



**House
Legislative
Analysis
Section**

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**CRIMINALIZE CONSENSUAL
INCEST**

**House Bill 5076 (Substitute H-3)
First Analysis (1-25-96)**

**Sponsor: Rep. Clyde LeTarte
Committee: Judiciary and Civil Rights**

THE APPARENT PROBLEM:

Reportedly, before the criminal sexual conduct provisions (Public Act 266 of 1974) of the penal code replaced the older "carnal knowledge" state law, incest -- regardless of the ages of the people involved -- was prohibited by law. While the criminal sexual conduct provisions of the penal code do effectively criminalize incest (whether sexual penetration or sexual contact) with children under 16 years old, the code does not prohibit such conduct between relatives who are 16 years old or older. This oversight was not recognized until recently, with the publicizing of two incest cases, one in Holly (near Flint) and one in Hillsdale County. In the Holly case, a man reportedly impregnated his three daughters over a dozen times, but he escaped legal penalties until he was convicted for repeatedly raping his 13-year-old granddaughter over a three-year period starting when she was ten. Reportedly, four of the children the man allegedly fathered on his daughters died from severe congenital defects, while others suffer from medical problems ranging from mild disabilities, such as club feet and webbed fingers, to severe mental retardation and a serious muscle disorder that means one child cannot breathe without a ventilator. Medical experts reportedly say that many of these abnormalities are associated with incest. In the Hillsdale case, a man reportedly fathered eight children -- two of whom reportedly died of natural causes -- on his daughter, who was twenty-seven when she gave birth to their eighth child in March of 1995. In this case, too, the father was not charged in connection with any of the births resulting from the incestuous relationship. Instead, he and his daughter were arrested on charges of child abuse for not adequately feeding their then-youngest child. The father reportedly pled no contest to a reduced charge of one count of attempted child abuse, and gave up all rights to five of the surviving six children (a jury subsequently denied him custody of the newborn child and he relinquished those rights as well).

Legislation has been introduced to prohibit incest even when the people involved are 16 years old or older.

THE CONTENT OF THE BILL:

The bill would amend the Michigan Penal Code to criminalize incest between people 16 years old or older who weren't married to each other and who were related by blood or affinity to the third degree (see BACKGROUND INFORMATION below). If sexual penetration occurred, the offense would be third degree criminal sexual conduct, punishable by imprisonment for up to 15 years. If only sexual contact occurred, the offense would be fourth degree criminal sexual conduct, punishable by imprisonment for up to two years, a \$500 fine, or both. In both cases, however, it would be an affirmative defense to a prosecution under the bill's provision if someone charged with a violation under the bill's provisions (the "actor") were coerced into the prohibited sexual conduct by an authority figure ("the other person"). The bill would take effect on May 1, 1996.

MCL 750.520d and 750.520e

BACKGROUND INFORMATION:

Degrees of criminal sexual conduct (CSC). The Michigan Penal Code divides sex crimes into four degrees: the first and third degrees involve "sexual penetration," the second and fourth degrees involve "sexual contact." (The code defines "sexual penetration" as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." "Sexual contact" is defined as including "the intentional touching of the victim's or actor's intimate parts [which include "the primary genital area, groin, inner thigh, buttock, or breast of a human being"] or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.")

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First degree CSC is a felony punishable by life imprisonment, second and third degree CSC are felonies punishable by imprisonment for up to 15 years, and fourth degree CSC is a misdemeanor punishable by imprisonment for up to two years and a fine of up to \$500, or both.

Currently, under the penal code, sex with someone under thirteen years old is a felony, regardless of whether or not the accused is related to the victim. Sex with a child between 13 and 16 years old also is a felony if (a) the accused lives in the same household as the victim, (b) is related to the victim by blood or affinity to the fourth degree (which includes first cousins), or (c) is in a position of authority over the victim and used this authority to coerce the victim to submit.

Degrees of relationship. "Affinity" refers to relationships by marriage, while "consanguinity" refers to relationships by ancestry or descent. People related by blood to the first degree are one's parents or children. Second degree relatives include brothers, sisters, grandparents, and grandchildren. Third degree blood relations include uncles, aunts, nephews, nieces, great-grandparents, and great-grandchildren. Fourth degree (which the bill doesn't address) blood relatives include first cousins, great uncles, great aunts, grand nephews, grand nieces, great-great grandparents, and great-great grandchildren.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, to the degree that the bill added to the prison population, it could result in a state cost of \$23,742 per prisoner per year (the fiscal year 1995-96 average annual cost of housing an inmate). If people convicted under the bill's provisions were housed in minimum security facilities, the cost would be about \$10,000 per year less than the annual average housing cost. However, if such inmates were placed in protective segregation, the cost per prisoner per year would significantly increase. (1-25-96)

ARGUMENTS:

For:

The bill would close a significant gap in the existing criminal sexual conduct law that currently does not prohibit incest between apparently consenting adults over the age of 16. The two fathers in the disturbing incest cases reported last year were never charged with any crime in connection with the births that resulted from their sexual relations with their daughters.

