

## **We Do Not Perform Rape Kits Here: An Analysis of Chapter 714**

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### *Code Sections Affected*

Healthy and Safety Code § 1281 (amended); Penal Code §§ 1203.1h, 13823.5, 13823.7, 13823.9, 13823.93, 13823.95, 13823.11, 13823.13 (amended). AB 538 (Berman); 2019 STAT. CH. 714.

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\* J.D. Candidate, University of the Pacific, McGeorge School of Law, to be conferred May 2021; B.A. Political Science, Baylor University, 2018. First of all, thank you to my family, especially my parents, for their endless support, inspiration, and encouragement. I also thank the Law Review staff for their numerous edits and suggestions. Finally, I dedicate this article to the sexual assault survivors who are unable to receive a rape kit for one reason or another. Your experience is valid, and you are so strong.

## I. INTRODUCTION

One morning Leah woke up bleeding heavily with no memory of the previous night.<sup>1</sup> After some thinking, Leah feared she might be the victim of a rape.<sup>2</sup> She immediately drove to the nearest emergency room.<sup>3</sup> Hospital administrators told her, “We don’t do rape kits here.”<sup>4</sup> The hospital gave her two options: take an ambulance or drive herself to another hospital to receive a rape kit.<sup>5</sup> Still in shock from the trauma and groggy from the drugs, Leah agreed to a physical examination instead.<sup>6</sup> After the exam, the staff told Leah she had no serious injuries, but they found traces of Xanax and alcohol in her system.<sup>7</sup> Mixed together, Xanax and alcohol cause memory loss.<sup>8</sup> Following the exam, Leah went home.<sup>9</sup> Several hours later she realized she needed help.<sup>10</sup> She got back in her car and drove across town to a different hospital.<sup>11</sup> Once there, hospital staff performed a rape kit—which confirmed someone raped Leah.<sup>12</sup>

Police identified Leah’s rapist, but prosecutors did not to pursue criminal charges.<sup>13</sup> The decision not to pursue criminal charges devastated Leah; she could not eat for months and took leave from her job.<sup>14</sup> Prosecutors explained the two hospital visits prevented a definitive timeline.<sup>15</sup> Too much time passed between the physical examination at the first hospital and the medical evidentiary exam at the second hospital to establish a timeline of the rape.<sup>16</sup> The time-lapse between the two hospital visits would have allowed the defense to argue Leah drugged herself between hospital visits and fabricated the rape.<sup>17</sup> Unfortunately, Leah’s experience is not unique.<sup>18</sup> In the United States alone, a sexual assault

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1. Caitlin Flynn, *America Has a Rape Kit Crisis*, DAME MAGAZINE (Mar. 4, 2019), <https://www.damemagazine.com/2019/03/04/america-has-a-rape-kit-crisis/> (on file with *The University of the Pacific Law Review*).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *See id.* (postulating that in 2015 seventeen percent of acute-care hospitals in the United States had personnel on staff trained to perform rape kits).

occurs every ninety-eight seconds.<sup>19</sup> Following the traumatic experience, many survivors elect to undergo a medical evidentiary exam—the technical name for a rape kit.<sup>20</sup> In a sexual assault case, the victim’s body is a part of the crime scene.<sup>21</sup> Medical evidentiary exams collect and preserve evidence from the crime.<sup>22</sup> Many sexual assault survivors have limited or no access to medical evidentiary exams.<sup>23</sup> Although Chapter 714 expands the number of medical personnel eligible for trainings, it lacks a mechanism to ensure increased training and access in rural counties.<sup>24</sup>

## II. LEGAL BACKGROUND

The California Penal Code and federal laws govern minimum standards for performing medical evidentiary exams and for training of hospital personnel to perform medical evidentiary exams.<sup>25</sup> States must provide sexual assault survivors with free medical evidentiary exams.<sup>26</sup> Despite these requirements, many parts of California have limited access to medical evidentiary exams.<sup>27</sup> Section A examines the federal laws pertaining to medical evidentiary exams.<sup>28</sup> Section B explains existing California laws relating to medical evidentiary exams.<sup>29</sup>

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19. Alanna Vagianos, *30 Alarming Statistics That Show the Reality of Sexual Violence in America*, HUFFPOST (Apr. 6, 2017, 12:09 PM), [https://www.huffpost.com/entry/sexual-assault-statistics\\_n\\_58e24c14e4b0c777f788d24f](https://www.huffpost.com/entry/sexual-assault-statistics_n_58e24c14e4b0c777f788d24f) (on file with *The University of the Pacific Law Review*).

20. See CAL. PENAL CODE § 13823.93(a)(2) (West 2019) (defining performing a medical evidentiary exam as evaluating, collecting, and preserving evidence; interpreting findings; and documenting results); see also Rape, Abuse, & Incest National Network, *What Is a Sexual Assault Forensic Exam?*, RAINN.ORG, <https://www.rainn.org/articles/rape-kit> (last visited Aug. 1 2019) (on file with *The University of the Pacific Law Review*) (emphasizing there is no requirement for sexual assault survivors to undergo rape kits).

21. END THE BACKLOG, *What is the Rape Kit Backlog?* <http://www.endthebacklog.org/backlog/what-rape-kit-backlog> (last visited Aug. 1, 2019) (on file with *The University of the Pacific Law Review*).

22. Rape, Abuse, & Incest National Network, *What Is a Sexual Assault Forensic Exam?* *supra* note 20.

23. Press Release, Assembly Member Marc Berman, *Berman Introduces Bill to Enhance Care for Sexual Assault Survivors*, (Feb. 14, 2019), <https://a24.asmdc.org/press-releases/20190214-berman-introduces-bill-enhance-care-sexual-assault-survivors> (on file with *The University of the Pacific Law Review*).

24. See CAL. PENAL CODE § 13823.9(b) (amended by Chapter 714) (authorizing counties with populations under 100,000 to not have medical personnel trained to perform medical evidentiary exams in hospitals); see also ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 538, at 4 (Mar. 26, 2019) (claiming Chapter 714 increases the number of personnel eligible to perform medical evidentiary exams in California).

