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1-1-1992

## An Empirical Study of Kent Style Juvenile Transfers to Criminal Court.

Robert O. Dawson

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### Recommended Citation

Robert O. Dawson, *An Empirical Study of Kent Style Juvenile Transfers to Criminal Court.*, 23 ST. MARY'S L.J. (1992).

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## AN EMPIRICAL STUDY OF KENT STYLE JUVENILE TRANSFERS TO CRIMINAL COURT

ROBERT O. DAWSON\*

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I also wish to thank Douglas Forbes, Research Assistant in the Population Research Center at the University of Texas at Austin, for assisting me in the statistical analysis.

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## I. INTRODUCTION

In 1959, the Juvenile Court of the District of Columbia placed Morris Kent, fourteen years of age, on probation for housebreaking and attempted purse snatching. In 1961, Kent, then sixteen years of age, was taken into juvenile custody for allegedly entering a woman's apartment, taking her wallet and raping her. Upon interrogation, Kent admitted to that incident and to several other similar incidents.

Kent's mother promptly retained an attorney. Defense counsel discussed the case with the Social Service Director of the Juvenile Court of the District of Columbia, who mentioned the possibility that the juvenile court might waive jurisdiction and transfer Kent to the United States District Court for prosecution as an adult. Counsel filed motions with the juvenile court opposing transfer. He asked for a hearing on the transfer question, moved for access to the juvenile court's social service file on his client, and attached a psychiatrist's affidavit that attested to Kent's mental illness and that recommended hospitalization.

At the time of these events, District of Columbia law gave the juvenile court exclusive jurisdiction over all criminal offenses committed by persons under the age of eighteen but permitted the juvenile court, "after full investigation," to waive its jurisdiction over any felony offense committed by a sixteen or seventeen year old and to transfer

such a person to district court for trial as an adult.<sup>1</sup>

In Kent's case, the juvenile court did not rule on defense counsel's motions. It held no hearing and did not confer with Kent, his mother, or defense counsel. Seven days after Kent's arrest, the juvenile court simply entered an order reciting that after "full investigation" it was transferring Kent to district court for trial as an adult. There were no findings of fact or recitations of reasons for the decision.<sup>2</sup> The transfer order encompassed fourteen separate charges—seven charges of housebreaking, two of assault, two of assault with intent to commit rape, and three of rape.<sup>3</sup>

Kent's attorney appealed the transfer order to the District of Columbia Court of Appeals.<sup>4</sup> It affirmed the transfer order in a per curiam opinion, rejecting the contentions that the juvenile court's procedures did not comply with the statutory mandate of a full investigation, that the juvenile court erred in failing to state reasons for the transfer, and that its procedure did not comply with constitutional requirements of fundamental fairness. Kent appealed that decision to the United States Court of Appeals for the District of Columbia Circuit.

Meanwhile, Kent's attorney filed a pre-trial petition for writ of habeas corpus in the United States District Court to which the cases had been transferred. There, he made the same contentions he made before the District of Columbia Court of Appeals. The district court refused to grant the writ and, a few days later, Kent was indicted for eight offenses—three housebreakings, three robberies and two rapes. Before trial, he appealed the denial of the habeas petition to the United States Court of Appeals for the District of Columbia Circuit.

The D.C. Circuit consolidated that appeal with the appeal from the District of Columbia Court of Appeals.<sup>5</sup> In the habeas appeal, it affirmed the district court's denial of the writ, largely on the ground that the availability of an appeal from any conviction is a sufficient remedy.<sup>6</sup> In the appeal from the District of Columbia Court of Appeals, it held that the juvenile court's transfer order was not an ap-

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1. *Kent v. United States*, 343 F.2d 247, 250 & n.1 (D.C. Cir. 1965), *rev'd*, 383 U.S. 541 (1966).

2. *Kent v. United States*, 383 U.S. 541, 541 (1966).

3. *In re Kent*, 179 A.2d 727, 727 (D.C. 1962).

4. *Id.*

5. *Kent v. Reid*, 316 F.2d 331, 331 (D.C. Cir. 1963).

6. *Id.* at 333-34.

pealable judgment. It, therefore, ordered dismissal of that appeal for lack of jurisdiction.<sup>7</sup> Consequently, it established the propositions that review of a juvenile court's transfer order must be initiated in the district court to which the case was transferred and that appellate relief is limited to an appeal from any criminal conviction that might occur.

Upon remand from the D.C. Circuit, Kent moved the district court to dismiss the indictment on the ground that the juvenile court's transfer process was invalid and, in the alternative, that the district court constitute itself as a juvenile court<sup>8</sup> to try the charges. The district court denied both motions.

Kent was then tried before a jury in district court on the eight charges for which he had been indicted. His primary defense was insanity. The jury found Kent guilty of three charges of housebreaking and of three robbery charges, but it found him not guilty by reason of insanity of the two rape charges. The judge of the district court imposed a fifteen year sentence for each count on which Kent was found guilty and ordered the sentences to run consecutively, creating, in effect, a single sentence of ninety years. Had Kent been retained in the juvenile justice system by the juvenile court judge, the longest period of incarceration that could have been imposed would have been until his twenty-first birthday,<sup>9</sup> in his case, less than five years. The district court committed Kent to St. Elizabeth's Hospital on the two counts on which the jury had found him not guilty by reason of insanity.

Kent again appealed to the D.C. Circuit.<sup>10</sup> That court found that the juvenile court's procedures had complied with the statutory requirement of a full investigation.<sup>11</sup> It also upheld the transfer against the claim that the manner in which it was made had violated due process of law and had deprived Kent of the effective assistance of counsel.<sup>12</sup> The court thus rejected Kent's claims about the deficiencies in the juvenile court's transfer process and, rejecting claims of errors in the criminal trial itself, affirmed his convictions.

The United States Supreme Court granted Kent's petition for certi-

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7. *Id.* at 336.

8. *See Kent v. United States*, 383 U.S. 541, 548 (1966) (discussing powers of court).

9. *See Kent*, 343 F.2d at 254 & n.8.

10. *Id.* at 250.

11. *Id.* at 256.

12. *Id.* at 256-58.

orari,<sup>13</sup> and four and one-half years after he had been arrested, the Court reversed the six convictions in *Kent v. United States*.<sup>14</sup> The Court concluded that the Juvenile Court Act, "read in the context of constitutional principles relating to due process and the assistance of counsel," required that before transfer there must be a hearing in the juvenile court, that counsel for the respondent must be given access to records and reports that will be considered by the juvenile court at that hearing, and that the juvenile court must support its decision on transfer with a statement of reasons.<sup>15</sup>

*Kent*, decided in 1966, was the first in a series of major decisions by the United States Supreme Court that fixed constitutional minimum requirements for the juvenile justice system. It was followed the next year by *In re Gault*,<sup>16</sup> establishing for the adjudication phase of the process a right to notice of charges, to confrontation and cross-examination of witnesses, not to be compelled to incriminate oneself, and to counsel, including the appointment of counsel for the indigent.<sup>17</sup> In 1970, the Court decided *In re Winship*,<sup>18</sup> establishing the constitutional requirement that the government must prove its charges in juvenile court beyond a reasonable doubt.<sup>19</sup> Finally, in 1975, it decided in *Breed v. Jones*<sup>20</sup> that the Double Jeopardy Clause of the Constitution applies in the juvenile process.<sup>21</sup>

## II. THE *KENT* CRITERIA IN FORMAL LAW

In 1959, the year *Kent* was placed on probation, the juvenile court for the District of Columbia had adopted a policy statement announcing the criteria it would employ in making transfer decisions. Although that statement was rescinded by the juvenile court before the Supreme Court's decision in the *Kent* case,<sup>22</sup> the Supreme Court reproduced that policy in an appendix to its opinion. In relevant part, the *Kent* criteria, as disseminated by the Supreme Court, provide:

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13. *Kent v. United States*, 381 U.S. 902 (1965).

14. *Kent*, 383 U.S. at 565.

15. *Id.* at 557, 561.

16. 387 U.S. 1 (1967).

17. *Id.* at 33, 41, 55.

18. 397 U.S. 358 (1970).

19. *Id.* at 367.

20. 421 U.S. 519 (1975).

21. *Id.* at 541.

22. *Kent v. United States*, 383 U.S. 541, 546 (1966).

An offense falling within the statutory limitations . . . will be waived if it has prosecutive merit and if it is heinous or of an aggravated character, or—even though less serious—if it represents a pattern of repeated offenses which indicate that the juvenile may be beyond rehabilitation under juvenile court procedures, or if the public needs the protection afforded by such action.

The determinative factors which will be considered by the Judge in deciding whether the juvenile court's jurisdiction over such offenses will be waived are the following:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).
5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia.
6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.
8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the juvenile court.<sup>23</sup>

The eight *Kent* criteria can be thought of as addressing three different kinds of considerations: the offense, the respondent, and the system. Four criteria—the seriousness of the offense, whether it is an offense against the person, whether the offense was committed in an aggressive manner, and whether there is evidence to prosecute—relate

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23. *Id.* at 566, 567.

to the offense itself. Two criteria—the sophistication of the respondent and previous record—relate to characteristics of the child. Finally, two criteria—the ability of the juvenile system to protect the public and to rehabilitate the respondent and the desirability of disposing of the cases of co-actors in the same system—deal with system concerns.

Today, judicial transfer processes of the *Kent* style are based on the procedures required by the Court in the *Kent* case and are in place in virtually every American state and the District of Columbia.<sup>24</sup> Thirty-seven of those states have also enacted by legislation or adopted by court decision versions of the *Kent* criteria to guide juvenile courts in making transfer decisions.<sup>25</sup> Thus, almost three-fourths of the juvenile systems in the United States use very similar formal criteria to guide judicial discretion in making transfer decisions.

Texas is a jurisdiction with a *Kent* style judicial transfer process. The juvenile court may transfer any fifteen or sixteen year old charged with a felony in juvenile court to criminal court for prosecution as an adult.<sup>26</sup> The court is required to conduct a hearing<sup>27</sup> and counsel is given access to all records considered by the court in its decision.<sup>28</sup> The juvenile court is required to give a statement of reasons for its transfer decision.<sup>29</sup> It is also to be guided by statutory criteria that are based closely on the *Kent* criteria set out in the appendix of the Supreme Court's opinion.<sup>30</sup>

The Texas version of the *Kent* criteria, originally enacted in 1967,<sup>31</sup> is as follows:

- (a) The juvenile court may waive its exclusive original jurisdiction

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24. Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 504-08 (1987). I have referred to the judicial mechanism by which juvenile cases are sent to criminal court for adult prosecution as "transfer." This process is also called "certification," "waiver," or "reference."

25. *Id.* at 490, 505-07.

26. TEX. FAM. CODE ANN. § 54.02(a), (j) (Vernon 1986).

27. *Id.* § 54.02(c).

28. *Id.* § 54.02(e).

29. TEX. FAM. CODE ANN. § 54.02(h) (Vernon Supp. 1991).

30. TEX. FAM. CODE ANN. § 54.02(a), (f) (Vernon 1986 & Supp. 1991).

31. Act of August 28, 1967, 60th Leg., R.S., ch. 475, §§ 4, 6, 1967 Tex. Gen. Laws 1083, 1084. Originally, the transfer provision was in TEX. REV. CIV. STAT. ANN. art. 2338-1, § 6 (Vernon 1971). That provision was repealed in 1973 when the current juvenile statute was enacted but the present transfer provision is virtually identical to the one enacted in 1967.



and transfer a child to the appropriate district court or criminal district court for criminal proceedings if:

(1) the child is alleged to have violated a penal law of the grade of felony;

(2) the child was 15 years of age or older at the time he is alleged to have committed the offense and no adjudication hearing has been conducted concerning that offense; and

(3) after full investigation and hearing the juvenile court determines that there is probable cause to believe that the child before the court committed the offense alleged and that because of the seriousness of the offense or the background of the child the welfare of the community requires criminal proceedings.<sup>32</sup>

. . .

(f) In making the determination required by Subsection (a) of this section, the court shall consider, among other matters:

(1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person;

(2) whether the alleged offense was committed in an aggressive and premeditated manner;

(3) whether there is evidence on which a grand jury may be expected to return an indictment;

(4) the sophistication and maturity of the child;

(5) the record and previous history of the child; and

(6) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.<sup>33</sup>

### III. THE EMPIRICAL STUDY

This is an empirical study of juvenile court *Kent* style transfer proceedings in Texas. It includes all transfer proceedings in which a motion to transfer was filed from September 1, 1987, through August 31, 1988. There were one hundred twelve cases. The data were obtained from reports by local juvenile probation departments to the Texas Ju-

32. TEX. FAM. CODE ANN. § 54.02(a) (Vernon Supp. 1991).

33. TEX. FAM. CODE ANN. § 54.02(f) (Vernon 1986). The Texas version of the *Kent* criteria omits entirely the fifth criterion, dealing with disposition of the cases of co-actors in the same court system. The first *Kent* criterion—the seriousness of the offense—is elevated to a required finding by the juvenile court and is, therefore, not one of the statutory criteria. The Texas version is a close copy of the remaining six *Kent* criteria.

venile Probation Commission. The commission, which has state-wide responsibilities for funding and setting standards for local juvenile probation departments, initiated the study and collected the data. One form inquired about juvenile court proceedings in any case in which a motion to transfer was filed during the fiscal year ending August 31, 1988.<sup>34</sup> For cases transferred to criminal court, a second form inquired about the outcome in criminal court.<sup>35</sup> Telephone contact was used to verify the accuracy of information when that seemed necessary and to obtain as complete a report as possible on each case within the scope of the study.

The major purpose of the study was to determine what influence the statutory *Kent* criteria have on transfer decisions actually made by juvenile courts. As the conclusion shows, the *Kent* criteria are more closely related to the decisions made by prosecutors in selecting cases in which to file transfer motions than to the transfer decisions made by juvenile court judges. Because the criteria are first used by prosecutors to select cases, they are not particularly useful for judges in deciding which juvenile respondents to transfer to criminal court and which to retain in the juvenile system.

The only pre-judgment taken into the study was that the transfer process would be employed almost exclusively for very aggravated offenses. As the conclusion also shows, that pre-judgment is totally incorrect. Although the transfer process is employed for the very aggravated offense, it is also employed in other, special circumstances. The process is much more complicated than it seemed before it was studied.

Table one is a summary of the data that were gathered.

TABLE 1  
SUMMARY OF DATA

Variable	Referrals		Motions		Transfers	
	N	%	N	%	N	%
<i>Age</i>						
15	6358	44.9	29	25.9	22	25.3
16	7792	55.1	83	74.1	65	74.7
	14150	100.0	112	100.0	87	100.0

34. This report form has been reproduced as Appendix A.

35. This report form has been reproduced as Appendix B.

*Sex*

Male	12832	90.7	110	98.2	87	100.0
Female	1318	9.3	2	1.8	0	0.0
	14150	100.0	112	100.0	87	100.0

*Race/Ethnicity*

Black	3311	23.4	42	37.3	32	36.8
Hispanic	4854	34.3	47	42.0	35	40.2
White	5688	40.2	21	18.8	18	20.7
Other	297	2.1	2	1.8	2	2.3
	14150	100.0	112	100.1	87	100.0

*County*

Dallas	1702	12.0	39	34.8	24	27.6
Harris	2209	15.6	9	8.0	9	10.3
Tarrant	893	6.3	9	8.0	9	10.3
Bexar	888	6.3	5	4.5	5	5.7
Others	8458	59.8	50	44.6	40	46.0
	14150	100.0	112	99.9	87	99.9

*Offenses*

Homicide	96	0.7	30	26.8	26	29.9
SexAsslt	380	2.7	11	9.8	8	9.2
Robbery	478	3.4	29	25.9	19	21.8
AggAsslt	939	6.6	5	4.5	3	3.4
Burglary	6367	45.0	12	10.7	10	11.5
Theft	1126	8.0	0	0.0	0	0.0
MotVeh	2584	18.3	3	2.7	3	3.4
Drug	614	4.3	6	5.4	4	4.6
Other	1566	11.1	16	14.3	14	16.1
	14150	100.1	112	100.1	87	99.9

During the fiscal year ending August 31, 1988, there were approximately 14,150<sup>36</sup> felony referrals of fifteen and sixteen year olds to Texas juvenile courts. Under the statute, each referral was an event

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36. There were 14,728 such referrals during calendar year 1987. TEXAS JUVENILE PROBATION COMMISSION, TEXAS JUVENILE PROBATION STATISTICAL REPORT 12 (1987). And there were 13,860 such referrals during calendar year 1988. TEXAS JUVENILE PROBATION COMMISSION, TEXAS JUVENILE PROBATION STATISTICAL REPORT 10 (1988). Since I am interested in the fiscal year from September 1, 1987 through August 31, 1988, I have taken a weighted average of the felony referrals of fifteen and sixteen year olds during these two calendar years—one-third of the 1987 referrals plus two-thirds of the 1988 referrals—to approximate the number of such referrals during fiscal 1988.

potentially resulting in transfer to criminal court.<sup>37</sup> But, prosecutors filed motions to transfer on only 228 offenses.<sup>38</sup> The 228 offenses were less than two percent of the felony referrals eligible for transfer consideration.<sup>39</sup> Because some motions to transfer charged more than one offense, motions to transfer were filed on only 112 respondents. Juvenile courts transferred eighty-seven of the 112 respondents to criminal courts for prosecutions as adults. Twenty-five respondents were retained in the juvenile system.

#### IV. PROSECUTORIAL DISCRETION: THE INITIATION DECISION

While transfer cases are only a tiny percentage of the eligible cases referred to the juvenile court, they command time and energy of the process participants that is greatly disproportionate to the number of cases involved. In part, this occurs because the legal consequences of the transfer decision can be enormous for the respondent, his or her family, and society.<sup>40</sup> There is much at stake about which to fight.

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37. See *supra* text accompanying note 32 (listing considerations for transfers from juvenile court to district court).

