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## He's a Man, as Charged

But Should Emerging Brain Science Affect Courts' Handling of Young Defendants?

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The battle that sent high school junior Gary Durant to jail was over in minutes. Two rival groups in the Carver Terrace complex of Northeast Washington traded gunfire. One young man was killed. Durant and his buddies fled.

He was 17 the night of the shootout, a varsity athlete and a coach to youngsters in the city recreation department. A child under the law, he was charged as an adult with multiple counts, including conspiracy and murder, and taken to the D.C. jail. Sixteen months later -- now an adult at 18 and, along with three other defendants, still awaiting a trial date -- he idles behind bars with older inmates.

Clad in an orange jumpsuit and crocheted kufi, Durant sits behind a jail window that is faded with age. He speaks in monotone, his voice muffled over the phone line as if coming through cloth.

"I want to get out and go to college," he said. "Any college. I just sit here. Don't no one come by."

As he whiles away his days reading the Koran and playing the occasional game of basketball, a question is taking shape in science labs and attorneys' offices that someday could have a profound effect on cases like his: Should young people who are accused of a crime receive the full force of laws intended for adults, given accumulating evidence that their brains are not fully matured? Pitting attorney against attorney, scientist against scientist, even attorneys against scientists, that question has the potential to redraw courtroom battle lines nationwide.

The debate over whether kids should be tried and punished as adults has simmered for years. The discussion is intensifying, however, because of recent discoveries that the brain's prefrontal cortex, which governs reasoning, develops more slowly than the limbic system, where the emotions reside.

A person doesn't reach maturity, scientists say, until both parts of the brain begin working together, with the prefrontal cortex acting as a brake. Until that point, sometime in their mid-20s, young people are more susceptible to peer pressure than older adults, more likely to act impulsively, less likely to anticipate consequences if they get caught and thus arguably less culpable.

Magnetic imaging has developed to the point where even the untrained eye can pick out differences between, say, a brain scan of a healthy 15-year-old and one of a healthy 25-year-old. Yet scientists excited by what they're discovering in the lab are reluctant to say that their findings should be applied to individuals charged with a crime. Behavior, they say, is determined by factors that go beyond brain structure, such as drug use, poverty and family dysfunction. How much weight should be given to each?

"Brain development only tells us it is very possible that children are immature until a certain age," says Jay Giedd, a neuroscientist in charge of a massive brain imaging project of children at the [National Institute of Mental Health](#). "We can't conclude how mature an individual is at a given age, or how responsible for his actions. There's some evidence, but it's hardly overwhelming."

That hasn't stopped defense lawyers from drawing on the emerging science in court or asking that scans of their clients' brains be introduced as evidence. Laurence Steinberg, a psychology professor at Temple University and an expert in adolescent development, says he frequently receives phone calls from lawyers wanting to hire him as a consultant to help them make their cases. He says, half-jokingly, that he could quit his university job, go into

consulting and make as much as or more than he's making now.

He hasn't considered doing so. As he says in an article published this year in *Developmental Review*, "Much of what is written about the neural underpinnings of adolescent behavior . . . is what we might characterize as 'reasonable speculation.' "

### Go Directly to Jail

Gary Durant's public defender, Santha Sonenberg, might have an easier job if adolescent brain research were further along. An advocate of using brain science in court, she has been defending poor clients for 25 years in a system that operates largely according to the old axiom, "If you're old enough to do the crime, you're old enough to do the time."

Juveniles are not little adults, she argued in a motion requesting that Durant be transferred to the District's family division, which offers rehabilitation and counseling to offenders. She quoted a psychiatrist who directs a brain behavior laboratory at the [University of Pennsylvania](#): "Since brain development in the relevant areas goes in phases that vary in rate and is usually not complete before the early to mid-20s, there is no way to state with any scientific reliability that an individual 17-year-old has a fully matured brain (and should be eligible for the most severe punishment)."

Prosecutors take a different position. In a 2007 case involving a 16-year-old defendant, Jeffrey Taylor, the U.S. attorney for the District, argued that the government has a legitimate interest in protecting its citizens, including juveniles found guilty of lesser crimes, from violent young offenders. "The defendant's reliance on scientific journal articles goes too far," he argued. "Taken to its logical extreme [it] would require the juvenile justice system to include all persons under the age of twenty-six or even twenty-seven."

In a provision known as "direct file," Taylor and his assistants can automatically charge 16- and 17-year-olds as adults when the alleged crime is serious. They use that power frequently, according to the Durant motion. For example, between 1999 and 2005, the office prosecuted as adults more than 90 percent of 16- and 17-year-olds charged with murder, Sonenberg wrote, citing statistics submitted by Taylor's office in another case. That's a higher rate and "more egregious" than in other jurisdictions, according to Randolph Stone, a law professor at the [University of Chicago](#) and a former deputy director in the D.C. public defender's office.

Prosecutors in 14 other jurisdictions have similar powers, the Durant motion says. However, in 11 of those jurisdictions, including Virginia, a minor headed for prosecution as an adult can ask for a judicial review of the transfer. In Maryland, a judge automatically makes the initial decision following an arrest.