25. 34 U.S.C.A. § 10449 (West, Westlaw current through P.L. 116-65); see also CAL. PENAL CODE § 13823.5 (amended by Chapter 714) (West, Westlaw current with urgency legislation through Ch. 706 of the 2019 Reg. Sess. Some statute sections may be more current, see credits for details.).

26. *Id.* § 10449(b).

27. Press Release, Assembly Member Marc Berman, *supra* note 23.

28. *Infra* Section II.A.

29. *Infra* Section II.B.

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### A. Federal Laws Regarding Medical Evidentiary Exams

The federal government gives grants to state and local governments for funding medical evidentiary exams.<sup>30</sup> State and local governments must either provide medical evidentiary exams free of charge or arrange for survivors to obtain medical evidentiary exams free of charge.<sup>31</sup> Furthermore, federal law prevents state and local governments from requiring a survivor to participate in the criminal justice system in exchange for a medical evidentiary exam.<sup>32</sup>

### B. Existing Medical Evidentiary Exam Laws in California

Despite laws in California governing medical evidentiary exams, gaps in the law prevent all survivors from accessing medical evidentiary exams.<sup>33</sup> Subsection 1 explains the geographic and training requirements for hospital personnel performing medical evidentiary exams.<sup>34</sup> Subsection 2 discusses funding for medical evidentiary exams.<sup>35</sup> Subsection 3 outlines California's minimum medical evidentiary exam standards.<sup>36</sup>

#### 1. Geographic and Training Requirements of Hospital Personnel

Hospitals perform medical evidentiary exams.<sup>37</sup> California law requires counties with a population over 100,000 to have hospital personnel trained to perform medical evidentiary exams present in a county or general acute-care hospital.<sup>38</sup> Counties with a population over 1,000,000 must have one general acute-care hospital with hospital personnel trained to perform medical evidentiary exams present for every 1,000,000 people.<sup>39</sup>

California law governs training requirements for hospital personnel performing medical evidentiary exams.<sup>40</sup> Under California's law a "qualified

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30. See 34 U.S.C.A. § 10449(a) (West 2019).

31. *Id.* § 10449(b).

32. *Id.* § 10449(d)(1).

33. Press Release, Assembly Member Marc Berman, *supra* note 23 (observing many sexual assault survivors in California must travel long distances for medical evidentiary exams).

34. *Infra* Section II.B.1.

35. *Infra* Section II.B.2.

36. *Infra* Section II.B.3.

37. CAL. PENAL CODE § 13823.9(a) (West, Westlaw current with urgency legislation through Ch. 706 of the 2019 Reg.Sess. Some statute sections may be more current, see credits for details.).

38. *Id.* § 13823.9(b); see CAL. HEALTH & SAFETY CODE § 1250(a) (West 2019) (defining general acute care hospital as "a health facility having a duly constituted governing body with overall administrative and professional responsibility and an organized medical staff that provides 24-hour inpatient care."); Kirsten Slyter, *Types of Hospitals: Your Go-To Guide for Deciphering the Differences*, RASMUSSEN COLLEGE (Nov. 19, 2018), <https://www.rasmussen.edu/degrees/health-sciences/blog/types-of-hospitals/> (on file with *The University of the Pacific Law Review*) (reasoning local governments fund county hospitals).

39. CAL. PENAL CODE § 13823.9(b) (West 2019).

40. CAL. PENAL CODE § 13823.5(e) (West 2019).

healthcare professional,” or a “physician and surgeon,” conduct medical evidentiary exams.<sup>41</sup> One hospital-based training center trains every qualified healthcare professional in the state to perform medical evidentiary exams.<sup>42</sup> The standard curriculum attempts to ensure consistent exams throughout the state.<sup>43</sup> Qualified healthcare professionals learn how to perform medical evidentiary exams on sexual assault survivors, domestic violence victims, and abused elders.<sup>44</sup> The training center also teaches investigative and court personnel how to interpret the exam results.<sup>45</sup>

## *2. Medical Evidentiary Exam Reimbursements*

California law outlines reimbursements for medical evidentiary exams.<sup>46</sup> Hospitals may not charge sexual assault survivors for medical evidentiary exams.<sup>47</sup> Moreover, the law does not require sexual assault survivors to press charges against perpetrators.<sup>48</sup> The hospital charges the exam to local law enforcement.<sup>49</sup> In cases where the survivor does not press charges, local law enforcement covers up to \$300 for the exam, and the hospital pays for the remaining amount.<sup>50</sup> The California Office of Emergency Services (“CalOES”) reimburses law enforcement for some of the medical evidentiary exam costs with discretionary funds.<sup>51</sup> California receives these discretionary funds from the federal government via the Violence Against Women Reauthorization Act of 2013.<sup>52</sup>

Law enforcement may also seek payments from a criminal defendant.<sup>53</sup> Under California law, courts may require a defendant to pay law enforcement for costs resulting from medical evidentiary exams arising from child molestation.<sup>54</sup> Similarly, a court may require a defendant to pay law enforcement for the cost of a medical evidentiary exam following a sexual assault or attempted sexual assault.<sup>55</sup> Courts determine whether a defendant is financially able to pay law

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41. *Id.*

42. CAL. PENAL CODE § 13823.93(b) (West 2019).

43. *Id.*

44. *Id.*

45. *Id.*

46. CAL. PENAL CODE § 13823.95 (West, Westlaw current with urgency legislation through Ch. 706 of the 2019 Reg.Sess. Some statute sections may be more current, see credits for details.).

47. *Id.* § 13823.95(a).

48. *Id.* § 13823.95(b).

49. *Id.* § 13823.95(c).

50. *Id.*

51. *Id.* § 13823.95(d).

52. *See id.*

53. CAL. PENAL CODE § 1203.1h(a) (West, Westlaw current with urgency legislation through Ch. 706 of the 2019 Reg.Sess. Some statute sections may be more current, see credits for details.).