38. See *infra* Table 26.

39. 228 of 14,150 cases equals 1.61 percent.

40. If the respondent is retained in the juvenile system and adjudicated delinquent, he or she can be placed on probation for a period of one year, subject to court ordered extensions of one year each until reaching eighteen years of age. TEX. FAM. CODE ANN. §§ 54.04(d)(1), 54.05(b). Alternatively, the juvenile court can commit such a respondent to the Texas Youth Commission, the state training school system, until he reaches twenty-one years of age. TEX. FAM. CODE ANN. § 54.04(d)(2) (Vernon 1986); TEX. HUM. RES. CODE ANN. §§ 61.001(5), 61.084 (Vernon 1986). If the respondent is transferred to criminal court and convicted as an adult, for some offenses he or she can receive a term of probation that can be as long as ten years. TEX. CODE OF CRIM. PROC. ANN. art. 42.12, § 3 (Vernon Supp. 1992). Alternatively, he or she can receive a prison sentence the length of which, depending upon the penalty category in which the offense fits, can be as long as ten years, twenty years or ninety-nine years. See TEX. PENAL CODE ANN. §§ 8.07(d), 12.31(a), 12.32(a), 12.33(a), 12.34(a) (Vernon 1986 & supp. 1991) (sentencing ranges for capital, first, second, and third degree felonies).

For a very narrow category of violent juvenile offenses—the six most serious in the Texas Penal Code—the juvenile court, upon an adjudication of delinquency, can sentence the respondent to a term of incarceration for up to thirty years. Until age eighteen, the respondent is incarcerated in the state training school system. When the respondent nears age eighteen, the juvenile court conducts an additional hearing at which it decides whether respondent will be transferred to the prison system to serve the balance of the sentence under adult parole laws or whether he or she will be released on juvenile parole until age twenty-one. For an account of the history and scope of this legislation, see Robert O. Dawson, *The Third Justice System: The New Juvenile-Criminal System of Determinate Sentencing for the Youthful Violent Offender in Texas*, 19 ST. MARY'S L.J. 943 (1988). For an empirical study of proceedings under the statute during its first sixteen months, see Robert O. Dawson, *The Violent Juvenile Offender: An*

Counsel for the respondent is mandatory and cannot be waived.<sup>41</sup> Preparations for the transfer hearing are time-consuming and expensive. Texas law requires the juvenile court to order and obtain "a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense" prior to the hearing.<sup>42</sup> The hearing, which is without a jury,<sup>43</sup> itself is likely to be protracted and extremely adversarial. Texas law permits an appeal immediately from a juvenile court decision to transfer.<sup>44</sup> In short, a transfer proceeding is a major event for the juvenile court and all the participants. It is to a juvenile court what a capital murder case is to a criminal court.

The prosecuting attorney has discretion when a child is referred to the juvenile court for a felony to permit the case to proceed as an ordinary delinquency case or to file a motion to transfer to criminal court.<sup>45</sup> Prosecutorial selection of cases for initiating the transfer process is examined in this section. The focus is upon what marks a case as meeting the statutory minimum standards for the extraordinary step of filing a transfer motion. How does a prosecutor select the less than two percent of cases for transfer action? What criteria, if any, can be identified as influencing that decision?

#### A. *The Offenses Alleged*

While the law permits a motion to transfer to be filed when a fifteen or sixteen year old is charged with *any* felony,<sup>46</sup> in practice, prosecutors focus on the more serious offenses. Table 2 shows the distribution of motions filed by the offense charged.<sup>47</sup>

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*Empirical Study of Juvenile Determinate Sentencing Proceedings as an Alternative to Criminal Prosecutions*, 21 TEX. TECH. L. REV. 1897 (1990).

41. TEX. FAM. CODE ANN. § 51.10(b)(1) (Vernon 1986).

42. *Id.* § 54.02(d).

43. *Id.* § 54.02(c).

44. TEX. FAM. CODE ANN. §§ 56.01(c)(1)(a) (Vernon Supp. 1991).

45. TEX. FAM. CODE ANN. §§ 53.04(a), 54.02(b) (Vernon 1986). The Texas Family Code uses the term "petition" for the prosecutor's pleading. *Id.* § 54.02(b). However, since common practice refers to this pleading as a "motion," that terminology is used here.

46. TEX. FAM. CODE ANN. § 54.02(a) (Vernon Supp. 1991).

47. In the event more than one offense was alleged in the same motion, the most serious offense charged is shown in Table 2.

TABLE 2  
TRANSFER MOTIONS BY OFFENSE CHARGED

Offense	Frequency	Percent
Aggravated Robbery	23	20.5
Murder	18	16.1
Capital Murder	12	10.7
Burglary	12	10.7
Attempted Murder	8	7.1
Agg. Sex Assault	8	7.1
Drug Offenses	6	5.4
Robbery	6	5.4
Agg. Assault	5	4.5
Agg. Kidnapping	4	3.6
Use Motor Vehicle	3	2.7
Sexual Assault	2	1.8
All Others (1 each)	5	4.5
<b>TOTALS</b>	<b>112</b>	<b>100.1</b>

The four penalty categories into which felonies fall are: capital felony (punishable for a transferred juvenile by a mandatory sentence of life imprisonment),<sup>48</sup> first degree felony (punishable by a prison term of five to ninety years or life),<sup>49</sup> second degree felony (punishable by a prison term of two to twenty years),<sup>50</sup> and third degree felony (punishable by a prison term of two to ten years).<sup>51</sup> Table 3 shows the distribution of offenses charged in transfer motions by penalty category.<sup>52</sup>

48. TEX. PENAL CODE ANN. § 8.07(d) (Vernon Supp. 1991) & § 12.31(a) (Vernon 1986); see *Allen v. State*, 552 S.W.2d 843, 845 (Tex. Crim. App. 1977).

49. TEX. PENAL CODE ANN. § 12.32(a) (Vernon Supp. 1991).

50. TEX. PENAL CODE ANN. § 12.33(a) (Vernon 1986).

51. TEX. PENAL CODE ANN. § 12.34(a) (Vernon Supp. 1991).

52. In the event more than one felony was alleged in the same motion, the penalty category for the most serious offense is used in Table 3.

TABLE 3  
TRANSFER MOTIONS BY PENALTY CATEGORIES

Penalty Category	Frequency	Percent
Capital Felony	12	10.7
First Degree Felony	65	58.0
Second Degree Felony	25	22.3
Third Degree Felony	10	8.9
TOTALS	112	99.9

Using referrals of fifteen and sixteen year olds for felony offenses for fiscal 1988 as a basis for comparison,<sup>53</sup> seriousness of the offense as a criterion in deciding whether to seek transfer to criminal court is apparent, as shown in Table 4.

TABLE 4  
TRANSFER MOTIONS COMPARED TO ELIGIBLE REFERRALS

Offense Category	No. Refs.	Percent Refs.	No. Mots.	Percent Mots.	Mots. Refs.
Homicide	96	0.7	30	26.8	31.3%
Robbery	478	3.4	29	25.9	6.1%
Sex Assault	380	2.7	11	9.8	2.9%
Agg. Assault	939	6.6	5	4.5	0.5%
Burglary	6367	45.0	12	10.7	0.2%
Drug Offense	614	4.3	6	5.4	1.0%
Motor Vehicle	2584	18.3	3	2.7	0.1%
Theft	1126	8.0	0	0.0	0.0%
Other	1566	11.1	16	14.3	1.0%
TOTALS	14150	100.1	112	100.1	

Table 4 suggests a major basis of prosecutorial selection of cases in which to seek transfer to criminal court. Motions were filed in thirty-one percent of the eligible homicide cases referred to the juvenile court, in six percent of the robbery and aggravated robbery cases, and in about three percent of the sexual assault and aggravated sexual assault cases. For the balance of the offenses referred, motions were filed in one percent or less of the cases. Bearing in mind that, overall,

53. See *supra* note 36 (explaining weighting method used to derive these estimates).

motions are less than two percent of referrals,<sup>54</sup> it is safe to conclude that prosecutors concentrate on homicides, robberies and sexual assaults in filing motions to transfer. Sixty-three percent of the motions to transfer, seventy of one hundred twelve, charged offenses in one or more of those three offense groups, while offenses within those three groups were only seven percent of the referrals. Within these three groups, prosecutors focused overwhelmingly upon homicide offenses, as shown by Table 5.

TABLE 5  
TRANSFER MOTIONS: HOMICIDE OFFENSES

Offense	No Motion		Motion		Total	
	N	%	N	%	N	%
Homicide	66	68.8	30	31.3	96	100.1
Others	13972	99.4	82	0.6	4054	100.0
TOTALS	14038	99.2	112	0.8	14150	100.0

Using Chi-square,  $X^2$ ,<sup>55</sup> the difference in filing motions to transfer between homicide cases and all others is statistically significant.<sup>56</sup>

The Texas Family Code provides as a criterion to be used by the juvenile court in considering transfer of a case to criminal court, "whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person."<sup>57</sup> This is closely modeled on the third *Kent* criterion.<sup>58</sup> Is that criterion employed in the prosecutorial decision to file a transfer motion? Of the eight offense groups, excluding "other" displayed in Ta-

54. Motions for transfer to district court involved 228 of 14,150, or 1.61 percent, of felony cases referred to juvenile courts.

55. Chi-square ( $X^2$ ), is the test of statistical significance used in Table 5 and many of the tables that follow. This test indicates the probability that in the long run the differences displayed in the tables could merely be a product of chance. I have adopted the conventional level of significance of .05. When the statement is made that a difference is statistically significant, that means there is only a five percent or less probability that the differences observed have resulted from chance.

I will report the  $X^2$  total and the degrees of freedom (df) associated with the table (number of rows minus 1 times number of columns minus 1). I will also report the probability of error (p) as equaling or being less than .05 ( $\leq .05$ ) or being greater than .05 ( $> .05$ ).

For a general discussion of the Chi-square statistical measurement, see H. BLALOCK, SOCIAL STATISTICS 279-92 (2d ed. 1979).

56. Table 5  $X^2$  (1 df) = 1141.9.  $p \leq .05$ .

57. TEX. FAM. CODE ANN. § 54.02(f)(1) (Vernon 1986).

58. See *supra* text accompanying note 23 (listing *Kent* criteria).



ble 4, four involve offenses against the person and four do not. Table 6 shows the distribution of cases by whether a motion to transfer was filed and by whether the offense alleged was against the person or not.<sup>59</sup>

TABLE 6  
TRANSFER MOTIONS: OFFENSES AGAINST THE PERSON

Prosecutor's Act	No Motion		Motion		Totals	
	N	%	N	%	N	%
Person	1818	96.0	75	4.0	1893	100.0
Not Person	12220	99.7	37	0.3	12257	100.0
TOTALS	14038	99.2	112	0.8	14150	100.0

Prosecutors filed transfer motions in four percent of the felony offenses against the person that were referred to the juvenile courts against fifteen and sixteen year olds but only against three-tenths of one percent of the offenses not against the person. This is a significant difference.<sup>60</sup> Thus, in making filing decisions, prosecutors appear to reflect the same values the legislature enacted to guide the juvenile courts in making transfer decisions.

In summary, the prosecutorial decision to file a transfer motion reflects generally the seriousness of the offense alleged. The more serious the offense, the more likely it is that a prosecutor will file a transfer motion. He or she is statistically more likely to file such a motion when the offense is an offense against the person than when it is not.<sup>61</sup> Finally, he or she is particularly likely to file a motion to transfer when the offense is a homicide.

#### B. *The Respondent's Age*

The existence of the juvenile justice system as a legal process for the control of deviant behavior is based upon the age of the actor. In Texas, the maximum adjudication jurisdiction age is seventeen—the offense must have been committed before that age for the juvenile

59. The 1,566 "other" offenses, from Table 4, are regarded as offenses not against the person in Table 6. That is likely what most of them are.

60. Table 6  $X^2$  (1 df) = 279.83.  $p \leq .05$ .

61. The dichotomy of offenses against or not against the person is obviously related to the seriousness of the offense. Usually offenses against the person are graded by the legislature as worthy of more severe penalties than other offenses.

court to have jurisdiction to adjudicate it.<sup>62</sup> The minimum adjudication age is ten.<sup>63</sup> An adjudicated child placed on probation must be discharged from supervision at age eighteen.<sup>64</sup> Except for a child sentenced under the determinate sentence act,<sup>65</sup> a commitment to the state training school system automatically expires at age twenty-one.<sup>66</sup> Transfer to criminal court is available only for offenses committed while the child was fifteen or sixteen years of age.<sup>67</sup>

There were differences in the number of referrals for felonies to the juvenile courts during fiscal 1988 based upon the age of the respondent, as shown in Table 7.

TABLE 7  
FELONY REFERRALS BY AGE

Age at Referral	No. Refs.	% Refs.	
10	402	1.7	
11	644	2.8	
12	1317	5.6	
13	2523	10.8	
14	4312	18.5	39.4%
15	6358	27.2	
16	7792	33.4	60.6%
TOTALS	23348	100.0	100.0% <sup>68</sup>

About sixty percent (14,150 of 23,348), of the felony referrals were

62. TEX. FAM. CODE ANN. §§ 51.02(1)(A), 51.04(a) (Vernon Supp. 1991).

63. *Id.*

64. TEX. FAM. CODE ANN. § 54.05(b) (Vernon 1986).

65. *See supra* note 40 (juveniles convicted of one of six most serious felonies may receive sentence of up to thirty years).

66. TEX. FAM. CODE ANN. § 54.05(b) (Vernon 1986); TEX. HUM. RES. CODE ANN. § 61.084 (Vernon 1986); Act of June 20, 1987, 70th Leg. R.S., ch. 1099, § 52(b), 1987 Tex. Gen. Laws 3734, 3746-47.

67. TEX. FAM. CODE ANN. §§ 51.02(1), 54.02(a)(2) (Vernon 1986).

68. The total, 23,348, is smaller than the N for Tables 9 and 10, because Table 7 does not include an estimated 398 seventeen year olds referred to the juvenile courts during fiscal 1988. It is likely that most of those seventeen year olds were on juvenile probation and were referred to the juvenile court for felonies committed while seventeen years of age. The criminal courts would have jurisdiction over the prosecution of those offenses without a juvenile court order of transfer, but the juvenile court would also have jurisdiction to revoke probation. The seventeen year olds were included in Tables 9 and 10 because there was no effective way of reducing the numbers of prior referrals and prior commitments to the state training school system, the subjects of those tables, by how many of them were of respondents seventeen years of age.

of fifteen or sixteen year olds—persons eligible for transfer consideration. Forty-five percent of the 14,150 felony respondents in the transferrable category were fifteen year olds, while fifty-five percent were sixteen.

The law directs the juvenile court to consider the age of the respondent in making the decision whether to transfer a case to criminal court for prosecution as an adult. Two of the Texas *Kent* criteria intended to guide juvenile court discretion in making a transfer decision are related to the age of the respondent: “the sophistication and maturity of the child”<sup>69</sup> and “the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.”<sup>70</sup> The first is derived from the sixth *Kent* criterion<sup>71</sup> and the second from the eighth *Kent* criterion.<sup>72</sup> It also might be expected that the age of the respondent would influence a prosecutor’s decision to file a transfer motion.

Figure 1 displays the ages of the respondents at the time of the offenses in the one hundred twelve cases in which motions to transfer were filed. Ages are grouped into three-month intervals.

The influence of age on the filing decision becomes apparent at about age sixteen. In twenty-nine of one hundred twelve, or twenty-six percent, of the motions that were filed, the respondent was fifteen years of age at the time the offense was alleged to have been committed. In eighty-three of one hundred twelve, or seventy-four percent, he was sixteen.

Table 8 compares the ages of respondents in cases in which motions to transfer were filed with the ages of respondents in cases in which motions could have been filed but were not.

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69. TEX. FAM. CODE ANN. § 54.02(f)(4) (Vernon 1986).

70. *Id.* § 54.02(f)(6).

71. *See* text accompanying note 23 (listing *Kent* criteria).

