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OF WEST VIRGINIA

Albright, Justice, concurring:

I concur with the conclusion in the majority opinion that relationship by either consanguinity or affinity is sufficient to prove the necessary elements of the offense of incest under West Virginia Code § 61-8-12 (1994). I write separately to underscore the need for a legislative reexamination of our incest statutes.

West Virginia has heretofore adopted a series of sexual offense statutes punishing the same physical act of sexual aggression under two or more statutes that provide cumulative punishment for that same act. *See, e.g.,* W.Va. Code §§ 61-8B-1 *et al* (2000). This Court has approved such cumulative punishment where the second charged offense includes different elements and, in other cases, where the legislation expressly provides for cumulative punishment because of a particular relationship between victim and perpetrator. *See, e.g., State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983) (holding that convictions under first degree sexual assault and incest statutes require proof of different elements). I respectfully suggest that West Virginia’s legislative scheme with respect to multiple punishments for the same physical act deserves careful review to assure that the result is both reasonable and appropriate in terms of public policy.

Illustrative of those states that have rewritten their respective sexual offense statutes to better define the offense of incest are the statutes enacted by Michigan, Minnesota, and New Jersey. In these states, if the minor victim is under the age of thirteen, there is no distinction in the offense based on the perpetrator's status as a relative or family member. *See* Mich. Comp. Laws § 750.520b (2003) (defining most serious sex offense in terms of requiring that victim is at least 13 but less than 16 and requiring perpetrator to be member of same household, or related to victim by blood or affinity to the fourth degree, holding position of authority over victim, or teacher or administrator); Minn. Stat. Ann. § 609.342 (2000); N.J. Stat. Ann. § 2C-14-2 (West 2004); *see* Leigh B. Bienen, *Defining Incest*, 92 NWU L Rev 1501, 1562-67 (1998). The New Jersey and Michigan statutes modernized the approach taken to incest by recognizing that the

[r]elationship of the parties, or the existence of a marriage, is irrelevant to the definition of the offense if the child is under thirteen years old. For acts with children under age thirteen, there is no distinction in penalty or in the categorization of the harm, between sexual acts between father and daughter, for example, and sexual acts with an acquaintance or a stranger.

Bienen, supra at 1565. Another critical change in the more progressive approach to sexual offense statutes is to recognize that consenting sexual relations that transpire between close relatives where both individuals are over the age of sixteen is no longer a crime. *Id.* Additionally, the modernized approach makes no distinction between homosexual and heterosexual acts and expands the definition of prohibited conduct. *Id.*

The need to replace traditional incest statutes with an expanded definition of sexual abuse was compelled by the circumstances being reported to social service agencies, hospitals, and therapists. Bienen, *supra*, at 1566. By recharacterizing what constituted child sexual abuse, and by including familial authority or relationship as a subcategory of the most serious sex offense, the modernized offense, rather than being inherently familial in nature, is structured more in terms of position of authority. *See, e.g.*, N.M. Stat. Ann. §§ 30-9-10E, -11 (Michie 1978) (including as persons within position of authority parent, relative, household member, teacher, employer, or other person able to exercise influence over child); Wyo. Stat. Ann. §§ 6-2-301(a)(iv), 6-4-402 (Michie 2007) (defining those in positions of authority as parent, guardian, relative, household member, teacher, employer, custodian, and any other person who by reason of position is able to exercise significant influence over person).

Given that the prohibition against incest was focused historically on the relationship aspect rather than the sexual act and was impelled by inbreeding and succession-related concerns, it is high time for our Legislature to reexamine our incest laws for the purpose of rewriting those laws to more accurately reflect the societal concerns at issue today: proscribed sexual conduct. By defining the acts of prohibited sexual conduct in terms of familial relationship, our penal laws do not fully address the realities of protecting the children of this state from unsolicited acts of sexual conduct. On the other hand,

continuing to criminalize consensual sexual contact between adults whose only relationship is by way of affinity when that relationship has ceased to exist by reason of death or divorce borders on the ridiculous. Between these two extremes, varying situations and combinations of offenses clearly remain that deserve close legislative review to assure that specified punishments are just and that appropriate public policy concerns are being met.

I am authorized to state that Justice Starcher joins in this concurring opinion.