54. *Id.*

55. *Id.* § 1203.1h(b).

enforcement, and, if the defendant can, the amount the defendant must pay.<sup>56</sup>

### 3. *What Happens During a Medical Evidentiary Exam?*

California law provides the standard protocol for medical evidentiary exams.<sup>57</sup> At minimum, the law requires hospital personnel to conduct a physical examination and notify law enforcement following a sexual assault.<sup>58</sup> Survivors must consent to a physical examination, evidence collection, and treatment for injuries.<sup>59</sup> Survivors may refuse to consent to the physical examination and collection of evidence, but this refusal is not a ground for the hospital to deny treatment of the survivor's injuries.<sup>60</sup>

Hospital personnel must check for injuries, document injuries, and collect physical evidence during the medical evidentiary exam.<sup>61</sup> Additionally, hospital personnel record a history of the survivor's sexual assault experiences.<sup>62</sup> This history includes the circumstances of the assault, physical injuries reported, and relevant medical history.<sup>63</sup> Hospital personnel inspect the survivor's clothing, body, and external genitalia; examine the survivor's mouth, vagina, cervix, penis, and/or rectum; and, document the survivor's injuries.<sup>64</sup>

After completing the physical examination, hospital personnel collect evidence from the survivor's body.<sup>65</sup> They collect the clothing worn during the assault; foreign materials revealed during the physical examination; and swabs from the mouth, vagina, rectum, and/or penis as evidence.<sup>66</sup> If the assault involved drugs or alcohol, hospital personnel collect urine and blood samples.<sup>67</sup> Prosecutors may never use toxicology reports collected during the examination in any civil or criminal actions against the survivor.<sup>68</sup> The toxicology reports remain confidential unless prosecutors use them in the perpetrator's trial.<sup>69</sup>

While collecting the evidence, hospital personnel collect reference specimens.<sup>70</sup> Reference specimens include items such as hair, blood, and saliva.<sup>71</sup>

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56. *Id.* § 1203.1h(a)–(b).

57. CAL. PENAL CODE § 13823.11 (West, Westlaw current with urgency legislation through Ch. 706 of the 2019 Reg.Sess. Some statute sections may be more current, see credits for details.).

58. *Id.* § 13823.11(a)–(b).

59. *Id.* § 13823.11(c).

60. *Id.* § 13823.11(c)(3).

61. *Id.* § 13823.11(f).

62. *Id.* § 13823.11(d).

63. *Id.*

64. *Id.* § 13823.11(f)(2).

65. *Id.* § 13823.11(g).

66. *Id.* § 13823.11(g)(1)(A)–(C).

67. *Id.* § 13823.11(g)(1)(D).

68. *Id.*

69. *Id.* § 13823.11(g)(2).

70. *See id.* (defining a reference specimen as “a standard from which to obtain baseline information.”).

71. *Id.*

Prosecutors use the reference specimens to compare DNA and analyze suspects.<sup>72</sup> Hospital personnel test survivors for pregnancy, gonorrhea, and syphilis.<sup>73</sup> Likewise, a survivor may request emergency contraceptives—such as Ella or Plan B—at no cost.<sup>74</sup> Hospital personnel air-dry, package, seal, label, and give the evidence to the proper law enforcement agency.<sup>75</sup> CalOES uses a standard form for recording medical and physical data from survivors of sexual assault.<sup>76</sup>

### III. CHAPTER 714

Assembly Member Marc Berman introduced Chapter 714 to “improve the availability, efficiency, and quality of medical evidentiary examinations” across California.<sup>77</sup> Access to timely medical evidentiary exams is critical for both survivors’ well-being and prosecuting perpetrators.<sup>78</sup> Chapter 714 requires CalOES to accept paper and electronic versions of the standard form.<sup>79</sup> CalOES enters the electronic standard form into a database that generates aggregate data for professional and educational training.<sup>80</sup> Additionally, electronic forms may contain links to the California Victim Compensation Board so survivors can apply for victim compensation.<sup>81</sup>

Furthermore, Chapter 714 expands the definition of “qualified healthcare professional” to include physicians, surgeons, nurses, nurse practitioners, and physician assistants.<sup>82</sup> It defines “sexual assault forensic examiner” as “a qualified healthcare professional who has been trained on the standardized sexual assault forensic medical curriculum.”<sup>83</sup> Additionally, Chapter 714 expands the facilities eligible to perform medical evidentiary exams beyond general acute-care hospitals to include clinics and other emergency facilities.<sup>84</sup>

Chapter 714 mandates that all qualified healthcare professionals receive

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72. *Id.*

73. *Id.* § 13823.11(g)(3).

74. *Id.* § 13823.11(g)(4)(A)–(B); see also *Emergency Contraceptives after Sexual Assault: Five Key Facts for Survivors*, MASSACHUSETTS DEPARTMENT OF PUBLIC HEALTH (Mar. 2014), <http://www.astho.org/Maternal-and-Child-Health/Long-Acting-Reversible-Contraception/Emergency-Contraception-Patient-Fact-Sheet-Massachusetts/> (on file with *The University of the Pacific Law Review*) (observing the United States Drug and Food Administration approved both Ella and Plan B and hospitals generally offer these pills to survivors).

75. CAL. PENAL CODE §13823.11(h)(1)–(4).

76. CAL. PENAL CODE §13823.5(c) (West 2019).

77. Press Release, Assembly Member Marc Berman, *supra* note 23.

78. End the Backlog, *Why Testing Rape Kits Matters*, <http://www.endthebacklog.org/backlog/why-testing-matters> (last visited Aug. 4, 2019) (on file with *The University of the Pacific Law Review*) (discussing how testing rape kits sends a message to survivors that their cases matter and helps identify perpetrators).

79. CAL. PENAL CODE § 13823.5(c)(1) (amended by Chapter 714).

80. *Id.*

81. *Id.*

82. *Id.* § 13823.5(e)(1) (amended by Chapter 714).

83. *Id.* § 13823.5(e)(2) (amended by Chapter 714).

