{Chronic Hepatitis C}] (“\textsc{A}n estimated 4.1 million Americans[\textsuperscript{sic}] have antibody [sic] to HCV (anti-HCV), indicating ongoing or previous infection with the virus.”).
\item \textsuperscript{18} \textit{Id.}
\item \textsuperscript{19} \textsc{Assembly Committee on Public Safety, Committee Analysis of AB 2737}, at 4 (Apr. 8, 2008).
\item \textsuperscript{20} \textsc{Cal. Health \\ & Safety Code } \S 121060(a) (enacted by Chapter 554).
\item \textsuperscript{21} \textit{Id. } \S 121060(a)(2) (enacted by Chapter 554).
\item \textsuperscript{22} \textit{Id. } \S 121060(b) (enacted by Chapter 554).
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II. BACKGROUND

A. The Special Needs Doctrine and the Constitutional Bases for Involuntary Blood Testing

The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures.\(^{23}\) In *Skinner v. Railway Labor Executives Association*, the Supreme Court addressed whether involuntary drug and alcohol blood tests violated Fourth Amendment protections.\(^{24}\) The Federal Railroad Administration (FRA) policy at issue in *Skinner* required blood screenings for drug and alcohol abuse “of employees involved in particular train accidents.”\(^{25}\) The FRA established this policy to minimize the safety risks associated with the drug and alcohol abuse of railroad employees.\(^{26}\)

The Supreme Court recognized that involuntary blood tests constitute a search requiring a Fourth Amendment analysis.\(^{27}\) While the purpose of reasonable searches and seizures is to further criminal investigations,\(^{28}\) *Skinner* created a “special needs” exception for suspicionless searches for noninvestigatory purposes.\(^{29}\) Under the special needs doctrine, suspicionless searches are constitutional if a state interest justifies the privacy intrusion and if the search is conducted in a reasonable manner.\(^{30}\) The Court held that blood tests are reasonable if they are conducted “according to accepted medical practices” and involve little, if any, health risks or privacy imposition.\(^{31}\) Proponents of involuntary blood testing contend that *Skinner* justifies the suspicionless blood testing of defendants and minors for communicable diseases to protect the health of first responders.\(^{32}\)

The California Constitution also guarantees all people the inalienable right to privacy.\(^{33}\) On the issue of involuntary blood testing for diseases, California courts have rejected the argument that the state constitution affords individuals more protection from bodily intrusions than the U.S. Constitution.\(^{34}\) Thus, if the proponents of involuntary blood testing are correct that such testing does not

\(^{23}\) U.S. CONST. amend. IV.


\(^{25}\) *Id.*

\(^{26}\) *Id.*

\(^{27}\) *Id.* at 616.


\(^{29}\) *Skinner*, 489 U.S. at 619.

\(^{30}\) *Id.* at 624.

\(^{31}\) *Id.* at 625 (citing Schmerber v. California, 384 U.S. 757, 771 (1966)).

\(^{32}\) ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2737, at 6 (Apr. 8, 2008).

\(^{33}\) CAL. CONST. art I, § 1.

\(^{34}\) See Johnetta J. v. Mun. Court, 218 Cal. App. 3d 1255, 1277, 267 Cal. Rptr. 666, 679 (1st Dist. 1990) (noting that cases interpreting California’s constitutional right to privacy do not create a different or stricter test for bodily intrusions than does the U.S. Constitution).
violate the U.S. Constitution, neither does this testing violate California’s constitutional right of privacy.\textsuperscript{35}

\textbf{B. Compulsory Blood Test Procedures}

The first prerequisite to compelling a blood test from a defendant or minor entailed filing a criminal complaint or juvenile petition in a magistrate or juvenile court.\textsuperscript{36} The second prerequisite was that the complaint or petition specifically allege that the defendant or minor interfered with the official duties of the first responder “by biting, scratching, spitting, or transferring blood or bodily fluids.”\textsuperscript{37} If no formal complaint was filed, or if the complaint failed to allege that the defendant or minor so interfered with the first responder’s duties, a court would deny the hearing.\textsuperscript{38}

Once a criminal complaint or juvenile petition was filed, a first responder could petition a court for a hearing to compel the defendant or minor who allegedly interfered with the first responder’s official duties to submit to blood tests.\textsuperscript{39} Upon receiving the petition, the law required a court to promptly hold a hearing to determine if there was probable cause to believe that the first responder was exposed to the defendant’s or minor’s bodily fluids.\textsuperscript{40} If so, the defendant or minor was compelled to provide two blood samples to be tested\textsuperscript{41} for infectious diseases.

