VICTIMIZING THE CHILD VICTIM: VERMONT RULE OF EVIDENCE 807 AND TRAUMA IN THE COURTROOM

INTRODUCTION*

Since the early 1980's, a number of states have taken steps to improve the prosecution of child sexual abuse cases.[1] This new legislation, much of which provides exceptions to the hearsay rule by allowing child victims of alleged sexual abuse to testify out of court, has three purposes: to modify legal procedures and afford the victims added protection from the trauma of their experience; to improve prosecution and conviction rates; and to provide treatment for families, offenders and victims.[2]

While statistics vary on the increase in child sexual abuse in America, there is no doubt it has become epidemic. One expert has estimated that twenty-five percent of, or twenty-five million, American females will be sexually assaulted before they reach eighteen years of age.[3] Another study has revealed that in the United States, a child is sexually abused every two minutes.[4] One in five

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* In 1985, this author published a "development note" in this publication examining Rule 807 solely in the context of the defendant's right to confrontation under the sixth amendment to the United States Constitution. *See* Development Note, *Vermont Rule of Evidence 807 and the Confrontation Clause*, 10 VT. L. REV. 497 (1985). That development note posed many of the questions that this longer, more detailed note attempts to address. The author has attempted to minimize repetition. However, some repetition is inevitable, and indeed, essential. In re-writing Rule 807, the defendant's right to confrontation cannot be ignored even though it has been discussed in a previous note on this topic. To avoid confusion, the author has attempted to cite the reader to her development note when overlaps not crucial to the rewriting of the statute occur in this note. Hence, the author cites the reader to her development note for a discussion of the legislative history of Rule 807. The author hopes this will clarify, and not confuse, her purpose; this note's narrow focus is trauma, and details extraneous to this issue will only cloud the already muddy waters of this statute.

1. *See* ALASKA STAT. § 12.45.047 (1982); ARIZ. REV. STAT. ANN. § 12-2312 (1978); ARK. STAT. ANN. §§ 43-2035 to -2037 (Supp. 1985); CAL. PENAL CODE § 1346 (West 1985); COLO. REV. STAT. § 18-3-413 (Supp. 1985); KY. REV. STAT. ANN. § 421.350 (Baldwin 1984); LA. REV. STAT. ANN. § 15:283 (West 1984); ME. REV. STAT. ANN. tit. 15, § 1205 (Supp. 1986); MONT. CODE ANN. § 46-15-401 to -403 (1977); N.M. STAT. ANN. § 30-9-17 and N.M. R. CRIM. P. 29.1 (1980); S.D. CODIFIED LAWS ANN. § 23-A-12-9 (1983); TEX. CRIM. PROC. CODE ANN. § 38-071 (Vernon 1983); WIS. STAT. ANN. § 967.04(7) (West 1983).

2. Bulkley, *Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Assault Cases*, 89 DICK. L. REV. 645 (1984-85).

3. F. RUSH, THE BEST KEPT SECRET: SEXUAL ABUSE OF CHILDREN, 4-5 (1980).

4. Note, *The Young Victim as Witness for the Prosecution: Another Form of Abuse?*, 89 DICK. L. REV. 721, 728 n.45 (1984-85) (citing SUBCOMM. ON CHILDREN'S JUSTICE, JUDICIARY

girls and one in eleven boys will suffer sexual abuse before eighteen years of age.[5] Seventy percent of the offenders know their victims.[6] It is estimated that forty-three percent of offenders who sexually abuse girls and seventeen percent of offenders who sexually abuse boys are family members.[7] Only one to ten percent of the incidents of child sexual assault are ever disclosed.[8] The existence of these varying statistics makes it impossible to state positively how many children are sexually abused in America each year. However, there is no doubt that the number is rising. In Vermont in 1984, 436 children suffered 652 incidents of sexual abuse.[9] In recognition of the alarming statistics, Vermont has joined at least thirteen states[10] in enacting special provisions to facilitate prosecution of child sexual abuse cases.

The purpose of this note is to explore in some detail the traumatic effects of sexual assault and courtroom proceedings on children. Specifically, this note formulates a definition of trauma that will aid courts in determining when, if ever, to allow child victims to benefit from the protection afforded by Rule 807. This note's purpose is also to discuss Rule 807, highlight its weaknesses and ambiguities, and correct them in a rewritten statute.

Section I of this note discusses the statute and explains its provisions. This section discusses the Rule's "trauma test" and explores the potential ramifications of the absence of a manageable definition of trauma. This section also examines certain ambiguities in the Rule which may lead to confusion and misapplication during court proceedings. Section II of this note examines in some depth the effects of sexual assault on children in order to demonstrate that the sexually abused child enters the court proceedings already traumatized by the assault. Section II considers incestuous and non-incestuous child sexual assault separately because the effects of incest on children contain consequences unique to that type of abuse.

COMM. TO THE PA. SENATE, REPORT ON CHILDREN'S JUSTICE (Comm. Print Sept. 11, 1984)) [hereinafter SUBCOMM. REPORT].

5. *Id.*

6. Note, *The Sexual Abuse of Children: Myths, Research and Policy Implications*, 89 DICK. L. REV. 692, 694 (1984-85).

7. *Id.*

8. *Id.* at 695.

9. Telephone interview with Kathy Kelly, Data Clerk, Vermont Department of Social Rehabilitation Services, Agency of Human Services (March 10, 1986).

10. *See* statutes cited *supra* note 1.

Section III of this note investigates the traumatic effects of the trial experience on child victims. This section considers two distinct aspects of the impact of the courtroom proceedings on child victims. First, it explores the nature of children as victims, with emphasis on those aspects of the courtroom experience which have been found to have detrimental effects on child witnesses. Second, it discusses the nature of the trial for child sexual assault. This section devotes special attention to those aspects unique to the adversarial process, such as confrontation and cross-examination, which may exacerbate a child victim's trauma.

Section IV of this note briefly explores the long range effects of child sexual assault on victims. Section V briefly examines other state statutes comparable to Rule 807 and "trauma tests" which have been promulgated by other courts. Section VI extracts from research undertaken on trauma and child witnesses a set of factors found most likely to exacerbate the child victim's trauma if the child is made to testify in open court. These factors are then incorporated into the rewritten statute at the end of this note to provide judges with a set of concrete guidelines in the determination of whether to allow a child victim to utilize the protection afforded by Rule 807.