84. CAL. PENAL CODE § 13823.9(a) (amended by Chapter 714).

training from the California Clinical Forensic Medical Training Center.<sup>85</sup> Training must cover how to examine survivors of child sexual abuse, intimate partner violence, sexual assault, dependent adult abuse, and sex trafficking.<sup>86</sup> Furthermore, qualified healthcare professionals must learn about using standardized medical evidentiary exam kits, providing technical assistance, and emerging trends.<sup>87</sup> Chapter 714 also mandates annual assessments to diagnose the needs of sexual assault response teams and continued education on best practices for medical evidentiary exams.<sup>88</sup>

The training center must create standard protocols for medical evidentiary exams of child sexual abuse, intimate partner violence, sexual assault, dependent adult abuse, and sex trafficking survivors.<sup>89</sup> As part of the standard protocols, Chapter 714 requires qualified healthcare professionals to perform a complete examination and diagnostic tests on survivors suffering from strangulation.<sup>90</sup> Qualified healthcare professionals must also complete forms documenting the strangulation.<sup>91</sup> The training center uses standard forms to advance the field, develop the curriculum, oversee compliance, and ensure the quality of exams.<sup>92</sup>

Local law enforcement reimburses hospitals for the full cost of medical evidentiary exams at a locally-negotiated rate, regardless of charges against the perpetrator.<sup>93</sup> Chapter 714 expands CalOES's reimbursements to law enforcement.<sup>94</sup> Reimbursements by CalOES offset the cost of conducting medical evidentiary exams on survivors who are unsure of reporting to law enforcement at the time of the examination.<sup>95</sup> CalOES determines the reimbursement amount once every five years.<sup>96</sup> Any increase in the amount reimbursed "cannot exceed fifty percent of the amount reimbursed as recently determined by CalOES."<sup>97</sup>

Chapter 714 requires hospital personnel to perform baseline testing for sexually transmitted diseases on non-sexually active adults, persons with disabilities, and persons residing in a long-term care facility.<sup>98</sup> Minors may withhold consent for a medical evidentiary exam without the consent of a parent or guardian.<sup>99</sup>

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85. CAL. PENAL CODE § 13823.93(b)(1) (amended by Chapter 714).

86. *Id.* § 13823.93(d)(5) (amended by Chapter 714).

87. *Id.* § 13823.93(d)(7) (amended by Chapter 714).

88. *Id.*

89. *Id.* § 13823.93(d)(2) (amended by Chapter 714).

90. CAL. PENAL CODE § 13823.11(g)(1)(D)(5) (amended by Chapter 714).

91. *Id.*

92. CAL. PENAL CODE § 13823.93(d)(3) (amended by Chapter 714).

93. CAL. PENAL CODE § 13823.95(c)(1) (amended by Chapter 714).

94. *Id.* § 13823.95(c)(2) (amended by Chapter 714); *Id.* § 13823.95(d)(2) (amended by Chapter 714).

95. *Id.*

96. *Id.* § 13823.95(d)(2) (amended by Chapter 714).

97. *Id.*

98. CAL. PENAL CODE § 13823.11(g)(1)(D)(3) (amended by Chapter 714).

99. *Id.* § 13823.11(c)(4) (amended by Chapter 714).



#### IV. ANALYSIS

Chapter 714 increases access to medical evidentiary exams across California by expanding the term “qualified healthcare professional” and broadening the facilities performing medical evidentiary exams.<sup>100</sup> While Chapter 714 may increase access to medical evidentiary exams in urban areas, rural areas are unlikely to receive the same benefit.<sup>101</sup> Section A explains the importance of timely medical evidentiary exams.<sup>102</sup> Section B discusses the need for increased access to medical evidentiary exams.<sup>103</sup> Section C analyzes Chapter 714’s methods of increasing access to medical evidentiary exams and its effects.<sup>104</sup> Section D addresses the lack of access to medical evidentiary exams that still exists.<sup>105</sup>

##### *A. Importance of Timely Medical Evidentiary Exams*

Timely medical evidentiary exams are crucial for prosecuting rapists and for the survivor’s experience of the medical evidentiary exam.<sup>106</sup> Subsection 1 discusses the importance of timely medical evidentiary exams for criminal convictions.<sup>107</sup> Subsection 2 explains the importance of timely medical evidentiary exams for sexual assault survivors.<sup>108</sup>

##### *1. Timely Medical Evidentiary Exams and Criminal Convictions*

Timely medical evidentiary exams are vital for successfully prosecuting perpetrators.<sup>109</sup> If too much time passes between the sexual assault and collecting the evidence, medical personnel might not find DNA.<sup>110</sup> While medical personnel generally perform medical evidentiary exams up to five days after a sexual

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100. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 538, at 2 (Mar. 26, 2019).

101. See Danielle Paquette, *You Have to Drive an Hour for a Rape Kit in Rural America*, THE WASHINGTON POST (Apr. 19, 2016, 3:05 AM), <https://www.washingtonpost.com/news/wonk/wp/2016/04/19/you-have-to-drive-an-hour-for-a-rape-kit-in-rural-america/> (on file with *The University of the Pacific Law Review*) (analyzing the lack of staff trained to perform medical evidentiary exams in rural counties across the United States).

102. *Infra* Section IV.A.

103. *Infra* Section IV.B.

104. *Infra* Section IV.C.

105. *Infra* Section IV.D.

106. Becca Habegger, *supra* note 106; Danielle Paquette, *supra* note 101; Rape Abuse, & Incest National Network, *What Is a Sexual Assault Forensic Exam?*, *supra* note 20.

107. *Infra* Section IV.A.1.

108. *Infra* Section IV.A.2.