72. *See id.*

Figure 1  
Age at Time of Offense  
For Eligible Juveniles Who Received Motion to Transfer

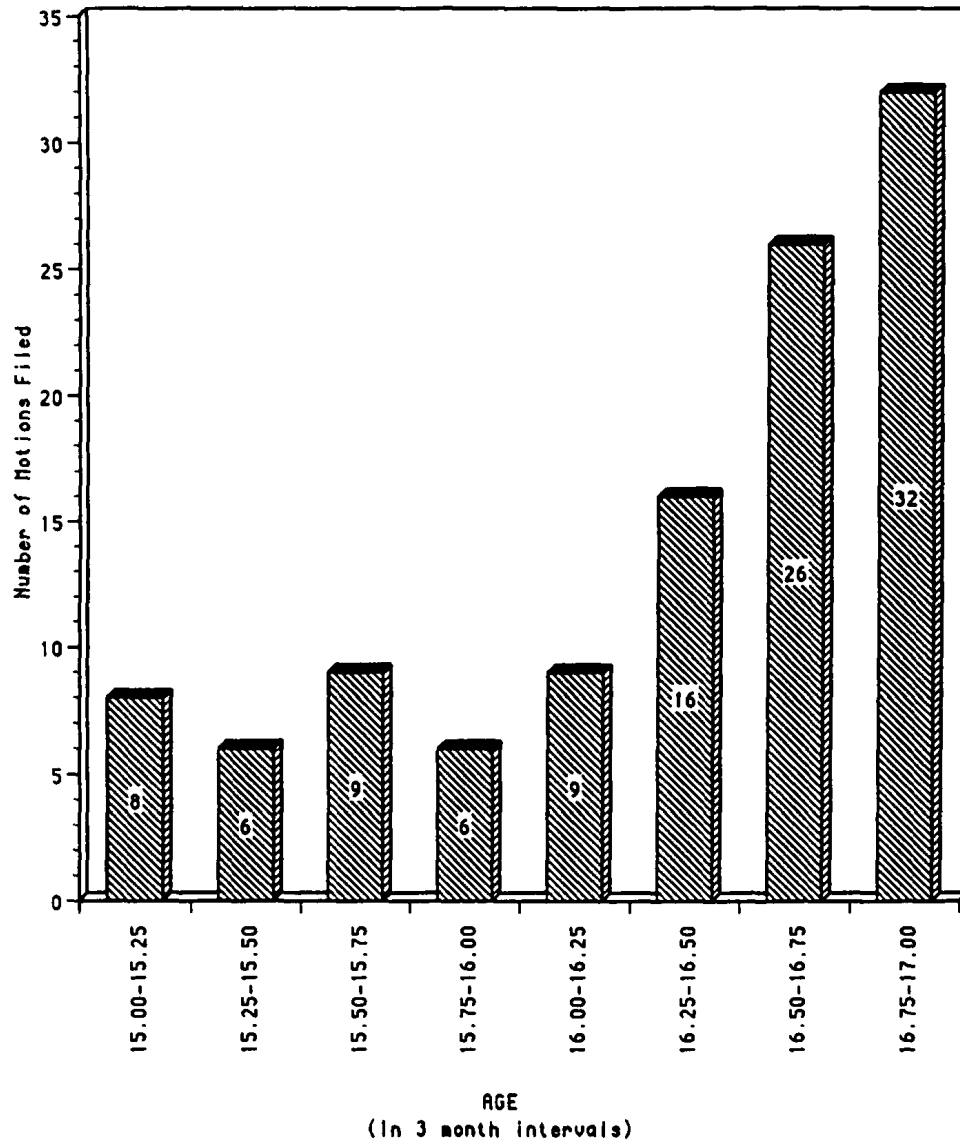


TABLE 8  
REFERRALS AND MOTIONS BY AGE

Age	No Motion		Motion		Totals	
	N	%	N	%	N	%
15	6329	99.5	29	0.5	6358	100.0
16	7709	98.9	83	1.1	7792	100.0
TOTALS	14038	99.2	112	0.8	14150	100.0

Table 8 shows that a motion to transfer was filed in 0.5 percent of the felony referrals of fifteen year olds and in 1.1 percent of the referrals of sixteen year olds. This is a significant difference.<sup>73</sup> A sixteen year old is over twice as likely to have a transfer motion filed in his case than a fifteen year old.

It appears that prosecutors think of fifteen year olds as juveniles, but of sixteen year olds as potential adults. The willingness of prosecutors to think of sixteen year olds as adults increases with proximity to their seventeenth birthdays. Figure 2 shows the same age distribution displayed in Figure 1, only segmented into twenty-four units of one month each.

There are substantial variations on a month-to-month basis, but a remarkable feature of Figure 2 is the twenty-fourth month. Twenty of the one hundred twelve cases, eighteen percent, in which motions were filed involved respondents who were within one month of their seventeenth birthdays at the times the offenses were alleged to have been committed. If those respondents were retained in the juvenile system, by the time their cases reached court and disposition, they would have less than one year of probation available.<sup>74</sup> As will be seen later, some of these respondents are transferred to the criminal system not to obtain a prison term, but to obtain a longer probation period than permitted in the juvenile system. This should be viewed as a special sub-category of the flow of transfer cases. The special case of the "almost adult" will be examined in more detail later.<sup>75</sup>

In summary, age appears to be a significant factor in prosecutors' decisions to file motions to transfer. Whether the respondent was fifteen or sixteen at the time the offense was believed to have been committed appears important, with substantial weight in favor of filing a

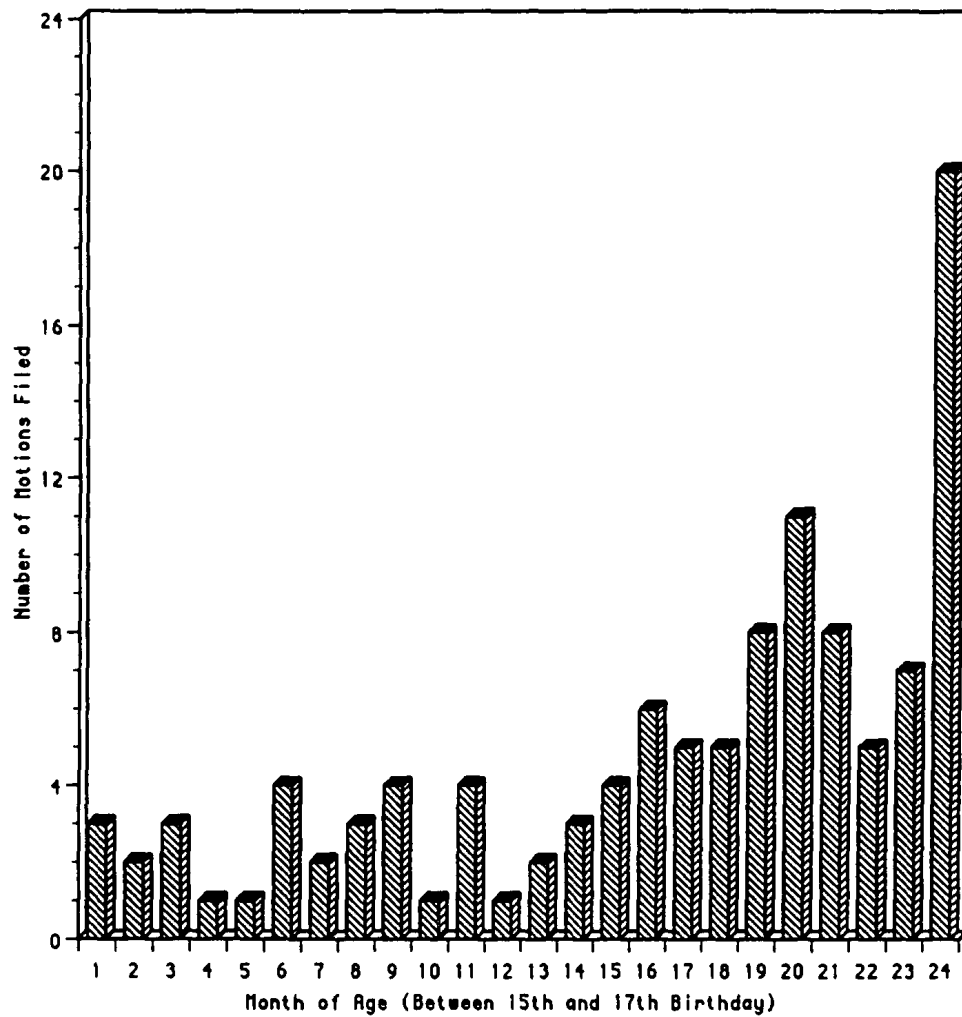
73. Table 8  $X^2$  (1 df) = 16.53.  $p \leq .05$ .

74. TEX. FAM. CODE ANN. § 54.05(b) (Vernon 1986).

75. See discussion *infra* pts. VIII.A - B.

Figure 2

Age at Time of Offense  
For Eligible Juveniles Who Received Motion to Transfer



transfer motion in the case of a sixteen year old. Even within the sixteen year old age group, there are differences. The major difference is the final month of juvenility, which appears to be disproportionate to the other months in transfer activity.

C. *Prior Record*

The Texas juvenile statute directs the court to consider the “record

and previous history of the child"<sup>76</sup> in making the decision whether to transfer a case to criminal court. This criterion is based on the seventh *Kent* criterion.<sup>77</sup> It would seem likely that prosecutors would also consider prior record in deciding whether to file a transfer motion. About forty-eight percent of all the children referred to the juvenile court for felonies during fiscal 1988 had prior referrals,<sup>78</sup> while about eighty-two percent of the children in cases in which transfer motions were filed had prior referrals. Table 9 shows the distribution.

TABLE 9  
REFERRALS AND MOTIONS BY PRIOR REFERRALS

Priors	No Motion		Motion		Totals	
	N	%	N	%	N	%
None	12266	99.8	30	0.2	12286	100.0
1 or more	11368	99.2	92	0.8	11460	100.0
TOTALS	23634	99.5	112	0.5	23746 <sup>79</sup>	100.0

Although the number of cases in which transfer motions were filed is small, Table 9 shows transfer motions were filed in cases with prior referrals at a rate four times as great as in cases without a prior referral. This difference is significant.<sup>80</sup> Because the data on referrals to the juvenile courts did not show prior referrals for fifteen and sixteen year olds separately, any conclusion that prosecutors use prior referrals for selection must remain very tentative.<sup>81</sup>

76. TEX. FAM. CODE ANN. § 54.02(f)(5) (Vernon 1986).

77. See *supra* text accompanying note 23 (listing *Kent* criteria).

78. Data were obtained on the one hundred twelve cases in which motions to transfer were filed that indicate those cases in which the respondent had previously been referred to the juvenile court. An event was counted as a prior referral without regard to its outcome in the court system. A comparison was made to a base of an estimation of felonies referred to juvenile courts during fiscal 1988. Since separate information on prior referrals for fifteen and sixteen year olds was unavailable, a base of all felony referrals was used instead. It must be recognized that including all referrals biases the data in favor of finding that prior record is related to the decision to file a transfer motion, since a higher percentage of sixteen year olds will have prior referrals than of, for example, twelve year olds. After all, they have a four year head start over the twelve year olds. Nevertheless, the differences are sufficiently great that serious consideration should be given to the possibility that prosecutors do consider prior record in deciding whether to file a motion to transfer.

79. See *supra* note 68 (explaining why the total for this table differs from that for Table 7).

80. Table 9  $X^2$  (1 df) = 51.65,  $p \leq .05$ .

81. Such a conclusion is corroborated, however, by comparing the seriousness of the offenses in which transfer motions were filed with prior referrals of the respondents. As the

Data were also collected on the number of prior commitments to the state juvenile training school system for the 112 cases in which transfer motions were filed and felony cases for all ages referred to the juvenile court during fiscal 1988. Of felony referrals in which motions to transfer were not filed, only four percent had one or more prior commitments to the state training school system, while twenty-nine percent of the cases in which motions to transfer were filed had one or more prior commitments. Transfer motions were filed in 3.3 percent of the felony referrals with prior commitments but only in three-tenths of one percent of those without. Table 10 shows the distribution.

TABLE 10  
REFERRALS AND MOTIONS BY PRIOR COMMITMENTS

Commitment	No Motion		Motion		Totals	
	N	%	N	%	N	%
None	22655	99.7	79	0.3	22734	100.0
1 or more	979	96.7	33	3.3	1012	100.0
TOTALS	23634	95.5	112	0.5	23746 <sup>82</sup>	100.0

Reiterating the cautions mentioned in connection with Table 9, Chi-square shows a significant relationship<sup>83</sup> between prior commitments to the state training school system and the prosecutor's decision to seek transfer to criminal court upon being presented with a new felony referral.<sup>84</sup>

In summary, the data *suggest* that whether the respondent has previously been referred to the juvenile court and whether he has previously been committed to the state training school system are factors in the prosecutor's decision to file a transfer motion. However, definitive conclusions cannot be based on these data because of the lack of separate prior record information on fifteen and sixteen year olds.

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seriousness of the offense decreases, the percentage of respondents with prior referrals increases. This *suggests* that prior referrals may have effects in cases of less serious offenses. This relationship is explored more fully later. See discussion *infra* pt. V.C.

82. See *supra* note 68 (explaining why the total for this table differs from that for Table 7).

83. Table 10  $X^2$  (1 df) = 173.9.  $p \leq .05$ .

84. This tentative conclusion is also corroborated by examining offense seriousness and prior commitments of respondents to the state training school system. As offense seriousness decreases, reliance on prior commitments as a selection criterion appears to become more important. See discussion *infra* pt. V.C.



D. *Race/Ethnicity*<sup>85</sup>

Is the race/ethnicity of the respondent a significant factor in the decision to file a transfer motion? Table 11 shows estimates of the numbers of persons age fifteen or sixteen who were referred to juvenile courts during fiscal 1988 for felonies by race/ethnicity and by whether a motion to transfer was filed by the prosecutor.<sup>86</sup>

TABLE 11  
REFERRALS AND MOTIONS BY RACE/ETHNICITY

Race/Ethnicity	No Motion		Motion		Total	
	N	%	N	%	N	%
White	5667	99.6	21	0.4	5688	100.0
Hispanic	4807	99.0	47	1.0	4854	100.0
Black/Other	3564	98.8	44	1.2	3608	100.0
TOTALS	14038	100.0	112	100.1	14150	100.0

Table 11 shows that motions were filed in only four-tenths of one percent of the referrals of whites, while they were filed in one percent of the Hispanics and 1.2 percent of the blacks/others. Table 11 shows a statistical association between race/ethnicity and the filing of a transfer motion from estimated eligible referrals.<sup>87</sup> Blacks/others were filed on at a rate three times greater than whites, and Hispanics

85. The Texas Juvenile Probation Commission's study used the categories, "white," "black," "Hispanic," and "other" to obtain race/ethnicity data. See appendices A and B. I have used the same labels to avoid confusion.

86. Table 11 was constructed in the following manner. Data were available on the total number of referrals of fifteen and sixteen year olds during the two calendar years that include the fiscal year being studied. From those data, a weighted average of the two calendar years was computed to obtain an estimate of the number of referrals of fifteen and sixteen year olds for fiscal year 1988. That number was 14,150. See *supra* note 36 (discussing the weighting technique).

Data were also available on the number of felony referrals for each racial/ethnic group that were made during these two calendar years. However, the racial/ethnicity data were not separately available for felony referrals of fifteen and sixteen year olds. Therefore, the racial/ethnicity percentage for felony referrals for all ages were applied to the felony referrals of fifteen and sixteen year olds to compute an estimate of the racial/ethnic distribution of felony referrals of fifteen and sixteen year olds. In Table 11, and in subsequent discussions, this estimation is compared to the actual distribution of racial/ethnic groups in transfer motions for the same period.

Of the one hundred twelve transfer motions, one hundred ten involved whites, Hispanics, or blacks. Only two involved other racial or ethnic groups. In Table 11, I have combined the "black" category and the "other" category to facilitate statistical analysis.

87. Table 11  $X^2$  (2df) = 22.87.  $p \leq .05$ .

were filed on at a rate over twice that of whites. It appears, then, that whites are significantly underrepresented in transfer activity, while Hispanics are somewhat overrepresented and blacks are even more overrepresented.

The next question is what accounts for these differences. Earlier discussion suggested that the nature of the offense is important in prosecutors deciding whether to file transfer motions.<sup>88</sup> Perhaps referrals of respondents of different races/ethnicities are for different kinds of offenses and it is those differences, rather than race/ethnicity, that are reflected in Table 11. Only two offense categories—homicide with thirty transfer motions and robbery with twenty-nine—have sufficient numbers of cases to permit statistical analysis. Table 12 examines homicide referrals and transfer motions by race/ethnicity.<sup>89</sup>

TABLE 12  
REFERRALS AND MOTIONS BY RACE/ETHNICITY: HOMICIDE

Race/Ethnicity	No Motion		Motion		Totals	
	N	%	N	%	N	%
White	20	76.9	6	23.1	26	100.0
Hispanic	23	57.5	17	42.5	40	100.0
Black/Other	23	76.7	7	23.3	30	100.0
TOTALS	66	68.8	30	31.3	96	100.1

Table 12 suggests that whites and blacks/others are underrepresented in transfer motions filed in homicide cases. It also suggests that filings involving Hispanics are at a rate almost double than of white and blacks/others. However, the differences shown in Table 12 are not

88. See discussion *supra* pt. IV.A.

89. Table 12 was constructed in the following manner. Data were available on the total number of homicide referrals of fifteen and sixteen year olds during the two calendar years that include the fiscal year being studied. From that data, a weighted average of the two calendar years was computed to obtain an estimate of the number of homicide referrals of fifteen and sixteen year olds for fiscal year 1988. See *supra* note 36 (discussing the weighting technique). Data were also available on the number of homicide referrals for each racial/ethnic group that were made during these two calendar years. However, race/ethnicity data were not separately available for referrals of fifteen and sixteen year olds for homicide or any other offense. Therefore, the racial/ethnic percentages for homicide referrals for all ages were applied to the homicide referrals of fifteen and sixteen year olds to compute an estimate of the racial/ethnic distribution of homicide referrals of fifteen and sixteen year olds. In Table 12, this estimation is compared to the actual distribution of race/ethnicity in homicide transfer motions for the same period.

statistically significant on these data.<sup>90</sup>

Table 13 examines referrals and motions by race/ethnicity for the combined offenses of robbery and aggravated robbery.<sup>91</sup>

TABLE 13  
REFERRALS AND MOTIONS BY RACE/ETHNICITY: ROBBERY

	No Motion		Motion		Total	
	N	%	N	%	N	%
White	86	97.7	2	2.3	88	100.0
Hispanic	149	92.5	12	7.5	161	100.0
Black/Other	214	93.4	15	6.6	229	100.0
TOTALS	449	93.9	29	6.1	478	100.0

Table 13 suggests that for the offenses of robbery and aggravated robbery, whites, who were filed upon at a rate of 2.3 percent, are underrepresented, while Hispanics and blacks/others, who are filed upon at a rate three times as great, are overrepresented. However, these differences are not statistically significant.<sup>92</sup> Another possible explanation for the racial/ethnic difference in transfer motion filing rates might be an uneven distribution of prior referrals along racial/ethnic lines. In other words, the differences in filing rates may reflect differences in the criterion of prior record. Table 14 explores that possibility.