I. Vermont Rule of Evidence 807

Rule 807 was enacted by the Vermont Legislature in July of 1985 as part of a package of exceptions to the hearsay rule. The new Rule provides that the child victim of an alleged sexual assault[11] may testify out of the courtroom, and that the child's testi-

11. For purposes of this note, "sexual abuse" is defined by the statutory provisions incorporated in Rule 807: Vt. Stat. Ann. tit. 13, § 3252 (Supp. 1986) (sexual assault); Vt. Stat. Ann. tit. 13, § 3253 (Supp. 1986) (aggravated sexual assault); Vt. Stat. Ann. tit. 13, § 2602 (Supp. 1986) (lewd or lascivious conduct with a child under thirteen); Vt. Stat. Ann. tit. 13, § 205 (1974) (incest with a child under twelve); and Vt. Stat. Ann. tit. 33, §§ 631-667 (1981) (delinquent acts alleged to have been committed against a child aged twelve or under, if committed by an adult). However, it is important to note that experts disagree on what constitutes sexual abuse of a child. Some have formulated general definitions, such as "exposure of a child to sexual stimulation inappropriate for the child's age, level of psychological development and role in the family." Brant & Tsiza, *The Sexually Misused Child*, 16 Am. J. Orthopsychiatry 80, 81 (1977). The ABA's National Legal Resource Center for Child Advocacy and Protection includes in its definition of child abuse "sexual exploitation which includes allowing, encouraging or forcing a child to solicit for or engage in prostitution, or engage in the filming, photographing, videotaping, posing, modeling, or performing before a live audience when such acts involved exposure of the child's genitals, or any sexual act with the child." Sexual Abuse Intervention: Attempts to Minimize Further Trauma, ABA

mony may be transmitted to the fact finder on videotape or closed-circuit television.[12] This procedure is available to victims under twelve years of age only if the court finds that in-court testimony by the victim will "present a substantial risk of trauma to the child which will substantially impair the ability of the child to testify."[13] Even if the child meets this requirement, the child must nonetheless testify in the presence of the defendant (though out of the presence of the jury and spectators) unless a second finding is made that "to see and hear the defendant would present a substantial risk of trauma to the child which would substantially impair the ability of the child to testify."[14] Hence, the child must meet the trauma test twice—first, to testify out of the presence of the jury and spectators, and second, to testify out of the presence of the defendant. The defendant is required by the Rule to observe the child at all times, either in person as the child testifies on videotape, or over closed-circuit television.[15] Neither the Rule nor the reporter's notes state whether the defendant may waive this right to confrontation.

The Rule further provides that during the taking of videotape testimony, the defendant, the attorneys for the defendant and the state, the judge, persons necessary to operate the equipment, and a support person who will not be a witness may be present in the room with the child.[16] However, when the child testifies by closed-circuit television, only the persons necessary to operate the equipment and a support person who will not be a witness may be present with the child.[17]

Rule 807 represents an important step toward aiding the child victim of sexual assault. However, the Rule as it stands is too vague to be of any value in criminal prosecutions for child sexual assault. The Rule's ambiguity may be viewed as twofold. First, there is vagueness in the use of the word "trauma" and in the corresponding trauma test. The second area of vagueness is reflected in the general *absence* of standards to aid a court in choosing be-

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Guideline 1.7 (1985). An entire redefinition of child sexual abuse is beyond the scope of this note. However, it is possible that in the future, drafters of legislation will incorporate a broader standard to define child sexual abuse.

12. VT. R. EVID. 807(b).
13. VT. R. EVID. 807(c).
14. VT. R. EVID. 807(f).
15. *Id.*
16. VT. R. EVID. 807(d).
17. VT. R. EVID. 807(e).

tween videotape and closed-circuit television, and in choosing who is to make the finding of trauma. In addition, the Rule is vague because it lacks specifications as to the gender and age of defendants and victims, and provides insufficient standards for the quality of electronic equipment to be used.

A. What is Trauma?

Like virtually all other similar provisions, Rule 807 does not define trauma.[18] The Rule seems to presume that a court will know trauma when it sees it. There are three problems with this absence of definition.[19] First, courts are given no direction to aid them in discerning various levels of trauma in different children. This is a problem because trauma may be manifested in subtle ways, and lay-persons, including judges, are unskilled in its detection. Absent guidelines to define trauma, a court may have difficulty in determining which children are eligible for the protection afforded by Rule 807.

The second problem accompanying the lack of a definition of trauma is that in-court testimony frequently increases the trauma

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18. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2312 (1978); KY. REV. STAT. ANN. § 421.350 (Baldwin 1984); ME. REV. STAT. ANN. tit. 15, § 1205 (Supp. 1986).

19. To formulate a simple definition of trauma and incorporate it into the Rule would unduly limit the Rule's scope. First, a single definition might result in the overinclusion of some victims who do not really require the protection afforded by Rule 807. Trauma cannot be presumed; conceivably, there are children who could testify to the details of a sexual assault in the presence of the defendant without suffering. A single definition of trauma might result in every victim of every alleged assault seeking the Rule's protection and contravening the legislative concern that the defendant and victim confront one another whenever possible. Hence, it is necessary to incorporate a set of suggested guidelines for the judge to use when evaluating a child victim's degree of trauma.

Second, a single definition might be underinclusive and exclude from the Rule's protection those victims who have an acute need to testify out of the presence of the public or defendant. Hence, a child whose trauma did not meet every element of a single definition would be barred from Rule 807's protection.

Third, there are many definitions of trauma, and experts in the field of psychiatry, psychology, sociology, and law may disagree on what constitutes trauma. Fourth, it is difficult to separate the trauma of the alleged assault from the trauma of testifying, so a single definition would be an impractical addition to the Rule.

Finally, a single definition would conceivably require an expert to determine if trauma existed under such a definition. This note postulates that the finding of trauma should be made by the judge, and not by experts. Hence, a list of suggested guidelines to determine trauma will be incorporated into the rewritten rule at the end of this note. Whatever the means—single definition or list of guidelines—it is necessary that a workable standard to define trauma be included to enable the court to determine which victims are in need of Rule 807's protection, and which others should be required to confront the defendant.

a child may already be suffering as a result of the sexual assault. While it would be preposterous to claim that criminal prosecutions should *reduce* a victim's stress, it seems axiomatic that the courtroom experience not be allowed to exacerbate a victim's trauma. As written, the Rule fails to recognize the court-induced stress which may beset a child victim. The courtroom can become as great an enemy to the child as the assailant. To understand the importance of defining trauma, one must acquire a working knowledge of the dynamics of the two-part trauma suffered by the child victim: first, as a result of the sexual assault, and second, during and as a result of the courtroom experience itself.

The third difficulty with the trauma test in the Rule is that it requires the child's trauma to impair the child's ability to testify. Vermont's is the only provision of this kind that requires a link between the victim's trauma and the victim's ability to testify.[20] Comparative provisions require only a finding of trauma or emotional stress to allow the child to testify out of court, thereby recognizing that the primary concern is to protect the child from further trauma.[21] Rule 807 thus denies protection to those children who are traumatized by the alleged assault and who will most likely be further traumatized by the courtroom experience, but whose testimony capabilities are nonetheless unimpaired. This note posits that all children are traumatized by sexual assault and its aftermath to varying degrees, that most children are further traumatized by the court process, and thus the only finding that should be required is that to testify in open court will cause trauma to the child.

B. Standards Absent from the Rule

1. Videotape or Closed-Circuit Television?

Rule 807 provides no standards for choosing between video-

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20. *See, e.g.*, CAL. PENAL CODE § 1346(d) (West 1985) ("[T]estimony would cause the victim emotional trauma . . . ."); COLO. REV. STAT. § 18-3-413 (Supp. 1985) ("[F]urther testimony would cause the victim emotional trauma so that the victim is medically unavailable or otherwise unavailable . . . ."); N.M. STAT. ANN. § 30.9.17 (1980) ("[F]or good cause shown.").