109. Danielle Paquette, *supra* note 101.

110. *Frequently Asked Questions*, FORENSICS FOR SURVIVORS (2015), <https://www.survivorape.org/forensics/sexual-assault-forensics/answers-to-faq#kit> (on file with *The University of the Pacific Law Review*).

assault, the likelihood of finding DNA decreases as time passes.<sup>111</sup>

DNA is important for catching the perpetrator.<sup>112</sup> Tested medical evidentiary exams can identify an unknown perpetrator, link crimes together, identify serial rapists, and exonerate the innocent.<sup>113</sup> Forensic scientists enter collected DNA into the Federal Bureau of Investigation's Combined DNA Index System.<sup>114</sup> These forensic scientists compare DNA from rape kits with thousands of profiles in the database.<sup>115</sup> For example, Mark Manteuffel violently raped several women in the Sacramento area during the 1990s.<sup>116</sup> Those cases were cold until 2019 when police matched DNA from medical evidentiary exams with Manteuffel's DNA.<sup>117</sup> Police located and arrested Manteuffel in Decatur, Georgia.<sup>118</sup> In 2012, the Sacramento District Attorney's ("DA") office started keeping track of "John Doe DNA warrants."<sup>119</sup> Since it began tracking these cases, the DA has filed more than fifty arrest warrants that led to ten arrests.<sup>120</sup> Preserving and testing medical evidentiary exams is critical for catching perpetrators.<sup>121</sup>

## 2. *Impact of Timely Medical Evidentiary Exams on Survivors*

Besides assisting prosecutors convict perpetrators, timely medical evidentiary exams are more comfortable for the survivor.<sup>122</sup> Hospital personnel advise survivors not to eat, drink, shower, use the restroom, change clothes, or comb hair between the time of the assault and the medical evidentiary exam.<sup>123</sup> Although survivors may still undergo a medical evidentiary exam if they do any of the above actions, avoiding these actions helps preserve evidence.<sup>124</sup> Survivors generally want to do these actions following a traumatic experience, so

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111. *See id.* (noting the amount of time that passed between the assault, whether the survivor showered after the assault, and the type of assault determine if medical personnel find DNA).

112. Becca Habegger, *supra* note 106.

113. END THE BACKLOG, *Why Rape Kit Testing Matters*, <http://www.endthebacklog.org/backlog/why-testing-matters> (last visited Aug. 1, 2019) (on file with *The University of the Pacific Law Review*); *see* END THE BACKLOG, *How Big is the Backlog Where You Live?* (last visited Aug. 1, 2019), <http://www.endthebacklog.org/> (last visited Aug. 1, 2019) (on file with *The University of the Pacific Law Review*) (estimating there are 13,615 untested rape kits in California).

114. Rape, Abuse & Incest National Network, *The Importance of DNA in Sexual Assault Cases* (2019), <https://www.rainn.org/articles/importance-dna-sexual-assault-cases> (on file with *The University of the Pacific Law Review*).

115. *Id.*

116. Becca Habegger, *supra* note 106.

117. *Id.*

118. *Id.*

119. *See id.* (explaining a John Doe arrest warrant is an arrest warrant where law enforcement use the person's DNA as his or her identification).

120. *Id.*

121. *Id.*

122. Danielle Paquette, *supra* note 101.

123. *Id.*; Rape, Abuse, & Incest National Network, *supra* note 20.

124. Rape, Abuse, & Incest National Network, *supra* note 20.

shortening the time between the assault and the medical evidentiary exam improves their comfort.<sup>125</sup>

Timely medical evidentiary exams also improve the comfort of the medical evidentiary exam itself.<sup>126</sup> Medical evidentiary exams often feel invasive to survivors.<sup>127</sup> The average length of a medical evidentiary exam is between four and six hours.<sup>128</sup> Consequently, medical evidentiary exams are not comfortable by nature.<sup>129</sup>

Well-trained hospital personnel help the process go smoothly.<sup>130</sup> For example, when Samantha arrived at the hospital after her rape, she learned there was no one in her town trained to perform a medical evidentiary exam.<sup>131</sup> Even so, she decided to have one performed.<sup>132</sup> Hospital staff without the required training performed the medical evidentiary exam.<sup>133</sup> Samantha characterized the process as “chaotic and devastating,”<sup>134</sup> but training can eliminate some of this chaos and put the survivor at ease.<sup>135</sup>

### *B. Issues with Current Access to Medical Evidentiary Exams*

Prior to Chapter 714, there were forty-nine Sexual Assault Response Teams (“SART”) across California’s fifty-eight counties.<sup>136</sup> A SART usually consists of a Sexual Assault Nurse Examiner (“SANE”), hospital personnel, a sexual assault victim specialist, and law enforcement.<sup>137</sup> A SANE provides care to sexual assault survivors, conducts medical evidentiary exams, and provides expert testimony at trial.<sup>138</sup> A pediatric SANE examines and collects evidence from

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125. *Id.*; Danielle Paquette, *supra* note 101.

126. Danielle Paquette, *supra* note 101 (noting timely medical evidentiary exams help with the survivor’s comfort).

127. See Madeline Carlisle, *A New System to Ensure Sexual Assault Cases Aren’t Forgotten*, THE ATLANTIC (Apr. 7, 2019), <https://www.theatlantic.com/politics/archive/2019/04/many-states-are-adopting-rape-kit-tracking-systems/586531/> (on file with *The University of the Pacific Law Review*) (emphasizing that medical evidentiary exams are long and invasive).

128. *Id.*

129. See *id.* (stressing survivors spend four to six hours undergoing swabbing, probing, and photographing).

130. See Caitlin Flynn, *supra* note 1 (reflecting a survivor’s account of experiencing a medical evidentiary exam performed by untrained staff as “chaotic and devastating”).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Cf. id.* (opining that untrained personnel may lose or never collect certain evidence when performing medical evidentiary exams).

136. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 538, at 3-4 (Mar. 26, 2019).

137. County of Placer, *Sexual Assault Response Team (SART)* (2019), <https://www.placer.ca.gov/3354/Sexual-Assault-Response-Team-SART> (on file with *The University of the Pacific Law Review*) (observing the only registered nurses and physicians can become SANEs).