TABLE 14  
MOTIONS BY RACE/ETHNICITY AND PRIOR REFERRALS

Race/Ethnicity	No Motion		Motion		Totals	
	N	%	N	%	N	%
White	5	23.8	16	76.2	21	100.0
Hispanic	9	19.2	38	80.9	47	100.1
Black/Other	6	11.9	38	88.1	44	100.0
TOTALS	20	17.9	92	82.1	112	100.0

Table 14 shows that seventy-six percent of the whites against whom motions to transfer were filed had prior referrals to the juvenile court, while eighty-one percent of the Hispanics and eighty-eight percent of

90. Table 12  $X^2$  (2 df) = 3.47.  $p > .05$ .

91. See *supra* note 15 (discussing how Table 13 was constructed).

92. Table 13  $X^2$  (2 df) = 2.41.  $p > .05$ .

the blacks/others had prior referrals. These numbers have the same vector as the overall distribution of motions by race/ethnicity as shown in Table 11. Indeed, prior referrals may help explain some of the racial/ethnic differences in filing rates noted in Table 11. However, the distribution shown in Table 14 is not itself statistically significant.<sup>93</sup>

Race/ethnicity is statistically associated with prosecutors' selection of cases from felony referrals of fifteen and sixteen year olds for filing transfer motions. Those differences cannot be explained by reference to the offense categories for which racial/ethnic groups were referred to the juvenile court, nor by the prior record by race/ethnicity of those against whom transfer motions were filed. However, this does not by itself mean that prosecutors are behaving in a discriminatory or racist fashion. Race/ethnicity may be related to other case characteristics for which data were not available, such as circumstances of offense aggravation or mitigation. Those characteristics, rather than race/ethnicity, may explain the decisions made.

#### E. Sex

In ninety-eight percent of the motions for transfer, the respondent was male. In only two of the one hundred twelve cases was a transfer motion filed against a female respondent.<sup>94</sup> Table 15 compares these numbers to the felony referrals of fifteen and sixteen year olds to juvenile court by sex.<sup>95</sup>

TABLE 15  
REFERRALS AND MOTIONS BY SEX

Sex	No Motion		Motion		Totals	
	N	%	N	%	N	%
Male	12722	99.1	110	0.9	12832	100.0
Female	1316	99.8	2	0.2	1318	100.0
TOTALS	14038	99.2	112	0.8	14150	100.0

Table 15 shows that males were filed upon at a rate of nine-tenths of one percent, while females were filed upon at a rate of only two-tenths

93. Table 14  $X^2$  (2 df) = 1.08.  $p > .05$ .

94. One case was a violation of the controlled substances act and the other was an aggravated assault. Neither female respondent was transferred to criminal court.

95. See *supra* note 36 (describing how Table 15 was constructed).

of one percent. The distribution in Table 15 is statistically significant.<sup>96</sup>

These results cannot be attributed to an uneven distribution of prior referrals according to sex. Eighty-three percent of the males against whom transfer motions were filed had prior referrals, while only fifty percent of the females had prior referrals. This is not a statistically significant difference.<sup>97</sup> Decision-making in favor of females seems established but not yet explained.

Are there differences in the offenses for which males and females were referred to the juvenile courts that might explain the differences in motions? Two offenses—homicide and robbery—occurred with sufficient frequency to permit analysis. Table 16 explores that possibility for the offense of homicide.

TABLE 16  
REFERRALS AND MOTIONS BY SEX: HOMICIDE

Sex	No Motion		Motion		Totals	
	N	%	N	%	N	%
Male	59	66.3	30	33.7	89	100.0
Female	7	100.0	0	0.0	7	100.0
TOTALS	66	68.8	30	31.2	96	100.0

Although homicide cases were filed on males at a rate of about thirty-four percent, there were no homicide cases filed on females from among seven referrals. This distribution, however, is not statistically significant.<sup>98</sup>

Table 17 addresses the influence of offense category for the combined offenses of robbery and aggravated robbery.

96. Table 15  $X^2$  (1 df) = 7.553.  $p \leq .05$ .

97. Chi-square for a 2 x 2 table of prior referrals or no prior referrals, and sex in cases in which transfer motions were filed:  $X^2$  (1 df) = 1.43.  $p > .05$ . N = 112.

98. Table 16  $X^2$  (1 df) = 3.435.  $p > .05$ .

TABLE 17  
REFERRALS AND MOTIONS BY SEX: ROBBERY

Sex	No Motion		Motion		Totals	
	N	%	N	%	N	%
Male	410	93.4	29	6.6	439	100.0
Female	39	100.0	0	0.0	39	100.0
TOTALS	449	93.9	29	6.1	478	100.0

Table 17 shows that almost seven percent of the males referred for robbery were filed upon, while no female was filed upon. This distribution, however, is short of statistical significance.<sup>99</sup>

Overall, there is a statistically supported difference between the treatment of males and females in filing transfer motions. This difference cannot be attributed to differences in prior referrals of males and females to the juvenile system. Nor can the difference be explained by different referral rates for homicide or robbery offenses. On these data, the difference is unexplainable.

#### F. *The Differences Among Counties*

The decision whether to file a transfer motion in a felony referral of a fifteen or sixteen year old is made in the discretion of the prosecutor's office in the county in which the case is referred. It is expected there will be differences among prosecutor's offices as to their inclinations to file motions. Some will be more willing than others to do so. The one hundred twelve transfer motions were filed in thirty-one, or twelve percent, of the two hundred fifty-four counties of the state during fiscal 1988. In seventeen of the thirty-one counties, more than one motion was filed during the fiscal year. Table 18 shows the frequencies for each county in which more than one motion was filed.

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99. Table 17  $X^2$  (1 df) = 2.747.  $p > .05$ .

TABLE 18  
MOTIONS FILED BY COUNTIES

County	No. Filed	Percent
Dallas	39	34.8
Harris	9	8.0
Tarrant	9	8.0
Bexar	5	4.5 (62)
El Paso	4	3.6
Hidalgo	4	3.6
Nueces	4	3.6
Cameron	3	2.7
Fort Bend	3	2.7
Hood	3	2.7
Travis	3	2.7
Brazos	2	1.8
Ellis	2	1.8
Galveston	2	1.8
Jefferson	2	1.8
San Patricio	2	1.8
Val Verde	2	1.8
Others (1 each)	14	12.5
<b>TOTALS</b>	<b>112</b>	<b>100.2</b>

Almost thirty-five percent of all transfer motions were filed in Dallas County. Superficially, it would appear that Dallas County is more aggressive than others in filing transfer motions. But, Dallas County is one of the most populous counties in the state. Therefore, it cannot be asserted that it is more aggressive in filing transfer motions than *any* other county, because there may be small counties in which a significantly higher percentage of eligible referrals resulted in transfer motions than in Dallas County. However, it may be possible to compare Dallas County with other large counties to determine whether there are differences in filing rates among large counties. There are several ways in which this can be accomplished.

One method is to compare populations. The four largest counties in the state, each with a population of over one million, are Harris (City of Houston),<sup>100</sup> Dallas (City of Dallas),<sup>101</sup> Bexar (City of San

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100. The United States Census Bureau's estimate for the 1985 population of Harris County was 2,794,700. 1988-1989 TEXAS ALMANAC 189.

Antonio),<sup>102</sup> and Tarrant (City of Fort Worth).<sup>103</sup> Table 18 shows that in those four counties combined, sixty-two transfer motions were filed. Dallas County accounted for sixty-three percent of the transfer motions filed in those counties, while it had only twenty-six percent of the four-county population.

A second method is to compare juvenile-age populations. The estimated 1988 juvenile-age population of Harris County was 296,052,<sup>104</sup> of Dallas County, 176,440,<sup>105</sup> of Bexar County, 133,472,<sup>106</sup> and of Tarrant County, 107,187,<sup>107</sup> for a four-county juvenile-age population of 713,151. Thus, it is estimated that in 1988 Dallas County had 24.7 percent of the four-county juvenile-age population, yet it filed sixty-three percent of the transfer motions filed in the four counties.

Finally, comparisons can be made in motions filed as a percentage of referral rates in the four large counties. It is possible that there are many more referrals in Dallas County than in the other three and that differences in the frequencies of referrals account for the higher filing rate rather than different prosecutorial policies.<sup>108</sup> Table 19 examines that possibility. It compares estimates<sup>109</sup> of referrals of fifteen and sixteen year olds for felonies during fiscal 1988 with transfer motions filed during the same period.

101. The estimated 1985 population of Dallas County was 1,781,700. 1988-1989 TEXAS ALMANAC 162.

102. The estimated 1985 population of Bexar County was 1,134,900. 1988-1989 TEXAS ALMANAC 140.

103. The estimated 1985 population of Tarrant County was 1,056,000. 1988-1989 TEXAS ALMANAC 245.

104. TEXAS JUVENILE PROBATION COMMISSION, TEXAS JUVENILE PROBATION STATISTICAL REPORT 23 (1988).

105. *Id.* at 22.

106. *Id.*

107. *Id.* at 24.

108. Probing further, differences in referral rates may reflect differences in crime rates, differences in apprehension rates, or differences in police policies regarding which cases to refer to juvenile courts and which to handle without referral, as authorized by Texas law. *See* TEX. FAM. CODE ANN. § 52.03 (Vernon 1986).

109. *See supra* note 36 (explaining the estimation method used).



TABLE 19  
REFERRALS AND MOTIONS: LARGE COUNTIES

County	No Motion Filed		Motion Filed		Total	
	N	%	N	%	N	%
Dallas	1677	97.7	39	2.3	1716	100.0
Harris	2200	99.6	9	0.4	2209	100.0
Tarrant	884	99.0	9	1.0	893	100.0
Bexar	863	99.4	5	0.6	868	100.0
TOTALS	5624	98.9	62	1.1	5686	100.0

Dallas County filed motions at a rate over twice that of the other three large counties. That is a statistically significant difference.<sup>110</sup> Table 19 supports the conclusion that prosecutors in Dallas County are more aggressive than those in the three other large counties in filing transfer motions from among eligible referrals.

It might be important to determine whether there are any differences between Dallas County and the three other large counties as to the type of offense for which transfer is sought. State-wide, homicides and robberies account for over 50 percent of the transfer motions.<sup>111</sup> Table 20 shows the referrals of fifteen and sixteen year olds for homicide offenses in Dallas County and the other three large counties and compares the referrals to the motions filed.

TABLE 20  
DALLAS V. OTHER LARGE COUNTIES: HOMICIDES

County	No Motion Filed		Motion Filed		Total	
	N	%	N	%	N	%
Dallas	19	76.0	6	24.0	25	100.0
Other 3	15	62.5	9	37.5	24	100.0
TOTALS	34	69.4	15	30.6	49	100.0

Table 20 shows that Dallas County filed on only about twenty-four percent of its eligible homicide referrals, while the other three counties filed on about thirty-eight percent of their referrals. While those numbers point in the opposite direction from those in Table 19, the

110. Table 19  $X^2$  (3 df) = 32.67.  $p \leq .05$ .

111. Of one hundred twelve motions, thirty were for homicide and twenty-nine were for robbery or aggravated robbery. See *supra* Table 4.

distribution in Table 20 is not statistically significant.<sup>112</sup> Nevertheless, Table 20 does *suggest* that aggressive filing of homicide cases in Dallas County cannot account for the four-county disparity.

Table 21 makes the same comparison for robbery cases.

TABLE 21  
DALLAS V. OTHER LARGE COUNTIES: ROBBERIES

County	No Motion Filed		Motion Filed		Total	
	N	%	N	%	N	%
Dallas	96	88.1	13	11.9	109	100.0
Other 3	124	93.9	8	6.1	132	100.0
TOTALS	220	91.3	21	8.7	241	100.0

Table 21 shows that Dallas County filed motions in about twelve percent of its eligible robbery referrals, about twice the rate in the other three large counties. Although this distribution is in the same direction as that in Table 19, it is not itself statistically significant.<sup>113</sup>

Therefore, the differences in filing rates cannot be accounted for statistically by differences in either homicide or robbery filing rates.

Earlier, it was shown that in general prosecutors tend to select offenses against the person for the filing of transfer motions.<sup>114</sup> Since the aggressive filing of transfer motions by Dallas County compared with the other three large counties cannot be further understood by reference to homicide or robbery cases, the two most frequent offenses against the person, perhaps it can be understood by reference to offenses that are *not* against the person. Table 22 compares Dallas County with the other three large counties in terms of motions filed as a percentage of referrals in offenses not against the person.

112. Table 20  $X^2$  (1 df) = 1.55.  $p > .05$ .

113. Table 21  $X^2$  (1 df) = 3.40.  $p > .05$ .

114. See *supra* Table 6.

TABLE 22  
OFFENSES NOT AGAINST THE PERSON  
*DALLAS COUNTY V. OTHER THREE*

County	No Motion		Motion		Total Referrals	
	N	%	N	%	N	%
Dallas	1396	99.2	11	0.8	1407	100.0
Other 3	3416	99.9	1	0.1	3417	100.0
TOTALS	4812	99.8	12	0.2	4824	100.0

Dallas County filed eleven transfer motions in cases involving offenses not against the person out of 1,407 eligible referrals of offenses not against the person. The other three large counties, on the other hand, filed only one transfer motion out of 3,417 eligible referrals. This is a statistically significant difference.<sup>115</sup> The Dallas County filing rate in this category of offenses was about eight times greater than the rate in the other three large counties. Of the eleven cases filed by Dallas County, seven were burglary cases, three were drug cases and one was a motor vehicle case. The one case filed in the other three large counties was a drug cases.

Thus, part of the difference in filing rates between Dallas County and the other three large counties lies in the filing rate in burglary cases. That, coupled with the greater filing rate in robbery cases, may assist in explaining the differences among these counties and to compensate for Dallas County's lower filing rate in homicide cases. Table 23 focuses on filing rates in combined robbery and burglary cases for the four large counties.

TABLE 23  
ROBBERY AND BURGLARY CASES  
*DALLAS V. OTHER LARGE COUNTIES*

County	No Motion		Motion		Total Referrals	
	N	%	N	%	N	%
Dallas	493	96.1	20	3.9	513	100.0
Others	1719	99.6	8	0.5	1727	100.1
TOTALS	2212	98.8	28	1.3	2240	100.1

The Dallas County filing rate in combined robbery/burglary cases

115. Table 22  $X^2$  (1 df) = 16.13.  $p \leq .05$ .

was about eight times greater than the rate in the other three large counties. Over fifty percent of all motions filed in Dallas County were in robbery or burglary cases, compared to thirty-five percent in the other three large counties. Dallas County had only twenty-three percent of the four-county referrals in those cases, but filed seventy-one percent of the motions. This is a statistically significant difference.<sup>116</sup> The aggressive filing of robbery and burglary cases in Dallas County more than compensates for the relative underfiling of homicide cases. Robbery and burglary cases go far to explain the differences between Dallas County and the other three large counties.

### V. JUDICIAL DISCRETION: THE TRANSFER DECISION

Once the motion to transfer has been filed, it must be served on the juvenile respondent.<sup>117</sup> The juvenile court must set a date for the transfer hearing.<sup>118</sup> It must order and obtain "a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense"<sup>119</sup> before the hearing begins. Counsel for the respondent must be retained or appointed.<sup>120</sup> And counsel must be given at least ten days to prepare for the transfer hearing.<sup>121</sup>

The time required of all the participants to prepare for a transfer hearing is substantial, at least in comparison to the relatively quick pace with which many juvenile cases proceed. In the one hundred nine cases for which data on this variable were available, the number of days from the filing of the transfer motion to the transfer decision ranged from zero to one hundred twenty-two,<sup>122</sup> with a mean of about forty-six days. So, on average, it takes about a month and a half from the time the motion is filed until the transfer decision is made.

The hearing itself is conducted by the juvenile court judge sitting

116. Table 23  $X^2$  (1 df) = 37.822.  $p \leq .05$ .

117. TEX. FAM. CODE ANN. § 53.06(a)(1)-(e) (Vernon 1986).

118. *Id.* § 53.05.

119. *Id.* § 54.02(d).

120. *Id.* § 51.10(b)(1).

121. TEX. FAM. CODE ANN. § 51.10(h) (Vernon 1986).

122. This range excludes one outlying event—a case in which the time from the filing of the transfer motion to the transfer decision was two hundred ten days. In that case, the respondent, who had been released from detention, absconded prior to the transfer hearing. The case remained on the juvenile court's docket until it was finally dismissed for want of prosecution.

without a jury.<sup>123</sup> The juvenile court may transfer a case to criminal court only if three statutory requirements are met: (1) the respondent must be alleged to have committed a felony,<sup>124</sup> (2) he or she must have been fifteen or sixteen years old at the time of the offense and no juvenile court adjudication hearing must have been conducted concerning that offense,<sup>125</sup> and (3) there must be probable cause to believe the respondent committed the offense and the court must find that "because of the seriousness of the offense or the background of the child the welfare of the community requires criminal proceedings."<sup>126</sup> The statute also provides *Kent* criteria that must be considered by the juvenile court in making the decision whether to transfer a case to criminal court.<sup>127</sup>

Table 25 shows the transfer decisions that were made by juvenile court judges in the 112 cases in which motions were filed.

TABLE 25  
TRANSFER DECISIONS

Decision	No.	Percent
No Transfer	25	22.3
Transfer	87	77.7
TOTALS	112	100.0

Even though prosecutors select less than two percent of the eligible referrals for filing transfer motions, Table 25 shows that juvenile court judges do not rubber stamp prosecutorial transfer requests. Transfer was denied in twenty-two percent of the cases in which it was sought. Even allowing for a plea bargaining effect,<sup>128</sup> that seems a substantial

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123. TEX. FAM. CODE ANN. § 54.02(c) (Vernon 1986).

124. *Id.* § 54.02(a)(1).

125. *Id.* § 54.02(a)(2).

126. *Id.* § 54.02(a)(3).

127. *See supra* text accompanying note 33 (Texas version of the *Kent* criteria).