21. See KY. REV. STAT. ANN. § 421.350 (Baldwin 1984) and LA. REV. STAT. ANN. 15:283 (West 1984), which *mandate* that the child can neither see nor hear the defendant, though the defendant can always see and hear the child. The constitutionality of these statutes has not been determined.

tape or closed-circuit television testimony.[22] The primary difference in procedure is that if the child testifies on videotape, the defendant, both attorneys, the judge, persons necessary to operate the equipment, and a support person may be present in the room with the child.[23] In addition, the child may testify on videotape before the trial.[24] In contrast, if the child testifies on closed-circuit television, only the equipment operators and a support person for the child may be present.[25]

The existence of these two modes of communication presents a complex problem for the child, the attorneys and the jury. The closed-circuit television provision requires that the defendant's image be transmitted to the victim *on television.* This may exacerbate a victim's trauma.[26] However, because neither the attorneys, the judge nor the defendant are present with the child during closed-circuit television testimony,[27] the child may find it easier to give a candid account of the event. On the other hand, the child whose ability to testify would be completely thwarted by viewing the defendant in person may find it easier and less traumatic to view the defendant's face on a television screen rather than in person. This is especially true if the defendant has threatened the child or the child has "promised not to tell."

The problem with the absence of a standard for choosing between the two media is that the defendant's right to confrontation appears to be left to the unbridled discretion of the prosecuting attorney. Two chief differences between closed-circuit television and videotape in this context may illustrate the point. First, closed-circuit television acts as a "conference call"—the image of the victim may be transmitted to the defendant while the image of the defendant is simultaneously transmitted to the victim. Con-

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22. Legislative Counsel Janet Ancel, who drafted the Rule's trauma test, speculated that legislators felt while videotape was technologically superior to closed-circuit television, the latter was better suited for confrontation, since the fact finder and defendant may view the child *as* the child testifies, and not after. Ms. Ancel stated that both provisions have existed since the bill's inception, and that the legislative intent was to let the court decide which mode of communication was better depending on the circumstances of the case. Telephone interview with Janet Ancel, Legislative Counsel (January 18, 1986).

23. VT. R. EVID. 807(d).

24. *Id.*

25. VT. R. EVID. 807(e).

26. VT. R. EVID. 807(f). For one potential ramification of this provision, see Development Note, *Vermont Rule of Evidence 807 and the Confrontation Clause*, 10 VT. L. REV. 497, 502 (1985).

27. VT. R. EVID. 807(e).

ceivably, images of both parties could be simultaneously transmitted to the finder of fact. Videotape, however, is "one way"—the witness' image is transmitted to the defendant or the trier of fact. Second, closed-circuit television simulates confrontation in that the witness' image may be transmitted *as* the witness testifies, whereas videotape transmission occurs after the witness has testified.

The central question must be which medium gives the fact finder the most accurate representation of the witness. This concern is not reflected in the Rule; yet, to serve the goals of confrontation effectively, the fact finder must be afforded the most reliable representation of the witness. To this end, closed-circuit television is superior.[28] Closed-circuit transmission simulates confrontation because it occurs *as* the witness testifies, and not after. Additionally, closed-circuit television monitors could theoretically transmit various images to the fact finder concurrently: a close-up, a long shot, and a profile, for example. Several monitors of suitable size could be set up in the courtroom and operated simultaneously, giving the defendant and the jury the essential opportunity to assess the witness' demeanor.

The Rule does not mandate the kind of equipment to be used, the size screen(s) to be shown to the jury, or whether the film should be in color. This is a problem because the Rule fails to ensure that the representation of the witness is optimally accurate.[29] The Rule should specify that the film must be in color because the fact finder can then observe any blushing or paling of the witness. Additionally, the Rule should provide for multiple screens of sufficient dimension to be shown to the fact finder.

The proposed rule included in this note permits the court to exercise discretion in ordering the method of confrontation between the witness and the defendant. The court has three choices: (1) the child may testify in the physical presence of the defendant; (2) the child may testify viewing the defendant's image on a closed-circuit television monitor; or (3) the child may testify without having to view the defendant at all. Closed-circuit television is the preferred medium. The defendant may view the child in any case. In the proposed rule the court is free to choose the method

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28. Interview with Janet Ancel, *supra* note 22.

29. The accuracy of the recording is vital to serve the ends of confrontation. *See* Development Note, *supra* note 26, at 503-04.

which will minimize the child's trauma according to a set of established guidelines for determining trauma.

The videotape provision is left in the Rule. For various reasons a child may have to testify at some point before the trial. In addition, there is a possibility that in the future, videotape equipment and recordings will be technically superior to closed-circuit television. With the videotape provision, the court may order the child to view the defendant in person, or not to view the defendant at all, depending on the degree of the child's potential trauma.

2. *Victims Eligible for Protection*

The next area in which Rule 807 is undermined by its vagueness pertains to which victims may benefit from the Rule's protection.[30] The Rule applies to children aged twelve and under,[31] yet provides no specifics as to the gender of the child witness or the age and gender of the defendant. Consequently, one observer reports that judges are construing the Rule to apply only when the victim is female and the offender is a male over eighteen years of age.[32] There is nothing in the legislative history of Rule 807 to suggest there was an intent to so limit the Rule. One of the Rule's drafters reports that this construction of Rule 807 is entirely outside the scope of legislative intent.[33] Because one in eleven boys will suffer sexual abuse before eighteen years of age,[34] any construction of the statute which affords its protection only to females soundly defeats its legislative intent. The proposed rule states that the provisions apply to male and female victims, and to male and female offenders of any age in a criminal proceeding.

3. *Who Makes the Finding of Trauma?*

The final ambiguity in Rule 807 is that it does not specify who is to make the finding of trauma. The drafters of the Rule intended that each party would call an expert witness to evaluate the victim's mental state and assist the court in determining if the

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30. *Id.* at 503 n.36.

31. VT. R. EVID. 807(a).

32. *See* Development Note, *supra* note 26, at 503 n.36.

33. Interview with Vermont State Senator Will Hunter, in South Royalton, Vermont, (September 6, 1985).

34. Note, *supra* note 4, at 728 n.45 (citing SUBCOMM. REPORT).

child would be traumatized by having to testify in open court.[35] However, the Rule makes no mention of expert witnesses. To require a child to be evaluated by two expert witnesses may be detrimental to the child, and utilize too much court time.[36]

This note postulates that the finding of trauma should be made by the judge alone. With the aid of suggested guidelines to determine trauma, and some discussion with the child and the attorneys, a trial judge could determine whether a child is too traumatized to testify in court. In addition, if the judge made the finding of trauma, the child would be exposed to fewer strangers, which would minimize the courtroom trauma experienced by many children.

Section II of this note is designed to provide attorneys, judges and other interested persons with a working knowledge of the effects of sexual assault on children. It is included here not to dramatize the plight of the child victim but to furnish some guidelines for the determination of trauma under Rule 807.

II. Immediate Traumatic Effects of Sexual Assault on Children

To modify Rule 807 so that it more effectively protects the child witness, it is necessary to examine the impact of the alleged assault on the child *before* the child goes to court. One particularly problematic aspect of hearsay statutes such as Rule 807 is that in evaluating the child's trauma, it is difficult to distinguish the trauma of the assault from the trauma of the court experience. Thus, it is important to examine the extent of the child's trauma before court proceedings commence.

A. Immediate Effects of Non-Incestuous Child Sexual Assault

It is estimated that two-thirds of all children who are victims of rape suffer severe short-term psychological effects.[37] These include withdrawal, anxiety, bedwetting, guilt, school problems, de-

35. Development Note, *supra* note 26, at 502.

36. For a detailed discussion of the difficulties inherent in the utilization of experts to assess the child's trauma, see Development Note, *supra* note 26, at 502-03.