138. *Id.*; 2017-2018 MARIN COUNTY CIVIL GRAND JURY, SEXUAL ASSAULT IN MARIN 9 (May 2, 2018),

child survivors.<sup>139</sup> SART staff assist the SANE perform the examination.<sup>140</sup> The victim specialist provides “crisis intervention, emotional support, referrals, and information for the victim.”<sup>141</sup> SART law enforcement personnel receive special training in listening to survivors’ stories and collecting information related to prosecuting the perpetrator.<sup>142</sup>

Access to medical evidentiary exams in rural areas is difficult.<sup>143</sup> SARTs perform medical evidentiary exams at county or general acute-care hospitals, which are sparse in rural areas.<sup>144</sup> In Surprise Valley, there is no county hospital, and the general acute-care hospital has one bed in the emergency room and is bankrupt.<sup>145</sup> Similarly, Colusa County has no county hospital and one general acute-care hospital that serves an area of 1,156 miles.<sup>146</sup> If the one hospital in Colusa County did not have a SANE on staff, a survivor would have to go to another county to receive a medical evidentiary exam.<sup>147</sup> In addition, not all counties have a SART; in counties with a population under 100,000, it is a choice for hospitals to have a SANE on staff.<sup>148</sup> Thus, prior to Chapter 714, sexual assault survivors either traveled to another county for a medical evidentiary exam or did not undergo a medical evidentiary exam.<sup>149</sup>

### *C. How Chapter 714 Increases Access to Medical Evidentiary Exams*

Chapter 714 expands the number of personnel trained to perform medical evidentiary exams to include nurse practitioners and physician assistants under the qualified healthcare professional umbrella.<sup>150</sup> Before Chapter 714, only doctors and nurses were “qualified healthcare professionals”—meaning only

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available at <https://www.marincounty.org/-/media/files/departments/gj/reports-responses/2017-18/sexual-assault-in-marin.pdf?la=en> (on file with *The University of the Pacific Law Review*).

139. County of Placer, *supra* note 137.

140. *Id.*

141. *Id.*

142. *Id.*

143. See Danielle Paquette, *supra* note 101 (stressing there is a shortage of SANEs in the United States and especially in rural locations).

144. CAL. PENAL CODE § 13823.9(a) (amended by Chapter 714).

145. Xenia Shih Bion, *A Long Road To Care for Rural Californians*, CALIFORNIA HEALTH FOUNDATION (June 8, 2018), <https://www.chcf.org/blog/long-road-to-care-for-rural-californians/> (on file with *The University of the Pacific Law Review*).

146. Sierra-Sacramento Valley Emergency Medical Services Agency, *Colusa County* (2019), <https://www.ssvems.com/colusa-county/> (on file with *The University of the Pacific Law Review*).

147. See *id.* (noting there is only one hospital in all of Colusa County).

148. See CAL. PENAL CODE §13823.9(b) (West 2019) (requiring only counties with populations over 100,000 to have a hospital with personnel trained in performing medical evidentiary exams), and ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 538, at 3–4 (Mar. 26, 2019) (“Currently, there are forty-nine sexual assault teams serving all fifty-eight counties in California.”).

149. See Danielle Paquette, *supra* note 101 (indicating that in the United States, many sexual assault survivors drive an hour for a medical evidentiary exam or never undergo a medical evidentiary exam).

150. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 538, at 4 (Mar. 26, 2019).

doctors and nurses could become SANEs.<sup>151</sup> Chapter 714 allows for the possibility of more SANEs across the state because nurse practitioners and physician assistants can become SANEs as “qualified healthcare professionals.”<sup>152</sup> The increase in medical personnel eligible to perform medical evidentiary exams will likely increase access to medical evidentiary exams across the state.<sup>153</sup>

Additionally, Chapter 714 increases access to medical evidentiary exams by expanding the facilities eligible to perform the exams.<sup>154</sup> Previously, only county and general acute-care hospitals could perform medical evidentiary exams.<sup>155</sup> Chapter 714 expands the facilities that may perform medical evidentiary exams to include clinics and emergency medical facilities.<sup>156</sup> This change will allow rural areas that do not have county or general acute-care hospitals to perform medical evidentiary exams.<sup>157</sup> For example, Colusa County has only one general acute-care hospital and no county hospital, but it does have multiple clinics and emergency medical facilities.<sup>158</sup> Expanding the facilities eligible to perform medical evidentiary exams improves a survivor’s chance of receiving a timely medical evidentiary exam by decreasing travel time and distance.<sup>159</sup>

#### *D. Remaining Barriers to Accessing Medical Evidentiary Exams*

While Chapter 714 expands the number of medical personnel who are eligible to become SANEs, there is no mechanism in Chapter 714 that ensures more training.<sup>160</sup> It takes forty hours of classroom training and an average of forty hours of clinical training to become a SANE.<sup>161</sup> Training costs between \$450–\$600,<sup>162</sup> certification is good for three years, and is renewable by illustrating

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151. *Id.*

152. *Id.*

153. Press Release, Assembly Member Marc Berman, *supra* note 23.

154. CAL. PENAL CODE § 13823.9(a) (West 2019); ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 538, at 4 (Mar. 26, 2019).

155. CAL. PENAL CODE § 13823.9(a) (West 2019).

156. CAL. PENAL CODE § 13823.9(b) (as amended by Chapter 714).

157. Compare *id.* § 13823.9(a), with *id.* (as amended by Chapter 714), and COUNTY OF COLUSA, COLUSA COUNTY REGIONAL DIRECTORY 2014-2015 16-17 (2d ed. 2014–2015), available at <https://www.countyofcolusa.org/DocumentCenter/View/4301> (on file with *The University of the Pacific Law Review*).

158. COUNTY OF COLUSA, COLUSA COUNTY REGIONAL DIRECTORY 2014-2015, *supra* note 157.

159. See *id.* (noting there is only one hospital in Colusa county but multiple clinics and emergency facilities); Danielle Paquette, *supra* note 101.

160. See CAL. PENAL CODE § 13823.9(b) (as amended by Chapter 714) (lacking a requirement or mandate for an increase in the number of personnel trained to perform medical evidentiary exams).