Pursuant to a court order, a licensed specialist would take the blood samples from the defendant or minor according to medically approved standards.\textsuperscript{42} The blood samples were then sent to a testing laboratory to determine the presence of infectious diseases.\textsuperscript{43} Under prior law, the test results were sent to the defendant or parents of the minor, the first responder who requested the test, and the first responder’s employer.\textsuperscript{44} If the defendant or minor was still incarcerated when the blood test was completed, the results were also sent to the chief medical officer

\textsuperscript{35} See id.  
\textsuperscript{36} ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2737, at 1 (Apr. 8, 2008).  
\textsuperscript{37} Id. at 4.  
\textsuperscript{38} See id. at 1-2 (stating that a hearing for a blood test could be held only if there was a formal criminal complaint or a juvenile petition and allegations of interference with official duties).  
\textsuperscript{39} Id. at 2.  
\textsuperscript{40} Id.  
\textsuperscript{41} Id.  
\textsuperscript{42} Id. at 3.  
\textsuperscript{43} CAL. HEALTH & SAFETY CODE § 121065(a) (amended by Chapter 554).  
\textsuperscript{44} Id. § 121065(b) (amended by Chapter 554).  
\textsuperscript{45} ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2737, at 2 (Apr. 8, 2008).
of their place of detention. The results of the blood test had to be kept confidential and would not be admissible in criminal or juvenile proceedings.

C. Treatment After Exposure

1. The Human Immunodeficiency Virus

HIV has been present in the United States since as early as the mid-1970s. Two weeks to a year after a person is infected with HIV, he or she undergoes seroconversion (the point at which a person becomes HIV positive). Seroconversion is a process by which one’s immune system detects the HIV and creates antibodies to fight the infection. HIV breaks down the immune system by infecting and killing CD4+ T cells, which fight off bodily infections. Left untreated, HIV infection can severely impair the immune system, resulting in potentially lethal opportunistic diseases.

The transmission of HIV occurs through the mixing of bodily fluids. Most commonly, HIV is spread through having unprotected sex or sharing needles with a person who has HIV, or transferred from an HIV-positive mother to her fetus or infant. In rare circumstances, HIV may be transmitted through accidental needle pricks, other substantial blood exposures, and biting, but contact with saliva, sweat, or tears has not resulted in HIV infection.

46. Id.
47. CAL. HEALTH & SAFETY CODE § 121065(e) (West 2006).
48. Id. § 121065(f).
51. Id.
55. Id.
56. Id.
57. Id.
59. Id.
After exposure to or infection with HIV, post-exposure prophylaxis (PEP) may prevent seroconversion. During PEP, a patient is prescribed a dosage of an antiretroviral; however, the prophylaxis is not always effective.

2. Hepatitis B

“Hepatitis B is a contagious liver disease” caused by the hepatitis B virus (HBV). Infection with HBV can cause either a short-term illness, known as an acute hepatitis B infection, or a long-term illness, known as a chronic hepatitis B infection. Nausea, vomiting, stomach and joint pains, and jaundice are symptoms associated with a hepatitis B infection. While “there were an estimated 46,000 new [HBV] infections” in 2006, the rate of infection has slowed by eighty percent in the past seventeen years. This reduction is due in part because a “routine hepatitis B vaccination of children was implemented and has dramatically decreased the rates of the disease.” People who have not been vaccinated and are exposed to HBV can be treated with a range of medications currently available. The virus is spread primarily by sharing intravenous needles, food, razors and toothbrushes, having unprotected sex, or coming into contact with the blood of a person with HBV.