37. S. Katz & M. Mazur, Understanding the Rape Victim: A Synthesis of Research Findings 234 (1979).

linquent or anti-social behavior, and marked lack of self-esteem.[38] In addition, following a sexual assault a child may undergo changes in eating and sleeping patterns, nightmares, and decreased concentration.[39] Physical symptoms such as stomachaches, restlessness, listlessness, and difficulty in urinating often appear.[40] Finally, the child's social behavior may suffer, evidenced by a marked decrease in play and other outside interests.[41]

Immediate trauma also besets members of a victim's family.[42] In one case,[43] subsequent to a sexual assault by an offender known to the victim, researchers report that the victim had little appetite, showed no interest in his usual activities, and remained at home for unusually lengthy periods of time.[44] This six-year-old victim refused to play outside, and would not attend school unless his mother accompanied him.[45] At night he suffered from nightmares and often woke up crying.[46]

All his siblings reacted, especially the older one who had corroborated the sexual assault.[47] The children refused to sleep in their own beds and entered their parents' room at night.[48] Once, when the power went out, the children became terrified, fearing the assailant was returning to their house.[49] Three weeks after the assault, the victim's father called a psychiatric counselor at midnight, fearing his wife was about to commit suicide.[50]

The reaction of adults has a stunning impact on the trauma children suffer after the sexual assault and before court proceedings have commenced.[51] Very young children have difficulties distinguishing fact from fantasy, and thus may have less distressing

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38. *Id.* at 234-36.

39. Burgess & Holmstrom, *Interviewing Young Victims*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 179 (1978) [hereinafter SEXUAL ASSAULT OF CHILDREN].

40. *Id.*

41. *Id.*

42. Groth, Burgess & Holmstrom, *Crisis Issues for an Adolescent Aged Offender and His Victim*, in SEXUAL ASSAULT OF CHILDREN, *supra* note 39, at 46-47.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. MacFarlane, *Sexual Abuse of Children*, in THE VICTIMIZATION OF WOMEN 94 (1978).

perceptions of what occurred during the sexual assault.[52] Children's perceptions of the world may provide unconscious self-protection that enables them to react only to what they *imagine* happened to them.[53] The immediate trauma of sexual assault is then greatly enhanced by the violent reactions of the adults around them.

This trauma is heightened by police questioning.[54] In their search for evidence, police may subject the child to a potentially excruciating ordeal in their efforts to elicit every sordid detail of the assault. Emphasis on the minute details serves to magnify the act and add to the child's sense of guilt and shame.[55] The older child may be especially embarrassed by revealing too much or too little knowledge of sexual acts and deviant sexual behavior.[56] The older child may be further embarrassed by terminology, whether the child uses childish or vulgar expressions to describe sexual functions. Thus, the child victim of non-incestuous sexual assault enters the court proceedings already traumatized by guilt, shame and confusion.

B. Immediate Effects of Incestuous Child Sexual Assault

The incest victim is frequently more traumatized before, during and after prosecution than the victim of non-incestuous child sexual assault.[57] Factors influencing the extent of post-assault trauma include the number of incidents and duration of the abuse, the degree of force or violence used by the assailant, and the degree of disruption created by separation of the victim and assailant.[58] In general, the greater the emotional distance between incest victim and assailant, the less emotional trauma suffered by the victim.[59] When the assailant is a member of the family, the level of trauma to the victim deepens as the degree of closeness of relationship increases.

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52. *Id.*

53. *Id.*

54. V. DEFRANCIS, PROTECTING THE CHILD VICTIM OF SEX CRIMES COMMITTED BY ADULTS 2 (1969).

55. *Id.*

56. *Id.*

57. S. Sgroi, *Child Sexual Abuse: Some Guidelines for Intervention and Assessment*, in SEXUAL ASSAULT OF CHILDREN, *supra* note 39, at 135.

58. *Id.*

59. *Id.*

Often, the incest victim is pressured by family members to retract the accusation.[60] Even if the victim does testify, it is often with ambivalence, depending on the degree of affinity to the defendant. Some commentators, in examining family dynamics in incest situations, have noted that the mother of an incest victim may forsake her child when the perpetrator is the child's father or stepfather.[61]

The child's relationship with the defendant is important in assessing the amount of trauma sustained as a result of familial sexual abuse.[62] A warm, close, loving and affectionate relationship may exist before the assault and continue afterwards between the child and the incestuous parent.[63] This relationship may become extremely confusing for the child because the prohibition against incest is so firmly embodied in our society, and because of the guilt that may result from prosecuting a family member.

Reporting an incestuous sexual assault on a child may create trauma in the family. Most incest occurs repeatedly, over a long period of time, before it is finally reported.[64] Thus, when it is reported, family members often have trouble believing they were not aware of it sooner. Sometimes the child is not believed;[65] both parents may accuse the child of lying or fabricating. In other situations, the non-incestuous parent, usually the mother, may lash out at the perpetrator, or leave the perpetrator. In either scenario, whether the child is not believed and emotionally alienated, or whether the child is believed and the parents' relationship disrupted, family harmony is shattered. This familial destruction, for some families, is permanent.

Frequently, when incest in finally reported, either the victim or the assailant is removed from the home.[66] This removal is traumatic for most children, whether they or the assailants are removed. Younger children who are removed from the home may not

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60. Burgess, Holmstrom, McCaugland, *Divided Loyalty in Incest Cases*, in SEXUAL ASSAULT OF CHILDREN, *supra* note 39, at 116.

61. Hermand & Hirschman, *Father-Daughter Incest*, 2 SIGNS: J. OF WOMEN IN CULTURE & SOC'Y 745-46 (1977).

62. Sgroi, *Comprehensive Examination for Child Sexual Assault*, in SEXUAL ASSAULT OF CHILDREN, *supra* note 39, at 156.

63. *Id.*

64. *Id.*

65. Note, *Parent-Child Incest: Proof at Trial Without Testimony in Court by the Victim*, 15 U. MICH. J.L. REF. 131, 135 n.22 (1981).

66. V. DEFRANCIS, *supra* note 54, at 184.

understand why *they* are the ones being made to leave.

After the incest is reported, the victim is interviewed by strangers: police, social workers, doctors, nurses, and in some cases, foster parents. Some incest victims may not be aware of the extent of the prohibition until they are informed of it, or perceive it, from these persons. The incest victim thus enters the court system more ashamed, more confused, and probably more traumatized than the victim of non-incestuous sexual assault. The final trauma to the incest victim may occur later in court if the defendant is convicted. This adds another weight to the burden of guilt, shame, and sometimes physical pain already placed on the incest victim by the family, and, unwittingly, by concerned personnel.

III. Traumatic Effects of the Courtroom Experience on Children

Whether the crime involved incestuous or non-incestuous child abuse, the victim's entire family experiences a traumatic reaction when the incident is revealed.[67] The family works through a state of crisis involving feelings of shock, anger and confusion.[68] On top of the familial crisis, the criminal justice system assaults the victim and the victim's family with such devastating impact that the victim often feels that the judicial "cure" is worse than the injury.