128. In an unknown number of cases in which the respondent was not transferred to criminal court, the motion to transfer may have been filed solely to obtain plea bargaining leverage over the respondent, not in serious expectation of transfer. In those cases, if the prosecutor is successful in his or her strategy, the case will not be transferred but the respondent will stipulate, plead guilty, to the charge in juvenile court. As part of the agreement leading to the stipulation, the prosecutor will withdraw the transfer motion. Obviously, in such a case it would be incorrect to conclude that the juvenile court judge in any sense denied the prosecutor's transfer request, for in reality there was none. The data collected do not indicate, when a case was not transferred, whether that was because the judge refused to transfer or because the prosecutor withdrew the transfer motion. In some cases, it can be deter-

denial rate. The next step is to determine what factors influence judicial transfer decisions. The same possibilities considered in the discussion of prosecutorial selection decisions will be considered here.

#### A. *The Offenses Alleged*

A prosecutor has discretion in drafting the transfer motion. He or she may seek transfer for as many offenses as the information available supports.<sup>129</sup> Table 26 shows the distribution of transfer motions by the number of offenses alleged in each motion.

TABLE 26  
TRANSFER MOTIONS BY NUMBER OF OFFENSES ALLEGED

No. Offenses Alleged	No. Motions	Percent
1	81	72.3
2	15	13.4
3	5	4.5
4	4	3.6
6	1	0.9
9	2	1.8
10	1	0.9
11	1	0.9
14	1	0.9
27	1	0.9
<b>TOTALS</b>	<b>228</b>	<b>100.1</b>

Although, on average, there were slightly more than two offenses alleged in each transfer motion, in almost three-fourths of the motions only one offense was alleged. There is no significant difference in the decision to transfer a case depending upon whether the transfer motion alleged one or more than one offense,<sup>130</sup> or whether it alleged one or two offenses, on the one hand, or more than two offenses, on the other.<sup>131</sup>

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mined from the juvenile disposition of the case following transfer denial whether the denial was a plea bargained event. See discussion *supra* pt. VI.

129. TEX. FAM. CODE ANN. § 53.04(a) (Vernon 1986) requires only that the prosecutor "has knowledge of the facts alleged or is informed and believes that they are true."

130. Chi-square for a two by two table of transfer decisions and whether the petition alleged one offense or more than one offense:  $X^2$  (1 df) = 0.2176.  $p > .05$ .

131. Chi-square for a two by two table of transfer decisions and whether the petition alleged fewer than three offenses or three or more offenses:  $X^2$  (1 df) = 0.1373.  $p > .05$ .

In order to transfer a respondent to criminal court, the juvenile court must determine that "because of the seriousness of the offense or the background of the child the welfare of the community requires criminal proceedings."<sup>132</sup> It might be expected, therefore, that there would be a relationship between the penalty category in which an offense fits and the willingness of the juvenile court to transfer that case to criminal court. Table 27 examines the relationship between the penalty category of the most serious offense alleged in each motion and the decision to transfer.

TABLE 27  
TRANSFER DECISION BY PENALTY CATEGORY

Penalty Category	No Transfer		Transfer		Totals	
	N	%	N	%	N	%
Capital Murder	2	16.7	10	83.3	12	100.0
1st Degree Felony	16	24.6	49	75.4	65	100.0
2nd Degree Felony	5	20.0	20	80.0	25	100.0
3rd Degree Felony	2	20.0	8	80.0	10	100.0
TOTALS	25	22.3	87	77.7	112	100.0

Table 27 does not support the hypothesis that penalty category, by itself, has an important influence on the decision to transfer a case. The differences displayed are not statistically significant.<sup>133</sup> While Table 27 shows that penalty category alone has no predictive value, it does not preclude the possibility that penalty category when combined with other variables might be predictive. It is possible that in prosecutorial selection of cases for filing transfer motions other considerations are combined with penalty categories. For example, prior referrals to the juvenile court or prior commitments to the state training school system might, when combined with penalty category, be useful in predicting transfer decisions. That possibility will be examined later.<sup>134</sup>

Although there is no demonstrated relationship between the transfer decision and the penalty category of the offense alleged, or the number of offenses alleged, there might be a relationship between spe-

132. TEX. FAM. CODE ANN. § 54.02(a)(3) (Vernon 1986).

133. Table 25  $X^2$  (3 df) = 0.5274.  $p > .05$ .

134. See *infra* text accompanying notes 163-64.

cific offense categories and the transfer decision. Table 28 examines offense categories and the transfer decision.

TABLE 28  
TRANSFER DECISION BY OFFENSE CATEGORY

Offense Category	No Transfer		Transfer		Totals	
	N	%	N	%	N	%
Homicide	4	13.3	26	86.7	30	100.0
Attempt Homicide	2	22.2	7	77.8	9	100.0
Sex Assault	3	27.3	8	72.7	11	100.0
Robbery	10	34.5	19	65.5	29	100.0
Agg. Assault	2	40.0	3	60.0	5	100.0
Burglary	2	16.7	10	83.3	12	100.0
Motor Vehicle	0	0.0	3	100.0	3	100.0
Drug Offenses	2	33.3	4	66.7	6	100.0
Others	0	0.0	7	100.0	7	100.0
TOTALS	25	22.3	87	77.7	112	100.0

Examining Table 28 in its entirety, there is no significant relationship among offense categories and the decision to transfer to criminal court.<sup>135</sup> Focusing on homicide offenses, there is no significant relationship between whether the offense is homicide or not and the decision to transfer.<sup>136</sup> Whether the offense is attempted homicide or not has no statistical relationship to the decision to transfer.<sup>137</sup> Whether the offense is sexual assault also has no statistical relationship to the transfer decision.<sup>138</sup> If the offense charged is robbery there is less likelihood of transfer than if it is not, but the relationship is not statistically established at the .05 level.<sup>139</sup> There is no statistical relationship between the charge of aggravated assault and the decision to transfer.<sup>140</sup> Similarly, there are no significant statistical relationships for burglary,<sup>141</sup> unauthorized use of a motor vehicle,<sup>142</sup> or drug of-

135. Table 26  $X^2$  (8 df) = 8.4427.  $p > .05$ .

136. Table 26  $X^2$  (1 df) = 1.9091 for homicide v. non-homicide.  $p > .05$ .

137. Table 26  $X^2$  (1 df) = 0.0001 for attempted homicide v. others.  $p > .05$ .

138. Table 26  $X^2$  (1 df) = 0.1725 for sexual assault v. others.  $p > .05$ .

139. Table 26  $X^2$  (1 df) = 3.3379 for robbery v. others.  $p > .05$ .

140. Table 26  $X^2$  (1 df) = 0.9434 for aggravated assault v. others.  $p > .05$ .

141. Table 26  $X^2$  (1 df) = 0.2479 for burglary v. others.  $p > .05$ .

142. Table 26  $X^2$  (1 df) = 0.8858 for unauthorized use of a motor vehicle v. others.  $p > .05$ .



fenses.<sup>143</sup> In summary, the only offense category that seems associated with whether there will be a transfer to criminal court is robbery, which appears less likely to be transferred than others, but the relationship falls just short of the .05 level.

Based on the third *Kent* criterion,<sup>144</sup> the juvenile statute requires the court to consider in making the transfer decision "whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person."<sup>145</sup> Table 29 separates the one hundred twelve cases into offenses against the person<sup>146</sup> and other offenses.

TABLE 29  
TRANSFER DECISIONS

Classification	No Transfer		Transfer		Totals	
	N	%	N	%	N	%
Against Person	21	23.6	68	76.4	89	100.0
Not Against Person	4	17.4	19	82.6	23	100.0
TOTALS	25	22.3	87	77.7	112	100.0

The irony of Table 29 is that a lower percentage, 76.4 percent, of offenses against the person were transferred to criminal court than of other offenses at 82.6 percent. While the difference is not statistically significant,<sup>147</sup> one would have expected, based on the Texas statute and this *Kent* criterion, a significant relationship in the opposite direction.

Since robbery was unusual in Table 28 in being less likely than other offenses to be transferred and since it is an offense against the person, the possibility exists that it alone may account for the distribution in Table 29. Eliminating robbery from Table 29, however, means that eighty-two percent of the offenses against the person were transferred to criminal court, while eighty-three percent of the other offenses were transferred.<sup>148</sup> So, robbery is not the explanation for the Table 29 event.

143. Table 26  $X^2$  (1 df) = 0.4434 for drug offenses v. others.  $p > .05$ .

144. See *supra* text accompanying note 23 (listing *Kent* criteria).

145. TEX. FAM. CODE ANN. § 54.02(f)(1) (Vernon 1986).

146. The eighty-nine offenses against the person include the eighty-four offenses in the first tier of Table 26 plus five of the seven offenses from the "Others" row.

147. Table 27  $X^2$  (1 df) = 0.4057.  $p > .05$ .

148. Table 26  $X^2$  (1 df) = 0.0100 without robbery.  $N = 83$ .  $p > .05$ .

There may be a relationship between offenses against the person and whether the respondent had one or more prior referrals to the juvenile court. Of the offenses against the person, seventy-nine percent had prior referrals, but of the other offenses, ninety-six percent had prior referrals. Whether a combination of offenses against the person and prior referrals is associated with transfer will be discussed in connection with the analysis of prior referrals.<sup>149</sup> Suffice it now to state the offense against the person, by itself, is not predictive of transfer despite the statutory directive to the contrary.

### B. *The Respondent's Age*

In making the transfer decision, a juvenile court is directed by statute to consider "the sophistication and maturity of the child"<sup>150</sup> and "the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court."<sup>151</sup> Those criteria are both arguably related to age of the child at the time of the offense, in which case they may reflect a belief in the lessened responsibility or culpability of children as compared with adults. Both criteria may also be related to age at the time of the transfer decision, in which case they may reflect a belief in the greater rehabilitation potential of children over adults.

Table 30 shows transfer decisions by the age of the respondent at the time of the offense.

TABLE 30  
TRANSFERS BY AGE AT OFFENSE

Age at Offense	No Transfer		Transfer		Totals	
	N	%	N	%	N	%
15	7	24.1	22	75.9	29	100.0
16	18	21.7	65	78.3	83	100.0
TOTALS	25	22.3	87	77.7	112	100.0

In Table 30, 77.7% of all cases were transferred. A higher percent-

149. See discussion *infra* pt. V.C.

150. TEX. FAM. CODE ANN. § 54.02(f)(4) (Vernon 1986). Compare this section with the sixth *Kent* criterion. See discussion *supra* pt. II.

151. TEX. FAM. CODE ANN. § 54.02(f)(6) (Vernon 1986). Compare this section with the eighth *Kent* criterion. See discussion *supra* pt. II.

age, 78.3 percent, of the sixteen year olds were transferred than of fifteen year olds at 75.9 percent. But, the differences shown by Table 30 are not statistically significant.<sup>152</sup> Thus, although age at the time of the offense appeared to be a significant consideration in the prosecutor's decision to file a transfer motion rather than to treat the referral as a conventional delinquency case,<sup>153</sup> age does not, by itself, seem significant in the decision of the juvenile court judge to transfer the case to criminal court or retain juvenile jurisdiction.

If age were related to another variable in prosecutorial selection of cases in which to file transfer motions, that might disguise age as a factor in the judicial transfer decision. Suppose, for example, that prosecutors considered filing transfer motions against fifteen year olds only for very aggravated offenses. That might mean that the factor of youthfulness would be balanced by the factor of offense severity. Table 31 examines that possibility by comparing age at the time of the offense with the penalty category of the offense charged.

TABLE 31  
PENALTY CATEGORIES AND AGE AT OFFENSE

Age	Cap. Murder		1st Deg.		2nd Deg.		3rd Deg.		Totals	
	N	%	N	%	N	%	N	%	N	%
15	5	17.2	17	58.6	5	17.2	2	6.9	29	99.9
16	7	8.4	48	57.8	20	24.1	8	9.6	83	99.9
TOTALS	12	10.7	65	58.0	25	22.3	10	8.9	112	99.9

Table 31 shows some support for a theory of prosecutorial blending of age and penalty severity in selection of cases. Seventeen percent of the fifteen year olds were charged with capital murder, but only eight percent of the sixteen year olds. About the same percentages were charged with first degree felonies, but a higher percentage of sixteen year olds were charged with second and third degree felonies. The results, however, are not significant at the .05 level.<sup>154</sup> Penalty category, by itself, cannot explain the apparent lack of influence of age at the time of the offense on the judicial transfer decision.

Eliminating age at the time of the offense as a significant influence on the judicial transfer decision does not eliminate the possible impor-

152. Table 30  $X^2$  (1 df) = 0.0745.  $p > .05$ .

153. See discussion *supra* pt. IV.B.

154. Table 31  $X^2$  (3 df) = 2.1917.  $p > .05$ .

tance of age in the court's decision. It is possible that age at the time the transfer decision is made may be a significant factor in the decision. One of the Texas *Kent* criteria requires the juvenile court to consider "the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court."<sup>155</sup> One ingredient in that determination might be how much time the juvenile system would have to rehabilitate the respondent if transfer to criminal court were denied. That would turn mainly on the age of the respondent at the time the transfer decision is being made.

The time from the commission of the offense to the decision whether to transfer to criminal court is varied and can be substantial. The number of days from the offense to the transfer decision ranged from eight to three hundred seventy-two<sup>156</sup> with a mean of about eighty-five days. It is possible that the variations in the time from the offense to the transfer decision, when added to the respondents' ages at the time of the offenses, may affect the courts' decisions. Table 32 explores that possibility for the 109 cases on which this information is available.

TABLE 32  
TRANSFERS BY AGE AT COURT DECISION

Age at Decision	No Transfer		Transfer		Totals	
	N	%	N	%	N	%
15	4	23.5	13	76.5	17	100.0
16	12	20.3	47	79.7	59	100.0
17 or over	6	18.2	27	81.8	33	100.0
TOTALS	22	20.2	87	79.8	109	100.0

The percentage of respondents transferred increased with their ages at the time of the decision, from seventy-seven percent for fifteen year olds to eighty-two percent for those seventeen or older. This difference is not, however, statistically significant.<sup>157</sup> We must conclude, therefore, that age at the time of transfer, by itself, has no significant influence on the transfer decision in this sample.

155. TEX. FAM. CODE ANN. § 54.02(f)(6) (Vernon 1986).

156. The actual range was 8 to 1465. I have, however, eliminated the largest case and a 518 day case as outliers.

157. Table 32  $X^2$  (2 df) = 0.201.  $p > .05$ .

### C. *Prior Record*

A Texas *Kent* criterion requires a juvenile court to take into account in making a transfer decision "the record and previous history of the child."<sup>158</sup> Prior record was earlier suggested as a factor in the prosecutor's decision to file a motion to transfer.<sup>159</sup> Do courts also take prior record into account in deciding whether to transfer? Or, is the significance of prior record exhausted by the filing decision so that it plays no role in the transfer decision? Does it matter whether one is examining prior referrals to the juvenile court or prior commitments to the state training school? Certainly, if the juvenile court takes seriously the Texas *Kent* criterion that it consider "the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of the procedures, services, and facilities currently available to the juvenile court"<sup>160</sup> it would look carefully at prior efforts by the juvenile system to rehabilitate the respondent as a major consideration in the decision to transfer.

Table 33 examines the relationship between transfer decisions and prior referrals to the juvenile court.

TABLE 33  
TRANSFER DECISIONS BY PRIOR REFERRALS

Prior Referrals	No Transfer		Transfer		Totals	
	N	%	N	%	N	%
No Priors	3	15.0	17	85.0	20	100.0
Prior Referrals	22	23.9	70	76.1	92	100.0
<b>TOTALS</b>	<b>25</b>	<b>22.3</b>	<b>87</b>	<b>77.7</b>	<b>112</b>	<b>100.0</b>

Table 33 suggests there is an inverse relationship between prior referrals and willingness of a juvenile court to transfer a case to criminal court. Eighty-five percent of the cases without prior referrals were transferred, while only seventy-six percent of the cases with prior referrals were transferred. The results, however, are not statistically significant.<sup>161</sup> Table 33 certainly does not, by itself, support the prop-

158. TEX. FAM. CODE ANN. § 54.02(f)(5) (Vernon 1986). Compare to the seventh *Kent* criterion. See *supra* text accompanying note 23.

159. See discussion *supra* pt. IV.C.

160. TEX. FAM. CODE ANN. § 54.02(f)(6) (Vernon 1986). Compare this section with the eighth *Kent* criterion. See *supra* text accompanying note 23 (listing *Kent* criteria).

161. Table 33  $X^2$  (1 df) = 0.7527.  $p > .05$ .

osition that juvenile court judges are following the Texas *Kent* criterion to take prior record into account in making transfer decisions.

Table 34 examines the relationship between prior commitments to the state training school system and the transfer decision.

TABLE 34  
TRANSFER DECISIONS BY PRIOR COMMITMENTS

Prior Commit.	No Transfer		Transfer		Totals	
	N	%	N	%	N	%
No Commitment	19	24.0	60	76.0	79	100.0
Commitment(s)	6	18.2	27	81.8	33	100.0
TOTALS	25	22.3	87	77.7	112	100.0

Table 34 hints at a positive relationship between prior commitments to the state training school and judicial willingness to transfer a case to criminal court. Only seventy-six percent of the cases without prior commitments were transferred, while eighty-two percent of those with commitments were transferred. However, this result is not statistically significant.<sup>162</sup>

Is there a relationship between the penalty category of the offense alleged and the number of prior referrals to the juvenile court? In other words, are prosecutors selecting cases in which to file transfer motions by a combination of offense seriousness and prior referrals? If so, that would tend to homogenize the perceived gravity of the cases as they would appear to a juvenile court judge and may account for the lack of relationship between the transfer decision and either offense seriousness or prior referrals. Table 35 examines that question.

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162. Table 34  $X^2$  (1 df) = 0.4624.  $p > .05$ .