3. Hepatitis C

In the 1980s, the Center for Disease Control discovered the hepatitis C virus, a disease caused by a virus (HCV) found in the blood of carriers. The virus attacks the liver and puts the carrier at risk of liver disease, cirrhosis of the liver, and cancer. Approximately four million U.S. citizens have or once had

60. See Michelle E. Roland et al., Seroconversion Following Nonoccupational Postexposure Prophylaxis Against HIV, 41 CLINICAL INFECTIOUS DISEASES 1507 (2005) (“The efficacy of antiretroviral postexposure prophylaxis (PEP) against infection with . . . [HIV] following occupational exposures has prompted the use of PEP after nonoccupational exposures.”).
61. Id.
62. Id. at 1508.
64. Id.
65. Id.
66. Id.
67. Id.
68. Id.
69. Id.
71. FAQs, supra note 63.
72. Id.
hepatitis C and thousands of people in the United States die each year. Like HIV, a person may become infected with HCV through sharing needles to inject intravenous drugs or having unprotected sexual contact with another person who carries the virus. The virus is also transmitted by contact with blood, bodily fluids, organs, or needles contaminated with HCV.

Treatment for HCV includes a twenty-four to forty-eight week regimen of alfa interferon injections. Another option is antiviral medication, Ribavirin, which is taken orally. However, Ribavirin is more effective if taken in combination with alfa interferon. The treatment’s duration depends on the specific genotype the HCV-infected person and can range from four weeks to about a year.

III. CHAPTER 554

Chapter 554 aims to protect first responders by providing greater and faster access to information about possible exposures to HIV, HBV, and HCV while performing their jobs. Chapter 554 makes two significant changes to existing law. First, it expands the circumstances under which a court can compel blood tests from arrestees. Second, it expressly provides for ex parte hearings to determine probable cause for blood testing. To protect the arrestee’s privacy, Chapter 554 requires that physicians make a good-faith effort to obtain the

73. Chronic Hepatitis C, supra note 17.
74. Id.
75. FAQs, supra note 63.
76. Id.
78. Id.
79. Id.
80. Id.
81. See CAL. HEALTH & SAFETY CODE § 121060(a) (enacted by Chapter 554) (expanding statute to “while acting within the scope of his or her duties”).
82. See CAL. HEALTH & SAFETY CODE § 121060(a)(2) (enacted by Chapter 554). “Ex parte” is defined as “[o]nly or from one party only, usually without notice to or argument from the adverse party.” BLACK’S LAW DICTIONARY 616 (8th ed. 2004).
83. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2737, at 4 (Apr. 8, 2008) (suggesting that the bill will improve medical treatment to first responders while protecting arrestees’ rights).
arrestee’s consent. It also limits compulsory testing to HIV, HBV, and HCV and permits notifying the arrestee of the results, so long as he or she consents.

Chapter 554 lifts the existing restrictions and permits first responders to petition for a compulsory blood test of an arrestee if they incur a percutaneous injury or are exposed to an arrestee’s blood, semen, vaginal fluid, or other tissue “while acting within the scope of [their] duties.” To compel a blood test and obtain the results, Chapter 554 provides that first responders may petition a court ex parte. A court receiving such a petition must quickly hold a hearing even if the arrestee has no representation or notice of the hearing. If a court finds probable cause to believe a first responder was exposed to an arrestee’s bodily fluids, it must order the involuntary testing of the arrestee’s blood for HIV, HBV, and HCV.

To address arrestees’ privacy concerns, Chapter 554 requires a physician to make a good-faith effort to obtain the consent of the arrestee, narrows the focus of the blood tests to HIV, HBV, and HCV, and allows notifying arrestees of the results only if they consent. Moreover, recipients of the test results are informed of penalties for breaching confidentiality requirements. Arrestees that undergo involuntary blood tests may decline to be informed of the results if they so choose by signing a form waiving disclosure. However, the failure to sign the waiver “shall be construed to be a refusal to be informed of the . . . test results.”