The phrase "Legal Process Trauma,"[69] the damaging psychological effect of legal proceedings on victims, suggests that the court proceeding itself subjects the child victim to a further degree of trauma. Child psychologists and legal scholars alike agree that court prosecutions are more traumatic for most children than the sexual abuse itself.[70]

In enacting Rule 807, the Vermont Legislature recognized that the normal adversarial process generally exacerbates the child victim's trauma. Consequently, the legislature determined that child

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67. MacFarlane, *supra* note 51, at 97.

68. *Id.*

69. Libai, *Protection of the Child Victim of a Sexual Offense In the Criminal Justice System*, 15 Wayne L. Rev. 977, 981 (1969).

70. *Id.* at 980-81; *see also* Burgess & Holmstrom, *The Child and Family During the Court Process*, in Sexual Assault of Children, *supra* note 39, at 205; Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?* 17 New Eng. L. Rev. 643 (1981-82).

victims merit special treatment in the courtroom. However, in mandating that the child's trauma impair the child's testimonial abilities, the legislature has granted child victims a protection that is no more than token. Society's interest in aiding the child victim is not adequately served when only those children whose testimonial capabilities would be impaired by in-court testimony are shielded from the resultant trauma. The legislature has overlooked the myriad of children whose trauma will not *necessarily* impair their ability to testify, but who will certainly suffer added trauma if made to testify in open court.

Alternatively, Rule 807 should state only that a child victim need not testify in open court if that child would suffer substantial trauma or distress, and not require the present Rule's testimonial impairment criterion. The rewritten statute at the end of this note appropriately eliminates the testimonial impairment test and includes a set of guidelines for the court to consider in making the determination whether substantial trauma or stress would result. Thus, two deficiencies in the present statute are rectified: first, the proposed rule attempts to acknowledge society's interest in protecting child victims by providing protection to *any* child victim who will be traumatized by having to testify in open court. Thus, the statute would no longer require a causal connection between a child's trauma and a child's testimonial capabilities. Second, the rewritten rule provides the judge with concrete guidelines by which to determine trauma, thus ensuring that only those children who require protection receive it.

It is conceivable that a child victim of sexual abuse could proceed through a criminal trial and emerge relatively unaffected by the dynamics of the process. However, the Vermont Legislature clearly believed that child victims merit special protection in prosecutions for child sexual abuse. To understand the detrimental effect a criminal prosecution can have on a child witness, it is necessary to examine the nature of the child as a victim and the nature of the trial proceeding itself.

A. Nature of the Child Victim

Criminal prosecutions involving sexual acts may be traumatic for all witnesses; for children, the proceedings can be unbearable. The individual child's age, experience, level of articulation, and fear of the defendant or the court proceeding all influence how the

trial affects the child.

Obviously, a child cannot be a witness until verbal skills have been attained. A child begins to develop verbal skills between the ages of two and four years, but cannot communicate concepts, metaphors, connections between events, or causality.[71] Between the ages of four and six a child has difficulty reconstructing events in an orderly fashion.[72] Time, space and distance as they might relate to a sexual assault may be beyond the conceptual ability of a five-year-old child.[73]

Until the age of ten, a child may also have some difficulty separating fact from fantasy.[74] This does not mean that a child is unable to distinguish truth from falsehood; while a child may be able to distinguish these two realities, a child may still resort to fantasy which serves as a shield from the painful emotions accompanying a sexual assault.[75]

From the ages of six to eleven, a child is able to respond to questions.[76] This is because a child is beginning to shift from a reliance on his or her parents to a greater socialization within the peer culture.[77] Additionally, a child witness of this age may be less emotionally confused about the ramifications of a sexual assault, and may be capable of understanding the necessity and nature of the courtroom proceeding.

Factors found to be the most damaging to the child in court include repeated interrogation,[78] cross-examination,[79] confrontation,[80] the formality of the courtroom,[81] and possible acquittal of

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71. S. BUTLER, A CONSPIRACY OF SILENCE: THE TRAUMA OF INCEST 160-61 (1978) (citing D. STEVENS & L. BERLINER, SPECIAL TECHNIQUES FOR CHILD WITNESSES 5 (1976)).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. D. WALTER, PHYSICAL AND SEXUAL ABUSE OF CHILDREN 166 (1975); *see also* Cross v. Commonwealth, 195 Va. 62, 77 S.E.2d 447 (1950) (holding that evidence was insufficient to sustain defendant's conviction when eight-year-old child witness could not testify from her own recollection about alleged sexual assault which had occurred two years previously).

79. D. WALTER, *supra* note 78, at 166.

80. *See generally* T. MCCAHILL, L. MEYER & A. FISCHMAN, THE AFTERMATH OF RAPE 170 (1979); L. HOLMSTROM & A. BURGESS, THE VICTIM OF RAPE: INSTITUTIONAL REACTIONS 222 (1978).

81. L. HOLMSTROM & A. BURGESS, *supra* note 80, at 222.

the defendant.[82] Many victims have also experienced distress at hearing the defendant's version of the events,[83] and many were surprised at the overall length of the trial.[84]

Confrontation and cross-examination can have a severe effect on the child victim of sexual assault by forcing the child to realize that a sexual offense has occurred.[85] However, the prosecutor may also contribute to the child's difficulty. A great deal of importance is attached by the prosecutor to the child's demeanor on the witness stand. Thus, the child may become confused when treated as an adult by the prosecutor.[86]

On cross-examination the defense may attempt to show that the child is incompetent, untruthful or malicious.[87] Also, when the defense attorney seeks to destroy the child's credibility through cross-examination, the child's sense of the truth may be undermined.[88] Finally, the trauma of confrontation may be increased for the child victim if the assailant threatened the victim, the victim "promised not to tell," or if the child was a victim of incest.

The drafters of Rule 807 obviously recognized the potential impact of confrontation on the child victim. The reporter's notes to the Rule emphasize that in finding the child "unavailable to testify," the court must consider the defendant's constitutional right to confrontation.[89] Presumably, the drafters are requiring the court to balance the potentially harmful effect of confrontation on the child victim against the defendant's constitutional right. However, the Rule does not provide any guidelines by which to weigh these competing interests. The proposed rule at the end of this note provides a framework for balancing these interests by affording the

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82. *Id.* at 236 (quoting a rape victim). A study of rape victims in Boston City Hospital emergency wards in 1972 and 1973 revealed that both adult and child victims found the courtroom proceedings stressful and traumatic. *Id.* at 222. Judged by the frequency with which they were reported, the most stressful elements of the courtroom experience were cross-examination, confrontation with the defendant, and the public setting of the courtroom. *Id.*

83. *Id.*

84. *Id.*

85. Reifen, *Protection of Children in Sexual Offenses: A New Method of Investigation in Israel*, 49 J. CRIM. LAW, CRIMINOLOGY & POLICE SCI. 222, 223 (1958-59).

86. Chappell, *A Literature Review and Annotated Bibliography*, in FORCIBLE RAPE 4 (1978).

87. L. HOLMSTROM & A. BURGESS, *supra* note 80, at 223-36; *see also* Reifen, *supra* note 85, at 223.

88. Gagnon, *Female Child Victims of Sex Offenses*, 13 SOC. PROB. 176, 191 (1965).

89. VT. R. EVID. 807, Reporter's Notes at 57 (Supp. 1986).

defendant degrees of confrontation based on the extent of the child's trauma. For example, the traumatized child may testify (1) while the child physically views the defendant, (2) while the child views the defendant on a closed-circuit television screen, or (3) without viewing the defendant at all. The defendant, on the other hand, may physically view the child in all cases. Thus, by permitting different degrees of confrontation, the proposed statute reflects the drafters' concern that the defendant's right to confrontation be balanced against the child's trauma.