TABLE 35  
OFFENSE SERIOUSNESS AND PRIOR REFERRALS

Penalty Category	No Priors		Priors		Totals	
	N	%	N	%	N	%
Capital Murder	5	41.7	7	58.3	12	100.0
1st Degree Felony	13	20.0	52	80.0	65	100.0
2nd Degree Felony	2	8.0	23	92.0	25	100.0
3rd Degree Felony	0	0.0	10	100.0	10	100.0
TOTALS	20	17.9	92	82.1	112	100.0

In fifty-eight percent of the capital murder cases, the respondent had one or more prior referrals to the juvenile court, while there were prior referrals on eighty percent of the first degree felonies, ninety-two percent of the second degree felonies and one hundred percent of the third degree felonies. In other words, as the seriousness of the offense decreased, the likelihood increased that the case was one in which the respondent had previously been referred to the juvenile court. The differences in Table 35 are statistically significant.<sup>163</sup>

Table 35 suggests that prosecutors may use a combination of offense severity and whether there have been prior referrals to the juvenile court in deciding to file transfer motions. If that is in fact occurring, then there will be either offense severity or prior referrals, probably in significant numbers, in virtually every case heard by a juvenile court on a transfer motion. To the extent the *Kent* criteria must be applied by a juvenile court in a comparative manner, these two criteria—offense severity and prior referrals—would tend to cancel out each other because of prosecutorial selection methods.

Is there a similar relationship between offense severity and whether the respondent had previously been committed to the state training school system? Table 36 examines that relationship.

163. Table 35  $X^2$  (3 df) = 8.6711.  $p \leq .05$ .

TABLE 36  
OFFENSE SERIOUSNESS AND PRIOR COMMITMENTS

Penalty Category	No Commit.		Commitment		Totals	
	N	%	N	%	N	%
Capital Murder	10	83.3	2	16.7	12	100.0
1st Degree Felony	51	78.5	14	21.5	65	100.0
2nd Degree Felony	13	52.0	12	48.0	25	100.0
3rd Degree Felony	5	50.0	5	50.0	10	100.0
TOTALS	79	70.5	33	29.5	112	100.0

Table 36 shows much the same relationship as Table 35. While the respondents in only seventeen percent of the capital murder cases had previously been committed to the state training school system, that percentage increases as the seriousness of the offense decreases, so that for third degree felonies fifty percent of the respondents had been previously committed. These differences are also statistically significant.<sup>164</sup>

Table 37 examines the relationship between whether the offense is against the person and whether there were prior referrals to the juvenile court.

TABLE 37  
OFFENSES AGAINST THE PERSON AND PRIOR REFERRALS

Offense Category	No Priors		Priors		Totals	
	N	%	N	%	N	%
Against Person	19	21.4	70	78.7	89	100.1
Not Against Person	1	4.4	22	95.7	23	100.1
TOTALS	20	17.9	92	82.1	112	100.0

While seventy-nine percent of the respondents charged with offenses against the person had prior referrals to the juvenile court, ninety-six percent of those charged with offenses that were not against the person had prior referrals. This suggests that the lack of a relationship between whether the offense is against the person and the transfer decision<sup>165</sup> may be explained by a compensating variable of prior referrals to the juvenile court. A juvenile court considering whether to

164. Table 36  $X^2$  (3 df) = 8.6711.  $p \leq .05$ .

165. See *supra* text accompanying note 147 (finding more offenses against property were referred than were offenses against the person).



transfer a case involving an offense against the person is less likely to be considering a respondent with prior referrals to the system than when considering an offense that is not against the person. The distribution in Table 37 is just short of being statistically significant at the .05 level.<sup>166</sup>

Table 38 examines the relationship between whether the charge is an offense against the person and prior commitments to the juvenile training school.

TABLE 38  
OFFENSES AGAINST THE PERSON AND PRIOR COMMITMENTS

Offense Category	No Commit.		Commitments		Totals	
	N	%	N	%	N	%
Against Person	67	75.3	22	24.7	89	100.0
Not Against Person	12	52.2	11	47.8	23	100.0
TOTALS	79	70.5	33	29.5	112	100.0

The distribution in Table 38 is statistically significant.<sup>167</sup> While in twenty-five percent of the offenses against the person the respondent had one or more prior commitments to the state training school, in forty-eight percent of the cases not involving offenses against the person there had been such a commitment. This corroborates a theory that prosecutors are combining offense seriousness (this time, measured by whether the offense is against the person or not) and prior commitment to the state training school system in making the decision whether to file a transfer motion.

Facing such a selection of cases, a juvenile court will be considering a transfer request in a case that is against the person or will be considering a case that is not against the person but in which it is more likely the respondent has previously been committed to the state training school system. Once again, these two *Kent* criteria have a tendency to cancel each other out because of prosecutorial selection practices.

#### D. Race/Ethnicity

Race/ethnicity was tentatively shown to be a basis for prosecutorial

166. Table 37  $X^2$  (1 df) = 3.6011.  $p > .05$ .

167. Table 38  $X^2$  (1 df) = 4.6955.  $p \leq .05$ .

selection of cases in which to file motions to transfer.<sup>168</sup> Is it also a basis for juvenile court selection of which cases to transfer to criminal court? Table 39 examines that question.

TABLE 39  
TRANSFER DECISIONS BY RACE/ETHNICITY

Race/Ethnicity	No Transfer		Transfer		Totals	
	N	%	N	%	N	%
White	3	14.3	18	85.7	21	100.0
Hispanic	12	25.5	35	74.5	47	100.0
Black/Other	10	22.7	34	77.3	44	100.0
TOTALS	25	22.3	87	77.7	112	100.0

Table 39 shows that a higher percentage of whites were transferred, eighty-six percent, than of blacks/others, seventy-seven percent, or Hispanics, seventy-five percent. Table 39 as a whole, however, does not display differences that are statistically significant.<sup>169</sup> Even when whites are compared with all other races/ethnic groups in a two-by-two table, there is no significant difference.<sup>170</sup> The same is true when Hispanics<sup>171</sup> and blacks/others<sup>172</sup> are each compared with other races/ethnic groups.

If it is true that juvenile courts transfer a higher percentage of whites to criminal court than other racial/ethnic groups, that might be explainable by prosecutorial decision-making in favor of whites in the selection process. In other words, if prosecutors are filing transfer motions more readily in cases involving blacks and Hispanics than in those involving whites, then the cases of whites in which motions *are* filed will likely be more aggravated, as a group, than cases filed against blacks or Hispanics. That may, in turn, account for a higher juvenile court transfer rate for whites than for blacks or Hispanics, assuming for the moment that there is really is such a higher rate.

168. See discussion *supra* pt. IV.D.

169. Table 39  $X^2$  (2 df) = 1.0656.  $p > .05$ .

170.  $X^2$  (1 df) = 0.9625 for a 2 by 2 table of whites v. other races/ethnic groups.  $p > .05$ .

171.  $X^2$  (1 df) = 0.4814 for a 2 by 2 table of Hispanics v. other races/ethnic groups.  $p > .05$ .

172.  $X^2$  (1 df) = 0.0069 for a 2 by 2 table of blacks/others v. other races/ethnic groups.  $p > .05$ .

E. *Sex*

In earlier discussion, the sex of the person referred to the juvenile court was found to be a significant factor in the prosecutor's decision whether to file a transfer motion or to proceed with the referral as a conventional delinquency case.<sup>173</sup> Only two of the one hundred twelve motions were filed against females. Neither was transferred to criminal court. Table 40 examines the relationship between gender and the transfer decision.

TABLE 40  
TRANSFER DECISIONS BY SEX

Sex	No Transfer		Transfer		Totals	
	N	%	N	%	N	%
Female	2	100.0	0	0.0	2	100.0
Male	23	20.9	87	79.1	110	100.0
TOTALS	25	22.3	87	77.7	112	100.0

Table 40 suggests that gender is a basis for decision by juvenile court judges in making the transfer decision. The results are significant at the .05 level.<sup>174</sup> The number of females against whom transfer motions were filed is too small to permit statistical analysis of whether there is a relationship between gender and the penalty category of the offense charged, whether the respondent had a prior referral to the juvenile court, and whether the respondent had a prior commitment to the state training school system.

F. *The Differences Among Counties*

The county in which the case was referred was shown to be important in whether a felony case against a fifteen or sixteen year old would be handled as a juvenile case or whether transfer to criminal court would be sought.<sup>175</sup> Is there a similar difference among counties as to the transfer decision? Table 41 shows the transfer decisions in the 112 cases in which motions were filed by the county in which the decision was made.

173. See discussion *supra* pt. IV.E.

174. Table 40  $X^2$  (1 df) = 7.0865.  $p \leq .05$ .

175. See discussion *supra* pt. IV.F.

TABLE 41  
TRANSFER DECISIONS BY COUNTIES

County	No Transfer		Transfer		Totals
	N	%	N	%	
Dallas	15	38.5	24	61.5	39
Harris	1	11.1	8	88.9	9
Tarrant	4	44.4	5	55.6	9
Bexar	0	0.0	5	100.0	5
El Paso	0	0.0	4	100.0	4
Hidalgo	0	0.0	4	100.0	4
Nueces	0	0.0	4	100.0	4
Cameron	1	33.3	2	66.7	3
Fort Bend	0	0.0	3	100.0	3
Hood	0	0.0	3	100.0	3
Travis	2	66.7	1	33.3	3
Brazos	0	0.0	2	100.0	2
Ellis	0	0.0	2	100.0	2
Galveston	0	0.0	2	100.0	2
Jefferson	0	0.0	2	100.0	2
San Patricio	1	50.0	1	50.0	2
Val Verde	0	0.0	2	100.0	2
14 Others	1	7.1	13	92.9	14
<b>TOTALS</b>	<b>25</b>	<b>22.3</b>	<b>87</b>	<b>77.7</b>	<b>112</b>

Although transfer decisions varied among counties from a high of one hundred percent of all motions to transfer being granted to a low of one-third granted, the differences shown by Table 41 as a whole are not statistically significant.<sup>176</sup> If we focus on the four most populous counties and compare each with all the other counties for significant differences, we find no significant differences between Harris County and all other counties,<sup>177</sup> between Bexar County and all other counties,<sup>178</sup> or between Tarrant County and all other counties.<sup>179</sup> However, there is a significant difference between Dallas County and all other counties. Table 42 shows the distribution.

176. Table 41  $X^2$  (30 df) = 30.2465.  $p > .05$ .

177.  $X^2$  (1 df) = 0.7093 for a 2 by 2 table from Table 41 of Harris County v. all others.  $p > .05$ .

178.  $X^2$  (1 df) = 1.5039 for a 2 by 2 table from Table 41 of Bexar County v. all others.  $p > .05$ .

179.  $X^2$  (1 df) = 2.7624 for a 2 by 2 table from Table 41 of Tarrant County v. all others.  $p > .05$ .

TABLE 42  
TRANSFER DECISIONS: DALLAS COUNTY AND ALL OTHERS

County	No Transfer		Transfer		Totals	
	N	%	N	%	N	%
Dallas	15	38.5	24	61.6	39	100.1
All Others	10	13.7	63	86.3	73	100.0
TOTALS	25	22.3	87	77.7	112	100.0

Overall, seventy-eight percent of the transfer motions resulted in the respondent being transferred to criminal court. In Dallas County only sixty-two percent of all motions resulted in transfer, while in all other counties combined, eighty-six percent of the respondents were transferred. These differences are statistically significant.<sup>180</sup>

To some extent, this exact result should be expected. Dallas County is much more aggressive in the cases selected for filing transfer motions.<sup>181</sup> It should, therefore, not be surprising that its success rate, at least as measured by percentage of cases transferred, is significantly lower.

#### VI. OUTCOMES IN THE JUVENILE PROCESS AFTER DENIAL OF TRANSFER

In twenty-five of the one hundred twelve cases in which motions to transfer were filed, the respondent was retained in the juvenile system. What were the juvenile court dispositions in those cases? That is an inherently interesting question, but its answer also may assist in understanding why those cases were not transferred. In addition to the twenty-five retained cases, there were three cases in which the respondent was transferred to criminal court, but there was also a disposition in juvenile court. Those cases will be analyzed as well.

Table 43 shows the outcomes of the twenty-five cases in which motions to transfer were denied by the juvenile court or in which the motion was withdrawn by the prosecutor.<sup>182</sup>

180. Table 42  $X^2$  (1 df) = 8.9898.  $p \leq .05$ .

181. See discussion *supra* pt. IV.F.

182. The data do not ordinarily indicate whether the motion to transfer was denied by the juvenile court or was withdrawn by the prosecutor. See appendix A (reporting form).

**TABLE 43**  
**TRANSFER DENIALS: JUVENILE COURT DISPOSITIONS**

Juvenile Court Disposition	N	%
Dismissed	12	48.0
Juvenile Commitment	8	32.0
Determinate Sentence	2	8.0
Juvenile Probation	2	8.0
Juvenile Parole Revocation	1	4.0
<b>TOTALS</b>	<b>25</b>	<b>100.0</b>

In almost one-half of the denials, the case against the respondent was dismissed. In the balance of the cases, the respondent either was adjudicated delinquent or was returned to the state training school system as a parole violator.

Relating the juvenile court disposition temporally to the transfer denial may yield information as to the reasons for the denial. Table 44 provides this relationship.

**TABLE 44**  
**TRANSFER DENIALS: JUVENILE DISPOSITIONS AND TIMES**

Juvenile Disposition	Same Day		Later Day		Totals	
	N	%	N	%	N	%
Dismissed	10	83	2	17	12	100.0
Juvenile Commitment	4	50	4	50	8	100.0
Determinate Sentence	0	0	1	100	1	100.0
Juvenile Probation	0	0	2	100	2	100.0
<b>TOTALS</b>	<b>14</b>	<b>61</b>	<b>9</b>	<b>39</b>	<b>23</b>	<b>100.0</b>

The number of days from the transfer denial to the juvenile court disposition in the twenty-three cases for which this information is available ranged from zero to 275, with a mean of about thirty-four days. In ten of the cases in which transfer was denied and the case was dismissed in the juvenile court, both actions were taken on the same day. Nine of the ten were in Dallas County. Six of the offenses were robbery or aggravated robbery, two were capital murder, one was attempted murder, and one was aggravated sexual assault.

In those ten cases, the conclusion seems inescapable that there was a failure of proof at the time the transfer hearing was scheduled to begin. A witness could not be located to be subpoenaed, or did not appear although subpoenaed, or changed his or her story at the last

minute. The transfer hearing could not go forward because the juvenile court could not make the statutory finding of "probable cause"<sup>183</sup> or, even if such a finding could be made, criminal conviction or juvenile adjudication would ultimately prove impossible. The only course of action available, if the juvenile court rejected a prosecutorial request for postponement of the hearing, was to withdraw the transfer motion and dismiss the juvenile case. So, it seems safe to conclude that in about forty-three percent of the transfer denials, ten of twenty-three, the reason was failure of proof, rather than an exercise of discretionary judgment by the juvenile court.

If the State of Texas had shown probable cause in the hearing, but the juvenile court denied transfer on discretionary grounds, the respondent would still have been subject to juvenile adjudication proceedings for the same offense. Certainly, if that were true, one would expect vigorous pursuit of juvenile proceedings, at least in the two capital murder cases that were dismissed on the same day the transfer motions were denied.

In an additional eight of twenty-three retained cases, the respondent received an indeterminate commitment to the state training school system. Four of those occurred on the same day transfer was denied. Those four were, therefore, almost certainly plea-bargained dispositions. It would not have been possible to have conducted adversarial adjudication and disposition hearings on the same day the transfer hearing was scheduled. One must assume that in those four cases the parties agreed to settle the case by an indeterminate commitment to the training school system in lieu of going forward with the transfer hearing.

In the balance of the denials, nine cases, the lapse of time from the transfer denial to the dismissal or other juvenile court disposition ranged from six to two hundred seventy-five days. It is almost certain that in those cases additional decision-making occurred between the transfer denial and the disposition. In those cases, the transfer denial and the ultimate disposition were apparently not coupled. After denial, the cases proceeded as juvenile cases, with the varied outcomes shown in Table 43.

Tables 43 and 44 shed some light of the extent to which juvenile court denials of transfer motions are based on discretionary factors or

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183. TEX. FAM. CODE ANN. § 54.02(a)(3) (Vernon Supp. 1991).

are based on other considerations. Probably only nine of the twenty-three denials on which dispositional and time data are available *could* have been the result of juvenile court discretionary decision-making. In fourteen others—ten dismissals on the same day as the denial and four indeterminate commitments on the same day—the juvenile court almost certainly did not exercise discretion to deny transfer. Transfer was denied, but for other reasons, either failure of proof or plea bargaining between the State and the respondent. Therefore, the juvenile court *discretionary* denial rate is probably nine out of one hundred ten, or eight percent, in contrast to the overall denial rate of twenty five out of one hundred twelve, or twenty-two percent.

Is there a relationship between the offense charged and outcomes in the juvenile court after transfer denial? Table 45 examines that question. Juvenile dispositions are divided into dismissed versus all others. The offenses are separated into robbery, homicide, and sexual assault (the three most frequent offenses in prosecutorial selection of cases in which to file transfer motions);<sup>184</sup> and all others.

TABLE 45  
TRANSFER DENIALS: JUVENILE DISPOSITIONS BY OFFENSE

Offense	Dismissed		Other		Total	
	N	%	N	%	N	%
Robbery	7	70.0	3	30.0	10	100.0
Homicide	2	50.0	2	50.0	4	100.0
Sex Assault	1	33.3	2	67.7	3	100.0
Others	2	25.0	6	75.0	8	100.0
TOTALS	12	48.0	13	52.0	25	100.0

The differences displayed by Table 45 are not statistically significant.<sup>185</sup> Seventy percent of the robbery cases in which transfer was denied were dismissed, compared to forty-eight percent of all cases of transfer denial. Focusing on robbery cases, and bifurcating the offenses into robbery and others, seventy percent of the robbery transfer denials resulted in dismissal while thirty-three percent of the denials in all other cases resulted in dismissal. This is not statistically signifi-

184. See *supra* Table 2.

185. Table 44  $X^2$  (3 df) = 3.899.  $p > .05$ .



cant either, at least not based on this small sample size.<sup>186</sup>

In addition to the twenty-five retained cases, in three cases the respondent was transferred to criminal court, but there was also a disposition in the juvenile system. In one case, it is apparent that plea bargaining about a juvenile disposition continued even after the respondent was transferred to criminal court. The respondent was transferred and was indicted for murder. There was a pretrial hearing before the criminal court and an apparent agreement to return the case to juvenile court for disposition. The criminal charges were dismissed and the respondent returned to the juvenile court. The respondent was there adjudicated on the lesser included charge of voluntary manslaughter and given an indeterminate commitment to the state training school.