161. *Become a Forensic Nurse*, INT’L ASS’N OF FORENSIC NURSES (2019), <https://www.forensicnurses.org/page/BecomeFN> (on file with *The University of the Pacific Law Review*).

162. *Online SANE Training Program*, INT’L ASS’N OF FORENSIC NURSES (2019), <https://www.forensicnurses.org/page/40HourSANE> (on file with *The University of the Pacific Law Review*).

clinical activity as a SANE and completion of continuing education.<sup>163</sup> Some hospitals require medical personnel to pay for the certifications themselves and use vacation time to complete the training.<sup>164</sup> Consequently, the cost and time commitment may deter medical personnel from pursuing the training.<sup>165</sup>

Furthermore, a SANE's job is challenging because the pay is lower than typical emergency room staffer salaries, and the hours tend to be long and unpredictable.<sup>166</sup> SANEs generally remain on-call and often spend time in court waiting to testify.<sup>167</sup> Accordingly, the job turnover rate is high, and it is difficult to recruit and retain SANEs.<sup>168</sup> While more medical personnel are eligible to become SANEs under Chapter 714, there is no guarantee the number of SANEs will increase.<sup>169</sup> Becoming a SANE is demanding and offers little to no reward for medical professionals.<sup>170</sup> The lack of incentive may prevent many medical personnel from becoming SANEs.<sup>171</sup>

Beyond the fact that there is little incentive for medical personnel to become SANEs, many rural areas have limited medical personnel.<sup>172</sup> Although Chapter 714 expands the number of medical personnel eligible to become SANEs, there is a shortage of medical care in rural California.<sup>173</sup> In California, there are 214 “doctor deserts”—locations where there is only one physician for every 3,500 people.<sup>174</sup> In the Sacramento area, there is approximately one physician for every 1,500 people.<sup>175</sup> Even with the help of physician assistants and nurse practitioners, wait time to see a doctor at the clinic in North San Juan is still

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163. 2017-2018 MARIN COUNTY CIVIL GRAND JURY, *supra* note 138.

164. Marcia Frellick, *SANE Nurse Shortfall Is a National Issue*, NURSE.COM (2018), <https://resources.nurse.com/sane-nurse-shortfall-is-a-national-issue> (on file with *The University of the Pacific Law Review*).

165. *Id.*

166. Danielle Paquette, *supra* note 101.

167. 2017-2018 Marin County Civil Grand Jury, *supra* note 138.

168. *Id.*; Katherine M. Iritani, Sexual Assault: Information on Training, Funding, and the Availability of Forensic Examiners (U.S. Gov't Accountability Office 2016).

169. See CAL. PENAL CODE §13823.9(b) (as amended by Chapter 714) (excluding a provision mandating an increase in medical personnel trained to perform medical evidentiary exams).

170. See Marcia Frellick, *supra* note 164 (presenting challenges that SANES face—including training fees and using vacation time for training).

171. See *id.* (articulating that in Illinois, only sixty-three percent of the state's 196,000 registered nurses are SANES).

172. See Christopher Cheney, *ER Staffing Split Along Urban-Rural Divide*, HEALTH LEADERS (June 18, 2018), <https://www.healthleadersmedia.com/clinical-care/er-staffing-split-along-urban-rural-divide-0> (on file with *The University of the Pacific Law Review*) (highlighting that two-thirds of emergency medicine physicians work in urban counties in the United States).

173. See Sammy Caiola, *Strapped for doctors: California's rural clinics backlogged with Medi-Cal influx*, THE SACRAMENTO BEE (Nov. 23, 2015, 04:01PM), <https://www.sacbee.com/news/local/health-and-medicine/article46122295.html> (on file with *The University of the Pacific Law Review*) (observing that there is a larger demand for medical personnel than there is supply in rural parts of California).

174. *Id.*

175. *Id.*

about three months.<sup>176</sup> In Camptonville, a bus outfitted with medical supplies visits the town once a month.<sup>177</sup> For many people, the bus is their only chance to receive medical care.<sup>178</sup>

Thus, although Chapter 714 allows more medical personnel to become SANEs, many rural areas in California are “doctor deserts” that have few medical personnel.<sup>179</sup> As a result, these areas may not have an increase in SANEs because there is a shortage of medical personnel altogether.<sup>180</sup> If the limited medical personnel do become SANEs, survivors may still experience long wait times at clinics for medical evidentiary exams.<sup>181</sup>

Moreover, California law mandates that counties with a population over 100,000 have hospital staff on-call to perform medical evidentiary exams.<sup>182</sup> Only thirty-five counties meet this requirement.<sup>183</sup> Yet, Chapter 714 does not address counties with populations under 100,000.<sup>184</sup> It does not change the staff requirements of California’s law.<sup>185</sup> Thus, the law still does not require California’s twenty-two counties with populations under 100,000 to have trained medical staff on-call to perform medical evidentiary exams.<sup>186</sup> Most Northern California have populations under 100,000 people.<sup>187</sup> Based on its population, California law does not require Colusa County to have a SANE within its county.<sup>188</sup> California law only requires three out of the four counties bordering

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176. *See id.* (discussing that while the physician at the clinic in North San Juan gives more responsibilities to physician assistants and nurse practitioners, the clinic’s wait time is still about three months).

177. *Id.*

178. *Id.*

179. *See* CAL. PENAL CODE § 13823.5(e)(1) (as amended by Chapter 714) (defining “qualified healthcare professionals” to include nurse practitioners and physician assistants), *and* Sammy Caiola, *supra* note 173 (stating approximately three-quarters of “doctor deserts” are in rural areas of California).

180. *See* Sammy Caiola, *supra* note 173 (postulating there is a shortage of medical personnel in rural areas of California).

181. *See id.* (claiming that even with the help of nurse practitioners and physician assistants, patients still experience about a three-month wait time at the clinic in North San Juan).