In addition to the problems associated with cross-examination and confrontation, the incest victim is likely to experience other difficulties testifying in open court. First, the victim's family may often apply pressure on the child victim of incest not to testify.[90] Second, the victim may already have a fear of punishment by the assailant or a parent.[91] Furthermore, guilt is often imparted to the incest victim by family members.[92] The child's guilt and fear of punishment may affect not only the child's testimony when confronting the defendant, but may also have long-range detrimental effects.[93] The guilt suffered by the child is compounded by the fact that if or when the child does take the stand, the child's testimony might send the offender, a relative, to prison.[94] The final factor enhancing the incest victim's courtroom-induced trauma occurs because incest is usually reported after a long period of time and repeated incestuous events.[95] Thus, the child's subjective sense of time may hinder the accuracy of the child's testimony.[96] Fear of the assailant or punishment, guilt and adult family ambivalence about prosecution may combine in the child incest victim to make it nearly impossible to testify in court.[97]

B. The Prosecution of Child Sexual Abuse

The nature of any adversary proceeding necessarily places some stress upon witnesses. This stress is compounded in a child sexual assault case not only by the child's inherent immaturity, but

90. S. BUTLER, *supra* note 71, at 154.
91. Reifen, *supra* note 85, at 223.
92. S. BUTLER, *supra* note 71, at 154.
93. Reifen, *supra* note 85, at 223.
94. S. BUTLER, *supra* note 71, at 154.
95. Note, *supra* note 65, at 136 n.25.
96. S. BUTLER, *supra* note 71, at 154.
97. *Id.*

by the tone of the proceedings themselves. The unsympathetic design of the adversarial process makes child sexual assault cases especially ill-suited for the normal adversarial proceeding.

In enacting Rule 807, the Vermont Legislature recognized that child victims merit special treatment in the courtroom. However, the United States Supreme Court has refused to extend preferential treatment to the child victim. In its 1982 decision in *Globe Newspaper Co. v. Superior Court for the County of Norfolk*,[98] the Court ruled that a Massachusetts statute was unconstitutional because it required exclusion of the press and public from courtrooms during victims' testimony of specified sexual offenses involving minors under the age of eighteen.[99] The Globe Newspaper Company ("Globe") challenged the trial court's banning of the press and public under the statute and asserted that the statute violated the first amendment to the United States Constitution.[100] The Court held that the statute was overbroad and not sufficiently tailored to serve the compelling state interest of safeguarding the physical and psychological well-being of child victims of sexual assault.[101]

In a dissent, Chief Justice Burger deplored the majority's holding. He first observed the "disturbing paradox" that minors charged with rape were automatically insulated from the press while minor victims do not even possess the right to closure while testifying.[102] Chief Justice Burger next defended the statute's purpose to limit the trauma, embarrassment and humiliation of having to reveal the details of a sexual assault in front of a large group of "voyeuristic strangers."[103] He then went on to argue that fear of public testimony might discourage victims from reporting sexual abuse.[104]

Chief Justice Burger also stated in his dissent that severe and possible permanent psychological damage may result from requiring a child victim of sexual abuse to testify in public.[105] The Chief Justice stated that testifying in an open courtroom about sexual

98. 547 U.S. 596 (1982).
99. *Id.* at 609-10.
100. *Id.* at 600-01.
101. *Id.* at 607-08.
102. *Id.* at 612 (Burger, C.J., dissenting).
103. *Id.* at 618.
104. *Id.* at 619.
105. *Id.* at 618.

abuse "can be devastating and leave permanent scars."[106] Chief Justice Burger's compelling dissent is significant in its acknowledgement of the detrimental impact of court proceedings on child victims and witnesses.

The following factors may affect the child victim adversely: the public setting of the courtroom; use of the court microphone; sequestration in a courtroom filled with strangers; a different prosecuting attorney for the probable cause hearing and the trial; and long delays and postponements.[107] Delays and postponements may "suspend" the child victim and family in what may seem to them a timeless process.[108] This is because the victim and family are required to wait through indefinite delays which interrupt their school and work routines.

The courtroom styles of prosecuting attorneys have been studied to see what influence, if any, they have on child witnesses.[109] In addition, child victims' courtroom styles have also been studied with the goal of mitigating courtroom trauma.[110] Generally, courtroom proceedings elicit an expressive or withdrawn response in child witnesses. An expressive child imparts feelings and details about the assault.[111] Often, the expressive child accomplishes this

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106. *Id.*

107. Burgess & Holmstrom, *The Child and Family During the Court Process*, in SEXUAL ABUSE OF CHILDREN, *supra* note 39, at 229.

108. *Id.*

109. The authors of one study characterized the attitudes of district attorneys toward child witnesses as indifferent, task-oriented, and humanistic. Burgess & Holmstrom, *supra* note 39, at 206-10.

The indifferent district attorney may actually contribute to the child witness' trauma. The attorney gives little instruction to the child, performs few social pleasantries, engages in minimal discussion, and talks at, rather than with, the child. *Id.* This technique, or lack thereof, upsets and confuses the child witness. Frequently, these witnesses are unable to discern whether the indifference reflects the attorney's personality or a judgmental belief about the sexual assault.

The task-oriented attorney uses an authoritative, matter-of-fact approach toward the child victim. This attorney engages in polite social pleasantries, acknowledges both the victim and the victim's family and instructs the victim on courtroom behavior. This style adversely affects the child's courtroom testimony only when the child does not understand the attorney's pragmatic approach toward the assault, which does not acknowledge the impact the assault has had on the child. *Id.*

The humanist prosecuting attorney is sensitive to the "socio-emotional" aspect of the courtroom interaction. This attorney acknowledges the child's stress, informs the child and family about what will occur in court and instructs both the child and the child's family about courtroom behavior. *Id.*

110. Burgess & Holmstrom, *Interviewing Young Victims*, in SEXUAL ASSAULT OF CHILDREN, *supra* note 39, at 172.

111. *Id.*

not only through verbal testimony but by crying or a statement of anger. However, the court proceedings may also cause the child to become withdrawn, nonverbal, and unable to express feelings.[112] Typically, the controlled or withdrawn child witness is unable or unwilling to engage in eye contact and may "freeze" on the stand.[113] Sometimes, even witnesses who were not victims may withdraw in open court. For example, in *State v. Hawthorne*,[114] the sister of a victim of a felonious sexual molestation was able to answer questions asked during the pre-trial examination, but was strained and contradictory on the witness stand at trial.[115]

Most important, the child must verbally and mentally relive the assault in a public setting.[116] Before the trial the child has usually related the same details at least four times: (1) to the family; (2) to the police; (3) to the prosecuting attorney; and (4) to a social worker. Consequently, the child victim may suspect that people are skeptical of his or her story, and the child may feel betrayed by family members and other persons previously considered supportive.[117]

The need for a restructured approach to in-court testimony by child victims is critical. Their difficulties in the open courtroom are noticed even by their assailants. In discussing a trial, the perpetrator of an incest assault stated, "[m]y daughter was crying all the time she was on the witness stand and it was so hard on her. She had to keep going over and over the same things, answering all their questions and I felt terrible that they put her through that after everything I put her through."[118]