In a second case, the respondent was transferred to criminal court for a murder committed while on parole from the state training school. He was acquitted in a trial in criminal court. Upon acquittal, he was remanded to the juvenile court, parole was revoked, and he was returned to the training school as a parole violator.

In a third case, the respondent, a juvenile parolee, was transferred to criminal court on a transfer motion that alleged twenty-seven counts of burglary. He waived indictment and plead guilty to one count of burglary, for which he received a term of eight years adult probation supervision. He was then remanded to the juvenile system, where his parole was revoked and he was returned to the training school as a parole violator.

In the latter two cases, the criminal process, by itself, was believed not to be sufficient. Therefore, the juvenile system was invoked to handle the deficiency. One of the ironies of the transfer process, discussed later,<sup>187</sup> is that the criminal process sometimes is more lenient on the transferred juvenile than the juvenile process probably would have been had there not been a transfer.

## VII. OUTCOMES IN THE CRIMINAL PROCESS AFTER TRANSFER

There were one hundred twelve motions for transfer filed during fiscal 1988. In twenty-five of those cases, the respondent was retained

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186.  $X^2$  (1 df) = 3.2318 for a  $2 \times 2$  table of robbery v. all others and dismissal v. all others.  $p > .05$ .

187. See discussion *infra* pts. VII - VII.A.2.b.

in the juvenile system and in eighty-seven he was transferred to the criminal system. Over eighteen months after the end of the fiscal year under study, six of the eighty-seven transferred cases had not yet been disposed of in the criminal system.<sup>188</sup> In addition, criminal case disposition data concerning two cases, both capital murder, could not be obtained because local officials failed to respond to repeated requests for information.

Thus, there are a total of eight cases, six with no dispositions and two with no information, that must be excluded from the analysis of outcomes in the criminal process. That leaves seventy-nine cases for discussion.

Table 46 shows the dispositions of those seventy-nine cases by the criminal courts.

TABLE 46  
TRANSFERS: CRIMINAL COURT DISPOSITIONS

<u>Criminal Court Disposition</u>	<u>Freq.</u>	<u>Percent</u>
Prison Sentence	46	58.2
Probation	21	26.6
Dismissed	9	11.4
Not Guilty	1	1.3
Shock Probation	1	1.3
Returned to Juvenile Court	1	1.3
TOTALS	79	100.1

In eleven of the seventy-nine cases (nine dismissals, one not guilty, and one returned to juvenile court), the transferred respondent was not convicted of any offense in the criminal court—about fourteen percent of the cases transferred. In those cases, the transfer process was a waste in the sense that the result was one that certainly could have been obtained in the juvenile process with much less effort and resource expenditure. But that is an unfair retrospective judgment to make because doubtless in most of those cases it could not have been known at the time of the juvenile transfer proceedings that the results would be nullified in the criminal court.

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188. Three cases, capital murder, attempted murder, and robbery, had future trial settings. One case, attempted murder, had no trial setting because the defendant had jumped bond. Two cases, unauthorized use of a motor vehicle and attempted murder, simply had never had trial settings in the criminal court during that eighteen month period.

In the balance of this section, two major questions are addressed: whether the criteria employed determine if the transferred juvenile will receive a sentence of imprisonment, and if so, whether the criteria employed determine the length of the prison sentence. Understanding what happens to juveniles after transfer and why should assist in understanding the transfer process itself.

#### A. *Imprisonment Rates*

About fifty-eight percent of the transferred juveniles received prison sentences. Of the balance, almost all remained in the community, with or without court supervision. Thus, a prison sentence is far from certain after transfer. This is remarkable given the legal restrictions on transfers to felony cases,<sup>189</sup> the extreme selectivity with which prosecutors file transfer motions (less than two percent of felony referrals),<sup>190</sup> and the screening effected by the judicial transfer process, resulting in twenty-two percent of the cases not being transferred.<sup>191</sup>

If obtaining a prison sentence were the sole motive for filing a transfer motion, prosecutors were successful in only about forty percent of their cases—forty-six sentences of one hundred twelve motions filed. As later discussion will indicate, however, a prison sentence is the apparent goal in only some of the cases in which prosecutors file transfer motions.

##### 1. *Seriousness of the Offense*

One would expect that the seriousness of the offense would have a major influence on whether a transferred juvenile is sentenced to prison. Table 47 shows the relationship of prison sentences to penalty category.

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189. *See supra* text accompanying note 32 (listing considerations for transfer from juvenile court to district court).

190. *See supra* note 39.

191. *See supra* Table 28.

TABLE 47  
IMPRISONMENT RATES BY PENALTY CATEGORY

Penalty Category	Prison		No Prison		Totals	
	N	%	N	%	N	%
Capital Murder	6	85.7	1	14.3	7	100.0
1st Degree Felony	30	61.2	19	38.8	49	100.0
2nd Degree Felony	10	62.5	6	37.5	16	100.0
3rd Degree Felony	0	0.0	7	100.0	7	100.0
TOTALS	46	58.2	33	41.8	79	100.0

As would be expected, there is a definite relationship between the seriousness of the offense and whether the case resulted in a prison sentence. The differences displayed in Table 47 are statistically significant.<sup>192</sup> Particularly noteworthy is the category of third degree felonies in which one hundred percent of the seven cases did not result in imprisonment. Of course, the imprisonment rate for third degree felonies is significantly lower than for the other three penalty categories combined.<sup>193</sup>

While the difference between capital murder and all other penalty categories is not statistically significant,<sup>194</sup> that may be because of the substantial number of non-capital homicide cases that are first or second degree felonies. Table 48 shows a significant difference between imprisonment rates for homicide cases, including capital murder, and all other cases.

TABLE 48  
IMPRISONMENT RATES: HOMICIDES V. OTHER

Offense	Prison		No Prison		Totals	
	N	%	N	%	N	%
Homicide	18	78.3	5	21.7	23	100.0
All Others	28	50.0	28	50.0	56	100.0
TOTALS	46	58.2	33	41.8	79	100.0

While fifty-eight percent of all the cases received a prison sentence,

192. Table 46  $X^2$  (3 df) = 12.2328.  $p \leq .05$ .

193.  $X^2$  (1 df) = 10.7062 for a 2 by 2 table from Table 46 of third degree felonies v. all others.  $p \leq .05$ .

194.  $X^2$  (1 df) = 2.3857 for a 2 by 2 table from Table 46 of capital murder cases v. all others.  $p > .05$ .

seventy-eight percent of all homicide cases resulted in a prison sentence and only fifty percent of non-homicide cases resulted in prison sentences. This difference is statistically significant.<sup>195</sup> This result corresponds to the emphasis prosecutors place on homicides in selecting cases in which to file motions for transfer.<sup>196</sup>

In the non-homicide cases disposed of by criminal courts, fifty percent received prison sentences and fifty percent did not. The fifty-six non-homicide cases are scattered among fourteen different offense categories. Only two, robbery and burglary, have sufficient frequencies—eighteen and ten respectively—to permit meaningful statistical comparison to the other non-homicide cases. Table 49 displays the differences in imprisonment rates for aggravated robbery and robbery cases combined versus all other non-homicide cases.

TABLE 49  
IMPRISONMENT RATES: ROBBERY V. OTHER NON-HOMICIDE

Offense	Prison		No Prison		Totals	
	N	%	N	%	N	%
Robbery	13	72.2	5	27.8	18	100.0
Other Non-Homicides	15	39.5	23	60.5	38	100.0
TOTALS	28	50.0	28	50.0	56	100.0

The imprisonment rate for robberies was seventy-two percent, but for all other non-homicide offenses only forty percent. The difference is statistically significant.<sup>197</sup> This result should be compared to the indication that prosecutors select robbery for filing transfer motions proportionally more often than other non-homicide cases,<sup>198</sup> but that robbery cases in which transfer motions have been filed are transferred to criminal court somewhat less frequently than other non-homicide cases.<sup>199</sup> Table 49 supports the theory that the reason for judicial non-transfer of robbery cases is not a perceived lack of seriousness of those offenses, but rather failure of proof attributed primarily to lack of cooperation by the victim. When the proof is present and the respondent transferred, robbery cases result in imprisonment

195. Table 47  $X^2$  (1 df) = 5.3536.  $p \leq .05$ .

196. See *supra* Table 5.

197. Table 48  $X^2$  (1 df) = 5.2398.  $p \leq .05$ .

198. See *supra* Table 4.

199. See *supra* Table 28.

at a rate almost equal to homicide cases. The difference between the two is not statistically significant.<sup>200</sup>

The imprisonment rate for burglary is lower than for other non-homicide offenses. Is it significantly lower?

TABLE 50  
IMPRISONMENT RATES: BURGLARY V. OTHER NON-HOMICIDES

Offense	Prison		No Prison		Totals	
	N	%	N	%	N	%
Burglary	4	40.0	6	60.0	10	100.0
Other Non-Homicides	24	52.2	22	47.8	46	100.0
TOTALS	28	50.0	28	50.0	56	100.0

While the overall imprisonment rate in non-homicide cases is fifty percent and that of burglary cases is only forty percent, this difference is not on these data statistically significant.<sup>201</sup>

In summary, imprisonment rates seem responsive to the penalty category in which the offense fits, mainly because of the effects of the one hundred percent non-imprisonment rate for third degree felonies. Homicides result in imprisonment at a significantly higher rate than all other offenses. Among non-homicide offenses, robbery results in imprisonment at a significantly higher rate than others, and burglary results in imprisonment at a lower rate, but not significantly lower.

## 2. Respondent Characteristics

Data were obtained on five respondent characteristics: sex, age, race/ethnicity, prior referrals to the juvenile court, and prior commitments to the state training school system. Since motions to transfer were filed on only two females and neither was transferred to criminal court, sex must be discarded as a respondent characteristic variable. Any of the remaining characteristics could be influential in determining imprisonment rates.

### a. Age

The total range of age at the time of the offense is only twenty-four

200.  $X^2$  (1 df) = 0.1997 for a 2 by 2 table comparing imprisonment rates in homicide cases with those in robbery cases.  $p > .05$ .

201. Table 49  $X^2$  (1 df) = 0.4870.  $p > .05$ .

months—ages fifteen and sixteen. Nevertheless, age was shown to be a significant variable in prosecutorial selection of cases in which to file a transfer motion.<sup>202</sup> The older the respondent, the more likely it is the prosecutor will select the case as one of the few in which to file a transfer motion. However, age was not significant in the transfer decision itself.<sup>203</sup>

With respect to imprisonment rates, age has a slightly *negative* influence. That is, the older the respondent at the time of the offense, the slightly *less* likely it is that if he is transferred to criminal court, he will receive a prison sentence. For every *increase* of one month in the age of the respondent at the time of the offense, there is about an eight percent *decrease* in the likelihood of imprisonment.<sup>204</sup> The mean age at offense of the forty-six juveniles who were sentenced to prison was sixteen years, three months, while the mean age at offense of the thirty-three who were not sentenced to prison was sixteen years, seven months.

At first blush, this relationship seems bizarre. Conventional wisdom in criminal sentencing is that the younger the offender the greater the leniency. That, indeed, is one reason why a juvenile justice system exists. This apparently contradictory result can be explained, however, by prosecutorial selection of cases. The older the respondent, the more likely the prosecutor is to seek transfer. For a prosecutor to seek transfer of a younger respondent, some countervailing factor must be present. This is almost always an unusually serious offense or unusually aggravating circumstances of the offense. It would, therefore, be remarkable if age were positively related to imprisonment because it is almost certainly negatively related to the gravity of the offense.

202. See discussion *supra* pt. IV.B.

203. See discussion *supra* pt. V.B.

204. Logit regression analysis is appropriate when there is a dichotomous dependent variable and one or more continuous independent variables. For example, whether the transferred juvenile was imprisoned or not is the dichotomous dependent variable, while his age in months from one to twenty-four is the continuous independent variable under scrutiny. Logit regression yields a  $X^2$  statistic to test the statistical significance of the model. In this model,  $X^2$  (1 df) = 5.59.  $p \leq .05$ . So, the model is significant. The test also yields a coefficient of age, in this case it is -.0847236. That means that for every increase of one month in age, the likelihood of imprisonment drops by slightly over eight percent. Finally, the probability of that coefficient being zero is in this case 0.029—less than three percent.

For a discussion of logit regression analysis, see H. BLALOCK, SOCIAL STATISTICS 541-44 (2d ed. 1979).

Earlier, whether the offense was homicide or not was shown to be a material factor in the likelihood a criminal conviction would result in imprisonment.<sup>205</sup> Regressing whether the offense was homicide upon age results in a negative, significant coefficient. In other words, because of prosecutorial selectivity, the younger the respondent, the more likely it is he is before the court for a homicide offense. For every month of *increase* in the age of the respondent, there is a *decrease* of about eight percent in the likelihood the offense charged is a homicide.<sup>206</sup>

In summary, age is negatively related to imprisonment rate. The most likely explanation for this is that age is negatively related to offense seriousness and offense seriousness is positively related to imprisonment rate. For example, younger respondents were significantly more likely than older respondents to be charged with homicide offenses, which are in turn more likely to result in imprisonment upon transfer to criminal court.

#### b. Race/Ethnicity

Race/ethnicity was shown to be a significant factor in prosecutorial selection of the few cases in which transfer motions would be filed.<sup>207</sup> It was not shown to be a factor in the transfer decision itself.<sup>208</sup> Is race/ethnicity related to imprisonment rates?

Table 51 shows the relationship of the race/ethnicity of the respondent to whether he received a prison sentence.

TABLE 51  
IMPRISONMENT RATES BY RACE/ETHNICITY

Race	Prison		No Prison		Totals	
	N	%	N	%	N	%
White	10	55.6	8	44.4	18	100.0
Hispanic	17	58.6	12	41.4	29	100.0
Black/Other	19	59.4	13	40.6	32	100.0
TOTALS	46	58.2	33	41.8	79	100.0

205. See *supra* Table 47.

206. Regressing whether the offense was homicide on age:  $N = 79$ .  $X^2(1 \text{ df}) = 4.88$   $p \leq .05$ . The coefficient of age is  $-.0785635$  with  $p \leq .05$ .

207. See discussion *supra* pt. IV.D.

208. See discussion *supra* pt. V.D.



Table 51 does not show a statistically significant relationship between race/ethnicity and imprisonment upon conviction in criminal court following transfer from juvenile court.<sup>209</sup>

c. Prior Referrals

In conventional criminal sentencing, prior arrests, whether they result in convictions or not, are often important in determining punishment. Since these juveniles were just transferred to criminal court, they have not had the opportunity to acquire an adult criminal record. However, some had prior juvenile referrals. Table 52 explores the relationship between whether the respondent had a prior referral to the juvenile court and whether upon transfer and conviction he received a prison sentence from the criminal court.

TABLE 52  
IMPRISONMENT RATES: PRIOR JUVENILE REFERRALS

Referral Status	Prison		No Prison		Totals	
	N	%	N	%	N	%
No Prior Referrals	12	80.0	3	20.0	15	100.0
Prior Referrals	34	53.1	30	46.8	64	99.9
TOTALS	46	58.2	33	41.8	79	100.0

Table 52 suggests a negative relationship between whether the respondent had a prior referral to the juvenile court and whether he received a prison sentence from the criminal court. Eighty percent of the respondents with no prior referrals received prison sentences, while only fifty-three percent of those with prior referrals were sentenced to prison. The differences shown in Table 52 are just over the .05 level.<sup>210</sup>

This result should not be surprising in light of earlier discussions<sup>211</sup> suggesting that prosecutors select cases in such a way that less serious offenses are not selected for filing transfer motions unless there are respondent characteristics, such as age or prior juvenile referrals, that motivate interest in the case.

209. Table 51  $X^2$  (2 df) = 0.042.  $p > .05$ .

210. Table 52  $X^2$  (1 df) = 3.6085.  $p > .05$ .

211. See *supra* Table 35.

## d. Prior Prison Sentence

In conventional criminal sentencing, a prior prison sentence has a strong positive influence on whether the defendant will receive a prison sentence if convicted of a new offense. Is the same true of transferred juveniles? While none of the transferred juveniles could have had a prior adult prison sentence, some had been previously committed to the juvenile training school system. Table 53 explores that relationship.

TABLE 53  
IMPRISONMENT RATES: PRIOR JUVENILE COMMITMENTS

Commitment Status	Prison		No Prison		Totals	
	N	%	N	%	N	%
No Commitment	29	54.7	24	45.3	53	100.0
Prior Commitment	17	65.4	9	34.6	26	100.0
TOTALS	46	58.2	33	41.8	79	100.0

With an overall imprisonment rate of fifty-eight percent, about fifty-five percent of the respondents without a prior juvenile commitment received a prison sentence, while about sixty-five percent of those with one or more prior sentences received such a sentence. This is not, on these data, a statistically significant difference.<sup>212</sup>

## 3. County of Prosecution

Earlier, the county of prosecution was shown to have a powerful influence on the likelihood that an eligible referral will be selected for the filing of a transfer motion.<sup>213</sup> It was also shown to be significant in the transfer decision itself.<sup>214</sup> Is the county of prosecution also related to imprisonment rates upon conviction in transferred cases?

