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Thirteenth birthday a cutoff between automatic lawyer and *Miranda* rights

Close, as they say, only counts in horseshoes and hand grenades. In law, the difference between being covered by a doctrine and merely being "close" can be enormous.

Take, for example, the Illinois policy on custodial interrogation of juveniles in cases involving homicide or serious sexual assault.

The Juvenile Court Act provides that a minor who is under 13 at the time of the commission of such an act must be represented by counsel during the entire custodial interrogation. 705 ILCS 405/5-170(a). Thus, *Miranda* warnings are not even necessary in these cases; the law simply requires that police provide such a juvenile with an attorney.

The juvenile one day shy of 13 gets an automatic lawyer. Yet the juvenile who is just one day older must navigate *Miranda* in the same way a sophisticated adult is expected to do. And since statistics show that about 80 percent of suspects waive their *Miranda* rights, chances are the 13-year-old will do likewise.

So the juvenile who is 12 years, 364 days old has a 100 percent chance of having an attorney with him at a custodial interrogation concerning these serious crimes. But the juvenile who is one day older — exactly 13 years old — has only a 20 percent chance.

In the words of the great Dinah Washington, "What a difference a day makes."

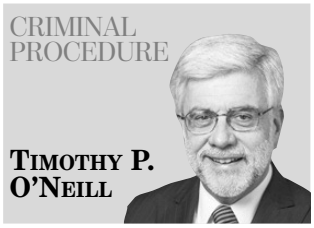
Adam J. Kolber of Brooklyn Law School has given a name to this phenomenon: "bumpiness." A "bump" occurs when a small change in legal input results in a dramatic change in legal output.

Kolber points out a number of situations where this occurs in criminal law. For example, a one-day difference in age could be the difference between statutory rape and a completely legal act. Likewise, the subtle difference between acting "knowingly" and acting "recklessly" is the difference between murder and manslaughter. (For a recent example, see *People v Lengyel*, 2015 IL App (1st) 131022.) Also, a slight shift in evidence concerning insanity can result in either a murder conviction or no culpability whatsoever.

What makes these examples bumpy is that there is no smooth middle ground that exists between the extremes. These are classic "all or nothing" propositions with no room for compromise. (Kolber's article, "The Bumpiness of Criminal Law" will be published in the Alabama Law Review.)

A recent example of bumpiness can be seen in the Illinois Supreme Court's decision *In re D.L.H.*, 2015 IL 117341 (decided May 21, 2015). Police questioned the suspect in his home concerning his possible involvement in a homicide. The officer who conducted the interrogation was not in uniform, but wore his service revolver.

The suspect was read his *Miranda* rights and indicated he understood them. He proceeded to make incriminating statements. After looking at the totality of circumstances, the Supreme Court held that the suspect was never formally in custody for *Miranda* purposes, because a reasonable person in his position would have understood that he was free to terminate the interrogation at any time.



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It was crucial to determine whether the police interrogation took place while the 9-year-old was in custody in order to see if he could claim the protection of Section 405/5-170(a), discussed above.

Fun fact: This sophisticated suspect was exactly 9 years old.

It was crucial to determine whether the police interrogation took place while the 9-year-old was in custody in order to see if he could claim the protection of Section 405/5-170(a), discussed above.

No police interrogation of any murder suspect under the age of 13 can be conducted without the presence of an attorney. By holding over the objections of Justices Anne M. Burke and Charles E. Freeman that the 9-year-old was not in custody, the court found that he had no automatic right to counsel. (Just to help you sleep tonight, I should add that fortunately the court went on to unanimously hold that the confession should have been suppressed on involuntariness grounds.)

Whether or not there was "custody" was the difference between the 9-year-old's automatically being provided with counsel and his having no right to counsel at all. Calling this a bump would be an understatement.

Fortunately, at least one state has shown that there is a way to smooth this out.

A New Mexico statute provides that no confession, statement or admission may be introduced against a child under the age of 13 on the allegations of a juvenile petition. (New Mexico Delinquency Act, NMSA Section 32A-2-14(F)) On the other hand, those who are 15 and older are covered by the same confession rules that apply to adults. But to eliminate the bump, New Mexico provides for a buffer zone between 13 and 15. The law provides that "There is a rebuttable presumption that any confessions, statements or admissions made by a child 13 or 14 years old to a person in position of authority are inadmissible." Recently, the New Mexico Supreme Court provided details on how the state may rebut this presumption of inadmissibility. *State v DeAngelo M.*, No. S-1-SC-34995 (decided Oct. 15, 2015).

The New Mexico legislature refused to create a statutory bump between children and adults. Instead, the legislature created a "rebuttable presumption" buffer zone that only applies to 13- and 14-year-olds.

The Supreme Court saw its job as filling in the statutory gaps.

First, the court held that the state should have a heightened burden of proof when rebutting the presumption that the statements are inadmissible. Since "preponderance of the evidence" is the state's burden when dealing with the admissibility of confessions for adults, the court held that the burden for rebutting the inadmissibility of confessions from 13- and 14-year-olds should be the stricter "clear and convincing."

Second, the court imposed a heightened standard for proving that a 13- or 14-year-old voluntarily, intelligently and knowingly waived his or her *Miranda* rights. To prevail, the state must "invite the child to explain, on the record, his or her actual comprehension" of *Miranda*. The state must produce "more than simple 'yes' answers or a signed *Miranda* ... consent form ... It is through the child's articulation of his or her understanding" that the fact-finder can truly assess whether the 13- or 14-year-old really understood what was at stake.

By creating this buffer zone, New Mexico has done an excellent job of smoothing out the bump between the rights of a child and the rights of an adult. It is a legal solution Illinois should resolve to emulate.