In sum, both the nature of the child victim and the nature of the court proceedings make the prosecution of child sexual assault exceedingly difficult for child victims and witnesses. Young children may not always understand the ramifications of a sexual assault. Cross-examination may undermine a child's sense of the truth, and confrontation may cause the child to withdraw in court. The prosecution of sexual abuse is particularly ill-suited to child victims. The public setting of the courtroom, testimony in a room

112. *Id.*
113. *Id.*
114. 523 S.W.2d 332 (Mo. Ct. App. 1975).
115. *Id.* at 335.
116. Burgess & Holmstrom, *supra* note 107, at 229.
117. *Id.*
118. S. BUTLER, *supra* note 71, at 61.

filled with strangers and long delays and postponements may enhance the courtroom-induced trauma of the child victim. The immediate effect of the assault combined with the difficulties inherent in testifying in open court may influence a child permanently. Unfortunately, it is impossible to determine to what extent "Legal Process Trauma" exacerbates the long-range effects of child sexual assault. However, it seems axiomatic that the courtroom proceedings should not be permitted to contribute to the long-range effects of child sexual assault.

IV. Long Range Effects of Child Sexual Assault

Most children are unprepared and unable to protect themselves against sexual abuse.[119] As a result, many children internalize this traumatic experience both within the context of the sexual assault and within the broader sphere of their own lives.[120]

The development of this victim mentality is perhaps the most insidious aspect of sexual abuse.[121] It can become pervasive in every area of the child's life. The assault may be reenacted and become a devastating source of continued self-depreciation and destruction.[122]

One study shows that more than one-third of all sexually abused children suffer some form of emotional disturbance later in life.[123] Consequently, incidences of promiscuity and prostitution may be higher among women who were sexually abused as children.[124] Victims of child sexual abuse frequently become abusive parents.[125] It is reported that seventy percent of all young prostitutes and eighty percent of all female drug users were found to have been sexually assaulted by a family member during childhood.[126]

V. Comparative Provisions and Other "Tests"

As noted above, Vermont's Rule 807 is the only provision of its

119. MacFarlane, *supra* note 51, at 82.
120. *Id.*
121. *Id.*
122. *Id.*
123. Gagnon, *supra* note 88, at 177.
124. S. Katz & M. Mazur, *supra* note 37, at 244.
125. *Id.*
126. F. Rush, *supra* note 3, at 5.

kind in the country which requires that the child's trauma affect the child's ability to testify.[127] Comparative state provisions share the common requirement of substantial trauma, in one form or another,[128] but none link the trauma to the ability of the child to testify in court. Most comparative state provisions require only that there be a likelihood the child will suffer severe or substantial trauma or stress if required to testify in the presence of the defendant.[129]

In deciding child sexual assault cases, courts have handed down a multitude of trauma standards designed to provide guidelines for permitting children to testify out of court. The First District Court of Appeal of Florida held that the Florida videotaping statute gave the trial judge the discretion to allow videotaping of a child sexual battery victim when "there is a substantial likelihood that the child will suffer severe emotional or mental strain if required to testify in open court."[130] The court permitted the victim to testify on videotape because she was under a visible strain, reacting physically and emotionally when she was informed of having to testify in open court.[131]

In *People v. Bowen*,[132] a California court of appeals held that a child victim could testify on videotape if there was a chance the child might "freeze" or become unable to sit through direct and cross-examination due to the stress of exposure to the jury and the formality of the adversary proceedings.[133] Other courts have considered whether the child would suffer "severe emotional or mental strain,"[134] or become uncommunicative.[135]

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127. *See, e.g.*, ME. REV. STAT. ANN. tit. 15, § 1205 (Supp. 1986) ("[I]f the court expressly finds that the emotional or psychological well-being of the person would be substantially impaired if the person were to testify at trial."); ARK. STAT. ANN. §§ 43-2035 to -2037 (Supp. 1985) (child may provide videotape deposition which may later be used at trial); COLO. REV. STAT. § 18-3-413(4) (Supp. 1985) (if the court finds that "further testimony would cause the victim emotional trauma," the child may testify out-of-court); CAL. PENAL CODE § 1346 (West 1985) (child may testify on videotape or closed-circuit television if the court finds that in-court testimony "would cause the victim emotional trauma").

128. *See* statutes cited *supra* note 127.

129. *Id.*

130. Washington v. State, 452 So.2d 82, 83 (Fla. Dist. Ct. App. 1984) (holding that the Florida statute gave the trial court discretion to allow videotaping of a victim of alleged child sexual abuse so that expert testimony was not required to establish the need for out-of-court testimony by the child).

131. *Id.*

132. 22 Cal. App. 3d 267, 279, 99 Cal. Rptr. 498, 504 (1979).

133. *Id.*

134. *Washington*, 452 So.2d at 83.

VI. A Comprehensive Approach to Trauma

Trauma may manifest itself in diverse ways, depending on the individual child, the degree of sexual abuse, and most importantly, the attitudes of the individuals within the child's world on whom the child has relied for support.

Various specialists have devised methods by which to reduce the overall trauma for the sexually abused child. For example, the American Bar Association's National Legal Resources Center for Child Advocacy and Protection has developed a set of guidelines for improving legal intervention in intrafamily child sex abuse cases.[136] The guidelines include the initiation of innovative approaches in the legal system's processing of family sexual abuse cases, such as the reduction of trauma to the child by providing the child with an advocate, utilization of special interviewing techniques, vertical prosecution (the maintenance of the same prosecuting attorney from the moment the complaint is filed to trial), special training for professionals handling sexual abuse cases, and the promulgation of specific statutory definitions to delineate sexual abuse of a child.[137]

For the purpose of this note, it is necessary to extract from the research undertaken on trauma those factors most likely to traumatize the child in court to the degree where it may be likely that actual harm (added trauma) will beset the child if the child is made to testify in open court or in the presence of the defendant. These factors include: the possibility that testifying in open court will inhibit the child's ability to testify and answer questions effectively and intelligibly; and the possibility that cross-examination, confrontation, or the public setting of the courtroom will cause the child to "freeze" or become uncommunicative or impair the child's ability to tell the truth due to fear or embarrassment. The only standard in Rule 807 should be whether testifying in open court will cause substantial trauma or emotional stress to the child. The

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135. *Bowen*, 22 Cal. App. 3d at 279, 99 Cal. Rptr. at 504-05; *see also* State v. Melendez, 135 Ariz. 390, ____, 661 P.2d 654, 655, (1982) (holding that when the defendant and his counsel were present during the videotaped testimony of the child victim of sexual abuse, and a psychologist testified that the child would become uncommunicative if made to testify in open court, the defendant's right to confrontation was not violated).

136. Boerma, *How to Overcome Barriers and to Develop Creative and Innovative Approaches in the Prosecution of Child Sexual Abuse Cases*, in Papers from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases at 34-38 (1985).

137. *Id.*

requirement that the trauma impair the ability of the child to testify should be abandoned. If one goal of this type of legislation is to afford the child victim added protection from the trauma of the assault,[138] then the courts must look to any and all potential trauma which might result from in-court testimony, and not just to trauma which will affect the child's testimonial abilities.

CONCLUSION

While Vermont Rule of Evidence 807 is an important legislative innovation, it is too vague to be of value in prosecuting criminal sexual assault of a child.