Instead, one father was prosecuted for raping his granddaughter over a three-year period starting when she was ten. In the other case the father was arrested for child abuse for failing to adequately feed one of the children resulting from the incest. The inability to prosecute for incest was partly due, apparently, to the difficulty in gathering more than circumstantial evidence and to an expired statute of limitations. But it also was due to the fact that the daughters involved were 16 or older when at least some of the children resulting from the incestuous relationships were born.

Although no law can prevent incest or the sexual abuse of children, the bill would make it clear that incest is a crime and would allow its prosecution regardless of the ages of the people involved. And although both partners in adult incestuous relationships could be charged with a crime, the bill would recognize that often one of the two supposedly consenting partners really is a victim in the incestuous relationship. As is the case with abusive relationships in general, experts say, some incest victims stay in the relationship with their partner long after reaching the age of consent because the established pattern of sexual abuse makes it difficult, if not impossible, for the victim to escape the relationship. In fact, according to one law review article, usually, incestuous conduct begins when the child is quite young, and progresses to sexual intercourse as the child grows older and matures physically. Because the victim fails to recognize the subtle coercion being used by the family member (especially if this is the only warmth and affection available in the family), overt force usually is absent, and there is at least the appearance that the victim is consenting to the incestuous relationship. (Kates, Detroit College of Law Review, 1983) By allowing as an affirmative defense coercion by an authority figure, the bill would protect the real victims in these relationships. So, for example, if a woman was charged with incest but could show that she had been coerced into the relationship by, say, her father, she wouldn't be in violation of the bill's provisions. (Kates mentions in her article that while some research indicates that sibling incest is the most frequently occurring, father-daughter incest is the most widely known.)

In addition, the bill could prevent medical problems arising from the expression of recessive genes that incest makes more likely. While incest does not actually cause genetic problems, an incestuous union increases the likelihood that recessive genes carried by members of the same family will be expressed in the offspring of such unions. These recessive genes can carry traits that can cause medical problems or even be life-threatening to the child of such unions. By

allowing for prosecution of incest even between legal adults, the bill would lessen the possibility that these incestuous relationships would continue to produce these at-risk children.

Finally, by extending the prohibition only to people related to the third degree (instead of to the fourth degree, as the other criminal sexual conduct prohibitions do) and by exempting lawfully married people from its provisions, the bill would recognize marriages that legally took place out of state. At least one state (Kentucky) permits marriage between first cousins, and the bill would recognize the legality of such marriages.

Against:

Some people argue that prohibiting all incestuous relationships, including those between consenting adults, is not enough. They say that what is needed, in addition to criminalizing consensual incest, is to allow the law enforcement community to effectively investigate suspected incestuous relationships by obtaining court-ordered genetic testing. Because genetic testing of children requires parental consent, when children are born of suspected incestuous relationships and the victimized sexual partner refuses to cooperate or has reached the age of consent, law enforcement officials have sometimes been unable to intervene in known incestuous situations. Allowing such court ordered testing in order to establish parentage would help law enforcement officials to prevent incestuous couples from having more at-risk children.

Against:

Even if all incest is criminalized, some experts argue that the ideal intervention system for incest, while keeping criminal sanctions for extreme situations, should expand therapeutic, non-criminal alternatives as well. As one law review article on incestuous families notes, "For the child and the family, the court process can be as difficult as the sexual abuse itself." (Kates, Detroit College of Law Review, 1983) The child often is removed from the home as a protective measure, but even while providing at least temporary protection from incestuous sexual abuse, removal from the home also is disruptive for the child, who may feel isolated and frightened. The child also is subjected to repeated questioning by strangers in order to prepare for various court procedures. But being required to repeatedly describe the abusive behavior is usually quite embarrassing for the child and can result in "a creeping suspicion of the victim's veracity." Perhaps there should be more of an emphasis in incest cases on family rehabilitation through therapeutic treatment, instead of just punishment of offenders through criminal sanctions.

POSITIONS:

There are no positions on the bill.

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.