Many of those who believe in keeping teenagers within the juvenile system argue that treating young defendants as adults increases the likelihood that once out, they will commit other, more-serious crimes. This argument, however, while bolstered by research, says little about kids' cognitive capabilities at the time they commit the offense.

Steinberg says he used to think that by age 16, kids were the cognitive equal of adults. "I toed that line for a long time," he says. "But there is a whole set of abilities that are still maturing after age 16. It has changed my mind about where the boundary should be drawn between adolescence and adulthood. Even at 21 or 22, kids are still developing competencies."

In one experiment, Steinberg asked teenagers, college students and adults to play a video driving game, either alone or with two friends watching.

The subjects were given the choice of driving through an intersection's yellow light, potentially winning lots of points but running the risk of crashing and losing everything, or not running the light, thereby avoiding a crash but winning fewer points.

When playing alone, the teens tended to act like the grown-ups and stop at the light. When friends were

observing, however, the young drivers were more likely to sail through the intersection, which suggests to Steinberg that still-developing prefrontal cortexes hadn't fully exercised their braking power.

"Under ideal conditions, kids and adults don't look that different," Steinberg says. "But when you introduce distractions including other people, the distractions have more harmful effects on kids."

### Thinking It Through

Those who cite differences between juveniles and adults got a boost in 2005 from the Supreme Court. In *Roper v. Simmons*, a divided court ruled that the juvenile death penalty was unconstitutional, with Justice [Anthony M. Kennedy](#), writing for the majority, citing developmental science as one reason. Young people's "vulnerability and comparative lack of control over their immediate surroundings," he said, "mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."

The relative immaturity of teens is one reason that states set the legal drinking age at 21. Some states have begun raising the minimum driving age for young drivers based on similar thinking. Rental car companies go further, requiring a driver to be at least 25 because younger drivers have higher accident rates.

Stone, at the University of Chicago, predicts the science of brain maturity eventually will be used in all kinds of legal cases involving juveniles. "It's going to roll over into the question of competency of younger ages," he says, "whether [young people] understand the charges against them, whether they can waive their rights as it relates to making a confession."

Not all who study adolescent decision making are convinced that the new brain science says what its advocates suggest. "It's a very incomplete picture, one of simple tasks created in highly artificial settings," says Baruch Fischhoff, a professor of social and decision sciences at [Carnegie Mellon University](#). "It evokes all the prejudices people have about adolescents."

Fischhoff and others worry about collateral damage: If minors aren't capable of fully matured reasoning, will that argument be used to deny girls the ability to purchase the morning-after pill or obtain an abortion without parental consent? The abortion issue has already been raised by Justice [Antonin Scalia](#), one of four justices to dissent in *Roper*. Scalia took the [American Psychological Association](#) to task for filing a brief opposing the juvenile death penalty, when it had argued in an earlier case that young people were mature enough to get an abortion without parental agreement.

Steinberg and others later responded that there's often a difference between young criminal behavior, which typically involves impulsivity and a group of kids, and securing an abortion, which usually is done with forethought in a clinic staffed by adult counselors.

"Under good conditions, kids can be very good decision makers," Steinberg says.

Still, the concept of the immature adolescent brain could be applied in unusual ways. It might, for example, mean a longer, rather than shorter, sentence for a young offender, in the interest of public safety.

One troubling prospect is the potential for disparate treatment: Wealthy parents of young defendants might be able to mitigate the outcome of those trials by paying for brain scans that will wow a jury and for consultants to interpret them. Parents with little income, like Gary Durant's, would not be able to do that.

"Often, the objective evidence suggests that young individuals planned, premeditated and acted deliberately, as defined and contemplated by criminal law," says Nita Farahany, an assistant professor of law and philosophy at [Vanderbilt University](#). "This is in tension with scientific theories that suggest otherwise. The science may help to explain why juveniles make bad choices, but unfortunately it does not give a normative answer of how the criminal law should therefore respond."

### 'What Did I Do?'

Wilhelmina Durant, Gary's mother, says police found Gary at her apartment late in the afternoon of Jan. 24, 2007, a little more than two weeks after the gun battle at Carver Terrace.

"They said he was under arrest and Gary said, 'What did I do?' " she said.

He is her oldest child, and she remains enormously proud of his accomplishments at Spingarn High School. A few weeks before his arrest, he was named a first-team football defensive back by the [D.C. Interscholastic Athletic Association](#). He was Spingarn's leading scorer in basketball and, according to a court motion, had been contacted by a collegiate scout.

In July, Sonenberg asked the judge to transfer Durant's case to family court or hold a full hearing to determine whether prosecution as an adult was warranted. She noted in her motion that a detective had testified that although Durant had been carrying a gun, he did not fire the shot that struck and killed the victim.

Ten months after that request, as his class at Spingarn High prepares to graduate, Gary Durant is still waiting, among older men, in jail.

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