This vagueness is demonstrated in the lack of guidelines to determine the degree of trauma in a sexually abused child. In addition, the Rule is vague because it lacks standards for choosing between videotape or closed-circuit television, specifications as to the gender and age of witnesses and defendants, criteria as to the quality and size of the recording to be shown to the fact finder, and provisions concerning who is to make the finding of trauma. Finally, the Rule is deficient in requiring that trauma impair the ability of the child to testify.

The Rule should include a set of guidelines to aid a court in determining trauma. With guidelines, a court could make a more educated inquiry into the child's ability to testify. Closed-circuit television should be mandated whenever possible because it more closely simulates actual confrontation, because the defendant and fact finder view the child as the child testifies, not after. The image of the witness should be transmitted to the fact finder on several television monitors and the film should be in color so as to duplicate the witness faithfully as the witness testifies. The Rule should specify that its protection applies to male and female victims and that face-to-face confrontation may be limited whether the defendant is male or female, regardless of the defendant's age.

The finding of trauma should be made by the court, and not by expert witnesses who might confuse the child as to the natural and proper response to sexual assault. Finally, the requirement that the child's trauma impair the ability of the child to testify must be abandoned. Substantial trauma or substantial emotional distress from having to testify in open court or in the presence of

138. Bulkley, *supra* note 2.

the defendant should be the only finding required. In order to mitigate further courtroom-induced trauma to the child, the finding of trauma cannot be predicated on the child's testimonial abilities.

Ideally, a court system which methodically sought to diminish a child witness' trauma would serve society's interest in protecting all its members. For this reason, Rule 807 has been rewritten to provide maximum protection to the child, while affording the defendant every right to confrontation possible under the circumstances of each case. Only with a rule of evidence such as Rule 807 can the legal system begin to mitigate the devastating effects of child sexual abuse.

RULE 807: TESTIMONY WHERE VICTIM IS A MINOR

(a) *APPLICATION.* This rule applies to
(1) A proceeding in a prosecution for sexual assault under 13 V.S.A. § 3253, lewd or lascivious conduct with a child under 13 V.S.A. § 2602, or incest under 13 V.S.A. § 205, alleged to have been committed against *a male or female* child aged twelve or under, by *a male or female offender of any age*, and applies to the testimony of that child; and
(2) A proceeding under Chapter 12 of Title 33 involving a delinquent act alleged to have been committed against *a male or female* child aged twelve or under, if that delinquent act would be an offense listed in this subsection or committed by *a male or female offender of any age*, and applies only to the testimony of that child.

(b) *WHO MAY MOVE.* The court may, on motion of any party, on its own motion, or on motion of the attorney or guardian ad litem for the child, order that testimony of the child be taken by closed-circuit television or by recorded testimony under this rule.

(c) *FINDING OF TRAUMA.* The court shall make an order for two-way closed-circuit television or recorded testimony under this rule only upon a finding *by the court* that to testify in court *will cause substantial trauma or substantial emotional distress to the child. Factors to be considered include*:
(1) *Whether testifying in open court will inhibit the child's ability to testify and answer questions effectively and intelligibly*; and
(2) *Whether cross-examination and/or confrontation and/or the public setting of the courtroom will cause substantial trauma to the child so that there is a likelihood that:*
(a) *the child will become uncommunicative; or*
(b) *the child's ability to tell the truth will become impaired due to fear or embarrassment or any other good cause demonstrated by the child to the court; or*
(c) *the child will suffer substantial emotional stress or trauma during or as a result of the in-court testimony.*

(d) *VIDEOTAPE TESTIMONY.* The testimony of the child may be taken outside the courtroom and recorded on videotape for showing in the courtroom before the court and the finder of

fact in the proceeding. Only the court and the attorneys for the state may question the child. In pro se proceedings, the court may modify the provisions of this subsection relating to the role of the attorney for the defendant. The court shall permit the defendant to observe and hear the testimony of the child in person and to confer personally with his or her attorney. Only the defendant, the attorneys for the defendant and for the state, the court, persons necessary to operate the equipment, and any person who is not a potential witness and whose presence the court finds would contribute to the welfare and well-being of the child may be present in the room with the child during the testimony. The persons operating the equipment shall be situated whenever possible in such a way that they can see and hear the child during the testimony, but the child cannot see or hear them. If the testimony is taken under this subsection, the court shall also ensure that:

(1) The recording is both visual and aural and is recorded on film or videotape or by other electronic means;
(2) The recording equipment was capable of making an accurate recording, the operator of the equipment was competent, and the recording is accurate and is not altered except as ordered by the court;
(3) Each voice on the recording is identified;
(4) *The recording is presented to the jury on a screen no less than 25 inches in dimension;*
(5) *The recording is in color* ; and
(6) Each party is afforded an opportunity to view the recording before it is shown in the courtroom.

(e) *CLOSED-CIRCUIT TELEVISION.* The court will order the child to testify on closed-circuit television *whenever possible. The court will order that the child:*

(1) *Testify on closed-circuit television in the physical presence of the defendant, unless to testify in the presence of the defendant would cause substantial trauma as outlined in subsections (c)(1) and (c)(2) of this rule; or*
(2) *Testify on closed-circuit television while viewing the defendant's image on a television monitor in the room with the child, unless to view the defendant's image on a closed-circuit television monitor would cause the child substantial trauma as outlined in subsections (c)(1) and (c)(2) of this rule; or*

(3) *Testify on closed-circuit television otherwise, in which case the child will neither see nor hear the defendant on a closed-circuit television monitor or in person if the court finds that to see or hear the defendant on a closed-circuit television monitor or in person will cause substantial trauma to the child as outlined in subsections (c)(1) and (c)(2) of this rule.*

(f) *PROVISIONS OF CLOSED-CIRCUIT TELEVISION. The court will order that:*

(1) *The recording is both visual and aural and is transmitted to the finder of fact in color;*

(2) *The recording equipment is capable of making an accurate recording, the operator of the equipment is competent, and the recording is accurate;*

(3) *The witness' image may be transmitted to the finder of fact on no more than four closed-circuit television monitors if it would aid the finder of fact in evaluating the witness' demeanor;*

(4) *The witness' image be transmitted to the finder of fact on screens no less than 25 inches in dimension.*

(g) *PLACING OF DEFENDANT.* During the recording of testimony under subsection (d) of this rule the defendant shall be situated in such a way that the child can see and hear the defendant *unless the court finds that requiring the child to see and hear the defendant would cause substantial trauma to the child as outlined in subsections (c)(1) and (c)(2) of this rule. During the recording of testimony under subsections (e) and (f) of this rule, the defendant shall be situated in such a way that:*

(1) *The defendant can see and hear the child personally, and the child can see and hear the defendant personally; or*

(2) *The defendant's image is transmitted to the child over a closed-circuit television monitor; or*

(3) *The defendant is entirely out of the presence of the child, and the defendant's image is not transmitted to the child.*

Whether the defendant is to be viewed personally by the child, or viewed by the child over closed-circuit television, or not viewed by the child at all is to be determined by the court in accordance with subsections (c)(1) and (c)(2) of this rule.

(h) *IN COURT TESTIMONY NOT REQUIRED.* If the court or-

ders the testimony of a child to be taken under this rule, the child may not be required to testify at the proceeding for which the testimony was taken unless otherwise ordered by the court for good cause shown.

Carol Marks