182. CAL. PENAL CODE § 13823.9(b) (West 2019).

183. *See California Counties by Population*, CALIFORNIA DEMOGRAPHICS BY CUBIT (2019), [https://www.california-demographics.com/counties\\_by\\_population](https://www.california-demographics.com/counties_by_population) (on file with *The University of the Pacific Law Review*) (showing only twenty-two of California’s counties have populations over 100,000).

184. *Cf.* CAL. PENAL CODE § 13823.9(b) (as amended by Chapter 714) (ignoring that there is no requirement for counties with populations under 100,000 to have a hospital with medical personnel trained to perform medical evidentiary exams).

185. *Cf. id.* (failing to include a provision requiring counties with populations under 100,000 to have a hospital with medical personnel trained to perform medical evidentiary exams).

186. *Compare id.* (omitting a provision that requires counties with populations under 100,000 to have a hospital with personnel trained to perform medical evidentiary exams), *with* CAL. PENAL CODE § 13823.9(b) (West 2019), *and California Counties by Population*, CALIFORNIA DEMOGRAPHICS BY CUBIT, *supra* note 183 (illustrating the locations of California’s counties).

187. *Compare California Counties by Population*, CALIFORNIA DEMOGRAPHICS BY CUBIT, *supra* note 183, *with California Counties*, CALIFORNIA STATE ASSOCIATION OF COUNTIES (2019), *available at* [https://www.counties.org/sites/main/files/fileattachments/california\\_county\\_map\\_0.pdf](https://www.counties.org/sites/main/files/fileattachments/california_county_map_0.pdf) (on file with *The University of the Pacific Law Review*).

188. *See California Counties by Population*, CALIFORNIA DEMOGRAPHICS BY CUBIT, *supra* note 183,

Colusa County to have SANEs on hospital staff.<sup>189</sup> Thus, following Chapter 714, there are still areas of California that have limited access to medical evidentiary exams.<sup>190</sup>

## V. CONCLUSION

Before Chapter 714, sexual assault survivors either traveled outside their counties for a medical evidentiary exam or did not get one at all.<sup>191</sup> Assembly Member Berman introduced Chapter 714 to increase access to medical evidentiary exams.<sup>192</sup> Expanding the personnel and facilities eligible to perform medical evidentiary exams may increase access to medical evidentiary exams.<sup>193</sup>

However, because there is no mechanism in Chapter 714 to ensure more personnel complete SANE training, there may not be an increase in access to medical evidentiary exams.<sup>194</sup> The large time and financial commitments associated with becoming a SANE suggest there will not be an increase in SANEs—especially in rural areas.<sup>195</sup> Chapter 714 does not require counties with a population of less than 100,000 to have SANEs on staff.<sup>196</sup> It is likely there will still be Californians from rural areas who have limited access to medical evidentiary exams.<sup>197</sup> Therefore, even if more medical personnel become SANEs

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*and California Counties*, CALIFORNIA STATE ASSOCIATION OF COUNTIES, *supra* 187 (detailing a map of California's counties).

189. Compare CAL. PENAL CODE § 13823.9(b) (as amended by Chapter 714) (permitting counties with populations under 100,000 to have no personnel trained to perform medical evidentiary exams in the hospitals), with *California Counties by Population*, CALIFORNIA DEMOGRAPHICS BY CUBIT, *supra* note 183 (observing Lake, Glenn, and Sutter counties have populations under 100,000), and *California Counties*, CALIFORNIA STATE ASSOCIATION OF COUNTIES, *supra* 187 (noting Lake, Glenn, Sutter, and Yolo counties surround Colusa County).

190. Compare CAL. PENAL CODE § 13823.9(b) (as amended by Chapter 714) (neglecting a requirement for counties with populations under 100,000 to have a hospital with medical personnel trained to perform medical evidentiary exams), with *California Counties by Population*, *California Counties by Population*, CALIFORNIA DEMOGRAPHICS BY CUBIT, *supra* note 183 (displaying a map of California's counties), and *California Counties*, CALIFORNIA STATE ASSOCIATION OF COUNTIES, *supra* note 187 (providing Nevada, Sutter, Mendocino, Yuba, Lake, Tehama, San Benito, Tuolumne, Calaveras, Siskiyou, Amador, Lassen, Glenn, Del Norte, Colusa, Plumas, Inyo, Mariposa, Trinity, Modoc, Sierra, and Alpine counties have populations under 100,000).

191. Press Release, Assembly Member Marc Berman, *supra* note 23.

192. *Id.*

193. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 538, at 4 (Mar. 26, 2019).

194. See CAL. PENAL CODE § 13823.9(b) (as amended by Chapter 714) (omitting a provision requiring counties to train more medical personnel to perform medical evidentiary exams).

195. 2017-2018 Marin County Civil Grand Jury, *supra* note 138; Katherine M. Iritani, *supra* note 168.

196. See CAL. PENAL CODE § 13823.9(b) (amended by Chapter 714) (inferring Chapter 714 does not change the requirement that counties with a population of over 100,000 have medical personnel trained to perform medical evidentiary exams on staff).

197. Compare *id.* (missing a provision ensuring counties with populations under 100,000 have medical personnel trained to perform medical evidentiary exams on staff), with *California Counties by Population*, CALIFORNIA DEMOGRAPHICS BY CUBIT, *supra* note 183 (indicating twenty-two of California's fifty-eight counties have populations under 100,000), and *California Counties*, CALIFORNIA STATE ASSOCIATION OF



in rural areas, there still may not be enough to meet the local demand.<sup>198</sup> Ultimately, Chapter 714 may assist survivors in urban areas receive medical evidentiary exams more quickly, but survivors in rural areas will likely still have limited access.<sup>199</sup>

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COUNTIES, *supra* note 187 (exhibiting a map of California's counties).

198. *See* Sammy Caiola, *supra* note 173 (examining the shortage of medical personnel in rural California).

199. *See* CAL. PENAL CODE § 13823.9(b) (as amended by Chapter 714) (expanding the definition of qualified healthcare professionals to include physician assistants and nurse practitioners), *and* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 538, at 4 (Mar. 26, 2019) (noting Chapter 714 increases the number of SARTs across California).