85. CAL. HEALTH & SAFETY CODE § 121060(a)(1) (enacted by Chapter 554).
86. Id. § 121065(b) (amended by Chapter 554).
87. Id. § 121060(c)(2) (enacted by Chapter 554).
88. Id. § 121060.1(a) (enacted by Chapter 554).
89. Id. § 121060.1(b)(1)-5) (enacted by Chapter 554).
90. Id. § 121060(a) (enacted by Chapter 554).
91. Id. § 121060(a)(2) (enacted by Chapter 554).
92. Id.
93. See id. § 121060.1(b) (enacted by Chapter 554) (defining “bodily fluids” as “blood, tissue, mucous containing visible blood, semen, [and] vaginal secretions”).
94. Id. § 121065(b) (amended by Chapter 554).
95. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2737, at 4 (Apr. 8, 2008) (suggesting that the bill will improve medical treatment to first responders while protecting arrestees’ rights).
96. CAL. HEALTH & SAFETY CODE § 121060(a)(1) (enacted by Chapter 554).
97. Id. § 121065(b) (amended by Chapter 554).
98. Id. § 121060(c)(2) (enacted by Chapter 554).
99. Id. § 121065(c)(2) (amended by Chapter 554).
100. Id. § 121060(c)(2) (enacted by Chapter 554).
101. Id.
Chapter 554 provides first responders with essential information to help them take the necessary measures to protect their health and the health of those around them. To accomplish this goal, Chapter 554 lifts restrictions that limit the ability of first responders to petition for compulsory blood tests of arrestees and speeds up the procedural aspects of compulsory blood tests.

A. The Compelling Case for Compelling Blood Tests

Chapter 554 potentially benefits the health of three groups: first responders, the families and coworkers of the first responders, and the arrestees from whom blood tests are compelled.

Because Chapter 554 allows compulsory blood testing in more circumstances, first responders will have greater access to information regarding their exposure to HIV or hepatitis. Previously, first responders would have access this information only if the arrestees were formally charged with a crime and interfered with the official duties of the first responders. Chapter 554 provides more frequent access to this information by allowing involuntary blood testing even when the exchange of bodily fluids is accidental, as long as the first responder was acting in the scope of his or her duties.

Chapter 554 would also yield results from blood tests faster than existing law. The prior requirement that formal criminal charges or a juvenile petition be filed may have resulted in unnecessary delays because city prosecutors must sometimes file these complaints with a magistrate or juvenile court. Chapter 554’s provision for ex parte hearings may also reduce the amount of time needed to compel the blood test from seven days to one day. The reduction in the amount of time needed to compel the blood test may allow for PEP and hepatitis treatments to be administered more quickly, which may provide for more effective care and prevention.
One possible disadvantage to more frequent and timely knowledge of possible exposure to HIV is the chance that PEP may be over-administered. The probability of HIV infection after skin exposure to the bodily fluids of another person with HIV is three-tenths of one percent.\textsuperscript{110} Moreover, the efficacy of prophylaxis has not clearly been established,\textsuperscript{111} and the side effects include nausea, vomiting, and stomach and head pain.\textsuperscript{112} Regularly administering prophylaxis after every possible exposure could unnecessarily subject first responders to side effects of antiretrovirals.

To mitigate this risk, physicians could limit administration of prophylaxis to exposures posing higher probabilities of infection.\textsuperscript{113} Additionally, adjusting the dosage of the prophylaxis can diminish its side effects.\textsuperscript{114} And while the efficacy of prophylaxis has not been clearly established, the biological plausibility that antiretroviral therapy could prevent seroconversion suggests that PEP could be effective.\textsuperscript{115}

Chapter 554 may also benefit families and coworkers of first responders and the arrestees required to give blood samples. Having quick, frequent access to information regarding possible exposure to HIV and hepatitis could reduce transmissions from first responders to their significant others, family members, and coworkers. While Chapter 554 allows arrestees to opt out of receiving the results of their tests,\textsuperscript{116} those who object to the blood testing but wish to know their results will have access to the information they need to treat their conditions and take measures to prevent spreading the disease.

