YOUTH TODAY

OPINION

In Peer-on-peer Child Sexual Abuse, States Differ on Who's a Peer

By Daniel Pollack and Lori Kornblum

Posted on July 29, 2020

The phrase "peer on peer child sexual abuse" is well known. It implies an exploitative sexual relationship of one minor by another. But who is a "peer"? From the Latin word par the term infers equality. A dictionary definition of the word "peer" as a noun is "a person of the same age, the same social position, or having the same abilities as other people in a group," or "one that is of equal standing with another."

As applied to child sexual abuse, David Finkelhor posited in 1986 that the perpetrator and victim were peers if they were less than five years apart. That definition has not been challenged. More than three decades later, is this still a realistic metric? When the perpetrator is an older teenager in the 15- to 17-year-old range, and the victim is a corresponding 10- to 12-year-old, a five-year spread may still fulfill the definition of "peer." Are a 14-year-old, potentially a high school freshman, and a 9-year-old, a third-grader, really peers? Certainly, five years between a perpetrator and an infant, toddler or very young child is no longer a peer relationship.

LEGAL DEFINITIONS AND CASE LAW

Most people know that many teens are having sexual relationships with other teens. The Centers for Disease Control and Prevention estimated in 2017 that 55% of male and female teens have had sexual intercourse by the time they turned 18. Under many state laws, however, teens under certain ages are unable to consent to sexual contact or intercourse.

States have criminalized sexual contact or intercourse under certain ages as "statutory rape." Why the quotes? Statutory rape applies even if the victim agrees to the sexual activity. Under these laws, the victim is presumed to lack the capacity to consent because of their age. The assumption underlying such laws is the need to protect children both from others and themselves.

States differ in defining the minimum age of consent. The age of consent, which is the age at which people are deemed to be mature enough to consent to sexual acts, varies from age 16 to age 18. However, over the past several years, a number of states have adopted "Romeo and Juliet" laws and age-gap laws that either decriminalize sexual activity between similar-aged teens or decrease the criminal penalties.

AGE-GAP LAWS OFFER LESS DISCRETION TO JUDGES

The name "Romeo and Juliet" comes from Shakespeare's tragedy in which Juliet was believed to be about 13 years old, and Romeo an older teen. If this were a modern-day situation, had Romeo and Juliet survived their star-crossed lover tragedy, both could have been prosecuted for statutory rape.

When discussing age-gap laws, people tend to use the term "Romeo and Juliet" laws and age-gap laws interchangeably, although for legal purposes judges may have more discretion under pure Romeo and Juliet laws. These laws put into the criminal law what Finkelhor posited in 1986: When teens engage in sexual activity, and they are within a certain age difference of each other, the activity is decriminalized or the penalties are reduced.

The age-gap laws are not uniform, however. States vary in terms of what type of age gap they will tolerate. Some laws have a two-year difference; others have up to a six-year difference. The Model Penal Code builds in an age gap to its model statutes. For example, rape of a child is an offense if the actor has sexual penetration of a child under age 12, and is more than two years older than the child. Sexual penetration of a child is a different crime when the alleged victim is less than 16 at the time, and the actor is more than four years older. In these two cases, a 13-year-old having sexual intercourse with an 11-year-old would not be punished. A 19-year-old having sexual intercourse with a 15-year-old would not be punished.

These age-gap provisions usually do not apply if threats of violence or violence is involved. Some states distinguish between a perpetrator who is an adult and one who is also a teen. The teen may be over the age of a minor, up to 19. For example, Wisconsin has a law defining "underage sexual activity." If the alleged victim is between age 15 and 16, and the alleged offender is under age 19, the offense is a misdemeanor (Wisconsin Statutes section 948.093).

However, if the alleged victim is under the age of 15, regardless of the age difference between the alleged victim and offender, the offender can be charged with a felony. The felony would be first degree sexual assault of a child if the victim is under 12. Thus, a 15-year-old having sexual activity with a 14-year-old could be found guilty of a felony, but a 16-year-old having sexual activity with a 15-year-old could be charged only with a misdemeanor.

So the question is: Are states adopting these laws due to obtaining information about the psycho-social maturity of teens, the relative maturity of similarly aged teens or some type of research into how teens of varying ages really are more similar than different? Or is something else in play?

LOCAL STANDARDS CAN VARY

The real impact of the age-gap laws appears to be to make prosecution or lack of prosecution of similarly aged teens more uniform throughout a state. Both prosecutors and law enforcement officers have wide discretion in what to prosecute and what to leave alone. Often, law enforcement and prosecution are essentially local. A teen may be prosecuted in one county for sexual activity that would be tolerated in another county, based on local views of teen sexual activity.

Enacting age-gap laws has the effect of putting into place general community standards throughout a state. Protection for teens having sexual activity when they are within a certain age range of each other, then, is not so much based on psycho-social development as a desire to implement general community standards in a more even-handed fashion.

Sexual abuse of children by other children is unequivocally a public health epidemic that is effecting every community. That is why it's appalling that the absence of a uniform definition

— indeed, any definition of the term "peer" in this context — leaves us unable to fully understand the scope and impact of peer-on-peer child sexual abuse. The age-gap statutes appear more designed to standardize punishment than to really grapple with whether older teenagers should be having sex with preteens. A more research-based approach to these statutes, is critical to standardizing the law and terminology. A truly operational definition of the term "peer" is essential if we are to address these larger issues in an informed and collaborative way.

Daniel Pollack, M.S.S.A. (M.S.W.), Esq., is a professor at the School of Social Work, Yeshiva University, New York City. He was recently appointed to Game Over: Commission to Protect Youth Athletes, an independent blue ribbon commission created to examine the institutional responses to sexual grooming and abuse by former USA Gymnastics physician Larry Nassar. Contact; dpollack@yu.edu; 646.592.6836.

Lori S. Kornblum, Esq., is an adjunct faculty member at Marquette University Law School and an instructor at Milwaukee Area Technical College (Paralegal Department) and has a private practice in Mequon, Wisconsin. She is a former Milwaukee County assistant district attorney, focusing on child abuse and neglect. Contact: lorikornblum.law@gmail.com; (414) 331-3165.