B. Privacy Concerns of Chapter 554

Aside from its expected benefits, Chapter 554 raises privacy concerns for the individuals compelled to give blood samples.\textsuperscript{117} Having a needle penetrate one’s skin and remove blood is a “physical intrusion [that] . . . infringes an expectation

\textsuperscript{111} See id. at 388 (“Assessing the efficacy of post-exposure prophylaxis has proved quite difficult.”).
\textsuperscript{112} Id. at 389.
\textsuperscript{113} See id. (“Deciding when to recommend prophylaxis after occupational exposure should take into consideration the risk associated with the specific incident.”).
\textsuperscript{114} Id.
\textsuperscript{115} See Phillippa Easterbrook, \textit{Prophylaxis After Occupational Exposure to HIV}, 315 BMJ 557 (1997), available at http://www.bmj.com/cgi/content/full/315/7108/557 (on file with the McGeorge Law Review) (“The biological rationale is that initial virus uptake and antigen processing after inoculation may take several hours or even days. This presents a window for therapeutic intervention before virus propagation occurs.”).
\textsuperscript{116} CAL. HEALTH & SAFETY CODE § 121060(c)(2) (enacted by Chapter 554).
\textsuperscript{117} See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2737, at 5 (Apr. 8, 2008) (“By compelling individuals to submit to an involuntary blood test, the protection of the Fourth Amendment to the United States Constitution is invoked.”).
of privacy that society is prepared to recognize as reasonable; however, the Court has recognized the legally protected privacy interests of arrestees are diminished when it comes to involuntary blood testing.

Society does not view blood tests as an “unduly extensive imposition on an individual’s privacy or bodily integrity” because the routine nature of blood tests diminishes privacy expectations involved with the procedure. Thus, involuntary blood testing does not necessarily constitute an unreasonable invasion of the right to privacy.

Furthermore, both Chapter 554 and existing statutes contain provisions that protect arrestees’ privacy. Chapter 554 attempts to safeguard the minimized privacy interest of arrestees who must give blood samples. First, it limits the scope of testing from any communicable disease to only HIV, HBV, and HCV, thus precluding searches for every possible disease the arrestee may have. Second, recipients are prohibited from disclosing the test results and are informed of the legal penalties for breaching confidentiality requirements. Third, Chapter 554 allows arrestees that have had their blood drawn to opt out of receiving the test results, thus providing arrestees with some control over their personal information.

Finally, other statutory provisions limit the dissemination of the results of the blood test. The blood test results may not be introduced in a criminal or juvenile hearing and those who receive the results are required to keep the information confidential.

V. CONCLUSION

HIV, HBV, and HCV clearly pose significant public health challenges. California’s police officers, firefighters, and emergency medics are at constant risk of contracting HIV, HBV, or HCV while performing their jobs. Prior to
the implementation of Chapter 554, statutes limited first responders’ ability to acquire information about whether they may have been exposed to HIV or hepatitis in the course of their jobs.\textsuperscript{131} To permit the early detection of possible infection, Chapter 554 increases first responders’ access to information regarding possible on-the-job exposure to HIV and hepatitis by allowing courts more leeway in granting petitions to compel blood tests from arrestees.\textsuperscript{132}

Chapter 554 allows first responders to be treated more quickly for exposure to HIV, HBV, and HCV while limiting the intrusiveness of the involuntary blood tests. It allows blood tests to be compelled not only when formal complaints are charged against individuals that interfere with an arrest, but any time a first responder is exposed to the bodily fluids of an arrestee while acting within the scope of his or her duties.\textsuperscript{133} Chapter 554 also speeds up the hearing process by allowing first responders to file ex parte petitions with a court to compel the blood tests.\textsuperscript{134} By limiting the scope of the testing and giving arrestees the option to deny receiving the results,\textsuperscript{135} Chapter 554 will protect the privacy interests of arrestees while promoting the health of California’s first responders.\textsuperscript{136}

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\item[131.] Id. at 1–2.
\item[132.] \textit{See} CAL. HEALTH \& SAFETY CODE § 121060(a) (enacted by Chapter 554) (allowing involuntary blood tests for when a first responder is exposed to a blood-borne pathogen while acting within the scope of his or her duty).
\item[133.] Id.
\item[134.] Id.
\item[135.] Id. § 121060(c)(2) (enacted by Chapter 554).
\item[136.] ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2737, at 4 (Apr. 8, 2008).
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