212. Table 53  $X^2$  (1 df) = 0.8161.  $p > .05$ .

213. See discussion *supra* pt. IV F.

214. See discussion *supra* pt. V.F.

TABLE 54  
IMPRISONMENT RATES: COUNTIES

County	Prison		No Prison		Totals	
	N	%	N	%		
Dallas	12	50.0	12	50.0	24	
Harris	7	87.5	1	12.5	8	
Bexar	3	75.0	1	25.0	4	
Tarrant	3	100.0	0	9.0	3	39
Nueces	3	75.0	1	25.0	4	
El Paso	2	67.7	1	33.3	3	
Hood	0	0.0	3	100.0	3	
Brazos	0	0.0	2	100.0	2	
Cameron	2	100.0	0	0.0	2	
Ellis	2	100.0	0	0.0	2	
Fort Bend	1	50.0	1	50.0	2	
Galveston	1	50.0	1	50.0	2	
Hidalgo	2	100.0	0	0.0	2	
Jefferson	1	50.0	1	50.0	2	
Val Verde	2	100.0	0	0.0	2	
OTHERS (1 each)	7	50.0	7	50.0	14	40
TOTALS	46	58.2	33	41.7		79

While Table 54 shows differences in imprisonment rates by counties, as a whole they are not statistically significant.<sup>215</sup>

The imprisonment rate in the four largest counties—Harris, Dallas, Bexar, and Tarrant—was 64.1 percent while the rate in all other counties was 52.5 percent, with the rate overall at 58.2 percent. This suggests a higher rate in the larger counties, but the difference is not statistically significant.<sup>216</sup>

The four most populous counties accounted for almost fifty percent of the transferred and convicted juveniles disposed of by the criminal courts. Previously, Dallas County was statistically different from the other three.<sup>217</sup>

215. Table 54  $X^2$  (28 df) = 35.6597.  $p > .05$ .

216.  $X^2$  (1 df) = 1.0929 for a 2 by 2 table from Table 54 of the four largest counties v. all others.  $p > .05$ .

217. See discussion *supra* pt. IV.F.

TABLE 55  
 IMPRISONMENT RATES: DALLAS V. OTHER LARGE COUNTIES

County	Prison		No Prison		Totals	
	N	%	N	%	N	%
Dallas	12	50.0	12	50.0	24	100.0
Other Three	13	87.5	2	12.5	15	100.0
TOTALS	25	64.1	14	35.9	39	100.0

Table 55 shows that in Dallas County fifty percent of convicted transferred juveniles received a prison sentence, while in the other three large counties eighty-eight percent were imprisoned. Table 55 shows significantly lower imprisonment rate in Dallas County than in the other three large counties combined.<sup>218</sup>

This result should not be surprising. Earlier, it was shown that Dallas County was distinctive among the four largest counties in the rate at which it files motions to transfer from among eligible juvenile court felony referrals.<sup>219</sup> It was much more aggressive or less selective in filing motions to transfer. It was also seen that Dallas County had a significantly lower success rate in obtaining transfers in those cases in which motions were filed than were all other counties.<sup>220</sup> Of those respondents transferred and convicted, Dallas County has a significantly lower imprisonment rate when compared with the other three large counties. The lower transfer rate and lower imprisonment rate in Dallas County are probably attributable to the aggressive transfer motion filing policies of the Dallas County Criminal District Attorney's Office.

#### B. *Length of Imprisonment*

Table 56 shows the distribution of prison sentences in the forty-six cases of transferred and convicted respondents in which a prison sentence was given.

218. Table 55  $X^2$  (1 df) = 5.3931.  $p \leq .05$ .

219. See discussion *supra* pt. IV.F.

220. See discussion *supra* pt. V.F.

TABLE 56  
PRISON SENTENCES: LENGTHS

Sentence(years)	N	%
2	1	2.2
5	3	6.5
7	1	2.2
9.5	1	2.2
10	11	23.9
12	1	2.2
15	3	6.5
17	1	2.2
18	1	2.2
20	6	13.0
25	1	2.2
30	3	6.5
35	1	2.2
45	3	6.5
50	1	2.2
52	1	2.2
99(or life)	7	15.2
<b>TOTALS</b>	<b>46</b>	<b>100.1</b>

The median sentence was nineteen years. The mean sentence was about thirty-one years, with a range from two to ninety-nine years.

Table 57 shows sentence lengths by the penalty category of the offense charged in the motion to transfer. There are only three penalty categories—capital murder, first degree felony and second degree felony—represented because no respondent transferred for a third degree felony received a prison sentence. In addition to the mean sentence within each category, the maximum punishment for that category and the percentage of the maximum represented by the mean sentence are displayed.

TABLE 57  
SENTENCE LENGTH BY PENALTY CATEGORY

Penalty Category	N	Mean Sent.	Max. Sent.	%
Capital Murder	6	68.7	99	69.4
1st Degree Felony	30	30.3	99	30.6
2nd Degree Felony	10	11.5	20	57.5
<b>TOTALS</b>	<b>46</b>	<b>31.2</b>	<b>—</b>	<b>41.5</b>

If a transferred juvenile is convicted of capital murder, the death penalty is not an available punishment. Instead, a sentence of life imprisonment is mandated, which is the penalty equivalent of ninety-nine years.<sup>221</sup> Only three of the six cases that began as capital murders were transferred and resulted in a criminal conviction with the sentence mandated for capital murder. Therefore, in at least three of the six cases that began as capital murder the conviction was for an offense other than capital murder, most likely a lesser included non-capital murder offense. In those three cases, the sentences were thirty, forty-five, and fifty years.

The mean sentence of all cases in which there was a transfer, conviction, and prison sentence was thirty-one years. The mean sentence in eighteen homicide cases was forty-four years and in twenty-eight non-homicide cases was twenty three years. This is a statistically significant difference.<sup>222</sup>

#### VIII. FOUR TRANSFER TRACKS

There is a tendency to think of juvenile transfer to criminal court in simple terms. The availability of transfer enables the juvenile court to assess the seriousness of the offense and to permit criminal prosecution for the extremely aggravated offense—the crime that is beyond the capacity of the juvenile system to handle with community acceptance. The availability of transfer, so conceived, serves as a safety-valve for the juvenile system and is necessary for its long-term political survival. That view was expressed, for example, in the IJA-ABA standards relating to transfer between courts:

Some acts are so offensive to the community that the arbitrary line drawn at eighteen cannot acceptably be used to protect the alleged wrongdoer. The serious offender should not be permitted to escape the criminal justice system simply because he or she is a day or a year short of eighteen. . . . If the conduct alleged is sufficiently serious, some mechanism should exist to permit retention of authority over some juveniles beyond the eighteenth birthday. A waiver [transfer] decision will determine which court will have jurisdiction. If the precipitating acts are serious enough, the criminal court's capacity to maintain con-

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221. See *supra* text accompanying note 48 (mandatory life sentence for transferred juvenile capital case).

222. Student's  $t = 2.275$ .  $p \leq .05$ . For a general discussion of the use of the  $t$  test statistic for determining whether a difference between means is statistically significant, see H. BLALOCK, *SOCIAL STATISTICS* 224-32 (revised 2d ed. 1979).

control over the juvenile for long periods of time may be more appropriate and socially reassuring than the maximum three-year period of juvenile court control proposed in these standards.<sup>223</sup>

While the aggravated offense may be the reason for the availability of transfer from juvenile to criminal court and while transfer is used in exactly that circumstance, this study suggests that the reality is more complicated than a single theory of juvenile court transfer. The study suggests that the transfer process can best be understood as consisting of three distinguishable tracks: (1) the aggravated offense, (2) the almost adult, and (3) the repeat offender. In addition, a fourth track—based on local legal cultures or differences in counties—can be identified that cuts across the other three.

#### A. *Homicide: The Aggravated Offense*

Although transfer is available under Texas law for any felony offense, it is used disproportionately in cases of aggravated offenses. To some extent, whether an offense is regarded by relevant persons as aggravated is a subjective matter that frequently depends upon how the offense was committed, by whom, against whom, with what, where, and with what consequences to the victim.

Aggravation may also depend upon the crime context within which the offense was committed. Thus, a robbery of a convenience store by a teenager is likely to be regarded as more serious if it was the fifth that month in the county than if it was an isolated incident. The fifth offense acquires aspects of aggravation from the preceding four. Of course, whether the offense has attracted local publicity also has much to do with its perceived aggravation. However, the data do not permit measuring offense aggravation at such micro levels.

However, some offense categories are almost always perceived as more aggravated than other offense categories. This is peculiarly true of homicide. There is a dead body and accountability is required.

The data show that while only seven-tenths of one percent of all felony referrals of fifteen and sixteen year olds were for homicide offenses, over thirty-one percent of the motions to transfer were for homicides.<sup>224</sup> Overall, juvenile courts transferred seventy-eight per-

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223. IJA-ABA JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO TRANSFER BETWEEN COURTS 3 (1980).

224. *See supra* Table 4.

cent of all cases to criminal court. They transferred eighty seven percent of all homicide cases and only seventy-four percent of the other cases. This difference is only suggested, however, not established statistically.<sup>225</sup> Of the seventy-nine cases transferred to criminal court in which there was a disposition, about fifty-eight percent received a prison sentence. However, seventy-eight percent of the homicide cases received a prison sentence, while only fifty percent of the other cases did. This is statistically significant.<sup>226</sup> About forty percent of all cases of imprisonment following transfer were for homicide cases, although only about twenty-seven percent of all motions to transfer were for homicide. Homicide cases also are handled differently in the length of imprisonment. Homicide prison sentences are over twenty years longer than those in non-homicide cases resulting in imprisonment, a significant difference.<sup>227</sup>

It is clear, then, that officials throughout the system view homicide as categorically different from all other juvenile felonies. They constitute a separate track through the system.

#### B. *The Almost Adult*

The age of the respondent has an important bearing on his or her handling in the juvenile transfer system. While the data do not permit analysis of whether the respondent's mental or social age affects the transfer process,<sup>228</sup> they do permit certain generalizations to be made about chronological age.

Prosecutors are twice as likely to file transfer motions on a sixteen year old as on a fifteen year old.<sup>229</sup> They are particularly likely to file a transfer motion if the respondent is in the twelfth month of his sixteenth year.<sup>230</sup> To some extent, this may reflect calculations as to the precise number of months of legal control that are available in the juvenile system as compared to the criminal. There is some sugges-

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225. *See supra* text accompanying note 136 (no statistical relationship between offense of homicide and decision to transfer).

226.  $X^2$  (1 df) = 5.3536 for a  $2 \times 2$  table of homicides or others and imprisonment or other dispositions.  $p \leq .05$ .

227. *See supra* text accompanying note 195 (prison sentences more likely to be imposed in homicide cases than in non-homicide cases).

228. *Kent* criteria imply that mental and social age should affect the transfer process. *See supra* text accompanying note 23 (listing *Kent* criteria).

229. *See supra* Table 8.

230. *See supra* figure 2.



tion that transfer of older respondents for less serious offenses is to achieve longer system control, not necessarily imprisonment, than would be possible by retention in the juvenile system.

But the psychological mechanism in the prosecutor is probably not that finely tuned in this circumstance. A prosecutor, in reviewing a police file on a case, may be struck by how close the respondent came to being an adult when the offense was committed. The inappropriateness of falling just short of the line separating juvenile from adult may lead the prosecutor to seek transfer because the respondent is an "almost adult" who, therefore, should be treated as an adult.

The fact that there are no differences in judicial transfer rates based on age at the time of the offense<sup>231</sup> or age at the time of the decision<sup>232</sup> most likely reflects the countervailing factor of offense seriousness in prosecutorial selection of cases<sup>233</sup> and the relatively small number of cases in which juvenile courts exercise discretionary judgment in making the transfer decision.<sup>234</sup>

The existence of the "almost adult" as a separate transfer track is corroborated by the fact that once transfer to the criminal system is effected, the system deals with the older defendant more leniently than with the younger.<sup>235</sup> That can be best understood by noting that the younger the respondent, the more aggravated the offense and/or the more extensive the delinquency background must be for a transfer motion to be filed in the first place. Thus, from the perspective of criminal system officials, younger offenders are almost certain to be more worthy of severe treatment than the older ones. Hence, the paradox arises that youthfulness is a factor leading to more severe criminal sentencing, the opposite result from the norm in criminal sentencing generally.

### C. *The Repeat Offender*

The third track through the transfer process is the repeat juvenile offender. This is the juvenile who, while he does not commit particularly aggravated offenses, as these matters go, and while he is not within a few months of adulthood, has been through the process re-

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231. See discussion *supra* pt. V.B.

232. See discussion *supra* pt. V.B.

233. See discussion *supra* pt. V.B.

234. See *supra* Table 43.

235. See discussion *supra* pt. VII.A.2.a.

peatedly. He has likely been committed to the state training school system on at least one occasion.

Juvenile system officials are, simply put, tired of seeing this respondent. In all likelihood, all of the treatment and punishment resources of the juvenile system have been attempted, in ascending order of severity, without success. Finally, a prosecutor, upon viewing a police report and record of juvenile referrals, thinks it is time to graduate this one to the big time.

The use of prior referrals and prior commitments as criteria becomes apparent only when combined with the seriousness of the offense. If the offense is aggravated, a motion may be filed without regard to prior referrals or commitments.<sup>236</sup> However, offenses not against the person will not likely be filed unless there is a significant record of prior referrals to the juvenile court.<sup>237</sup> This is particularly true of the least serious offenses not against the person—third degree felonies. The same analysis holds for the transfer decision.<sup>238</sup> Finally, when such a respondent is transferred to criminal court, criminal justice officials give such a respondent a fresh start. The person who was a chronic juvenile offender and who, if retained in the juvenile system would have surely been committed to the training school system, is placed on adult probation supervision.<sup>239</sup> As far as the criminal system is concerned, he is a first offender and is deserving of the probation that first offenders in the criminal system receive almost routinely for non-aggravated offenses.

#### D. *The Local Legal Culture*

It sometimes seems that the State of Texas is but a loose confederation of 254 sovereign counties. Local control is important, particularly in the administration of justice. Although operating under statewide legal rules, justice at the consumer level varies enormously from county to county throughout the state. Of course, that is true in many other American states.

County customs are of great importance in the juvenile transfer process. Whether a case will be selected for transfer from the steady flow of juvenile felony referrals depends in part upon what county is

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236. See discussion *supra* pt. V.C.

237. See discussion *supra* pt. V.C.

238. See discussion *supra* pt. V.C.

239. See discussion *supra* pt. VII.A.3.c.

involved. If a motion for transfer is filed, whether the case will be retained in the juvenile system or transferred to the criminal may also depend in large part on what county is involved. The same can be said of criminal court dispositions of transferred cases.

Determining statistically the differences between counties requires a sufficient number of cases to permit analysis. As a practical matter, only the four largest counties in the state—Harris, Dallas, Bexar and Tarrant—have sufficient cases to permit such analysis. As among the four largest counties, Dallas County stands alone in the way it approaches the question of juvenile transfer to criminal court. That difference manifests itself at virtually every step of the transfer process.

At the initiation stage, Dallas County is dramatically different from the other three large counties in the percentage of felony referrals of fifteen and sixteen year olds in which prosecutors file motions for transfer.<sup>240</sup>

A Texas *Kent* criterion to guide the juvenile court in making its transfer decision is “whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person.”<sup>241</sup> This is also one of the major criteria used in practice by prosecutors in selecting cases for filing a transfer motion.<sup>242</sup> However, when Dallas County is compared with the other three large counties, there is a major distinction in the extent to which prosecutorial transfer attention focuses on offenses against the person. About eighty-one percent of all transfer motions filed in the four largest counties were for offenses against the person. However, about ninety-six percent of the motions filed in the other three counties were for offenses against the person, while only seventy-two percent of the Dallas County motions were for offenses against the person. Eleven of the twelve motions involving offenses not against the person were filed in Dallas County. This is a statistically significant difference.<sup>243</sup>

The use of transfer motions for offenses not against the person distinguishes Dallas County from the other three large counties. It apparent that prosecutorial policies in the other three large counties

240. *See supra* Table 18.

241. *See supra* text accompanying note 33 (listing Texas criteria for transfer).

242. *See supra* Table 6.

243.  $X^2$  (1 df) = 5.2756 for a 2 by 2 table of offenses against the person v. others and Dallas County v. other three large counties.  $p \leq .05$ .

substantially restrict the filing of transfer motions to offenses against the person, but that no such policy exists in Dallas County.

There are differences between Dallas County and all other counties in the transfer decision as well. While in Dallas County only sixty-two percent of all cases were transferred, in the other counties, eighty-seven percent were transferred, a significant difference.<sup>244</sup>

A major difference between Dallas County and the other three large counties is the transfer rate in robbery and aggravated robbery cases. In the other three counties eighty-eight percent of the robbery cases were transferred, while in Dallas County only thirty-nine percent were transferred. This is a statistically significant difference.<sup>245</sup>

Finally, there is a significant difference in imprisonment rates in Dallas County against the other three large counties. In the other three counties, eighty-seven percent of the respondents transferred and convicted received prison sentences, while in Dallas County only fifty percent did. This is statistically significant.<sup>246</sup>

It is possible visually to summarize the differences between the transfer process in Dallas County and the other three large counties by identifying the three critical decisions that must be made: initiation, transfer and imprisonment. Figure 3 does that for Dallas County and the other three large counties. There were thirty-nine motions to transfer filed in Dallas County against twenty-three in the other three counties combined. However, only twenty-four of those thirty-nine motions resulted in transfer to criminal court, sixty-two percent, while eighteen of the twenty-three motions filed in the other counties resulted in transfer, seventy-eight percent. Finally, only twelve of the thirty-nine motions resulted in a sentence of imprisonment in Dallas County, thirty-one percent), while thirteen of the twenty-three motions filed in the other three counties, fifty-seven percent, resulted in imprisonment.

At the conclusion of the transfer process, Dallas County, with twenty-six percent of the four county population, obtained about fifty percent of the prison sentences resulting from transfer. That is important. However, equally important is the use of transfer for purposes other than obtaining a prison sentence. That is apparent to some ex-

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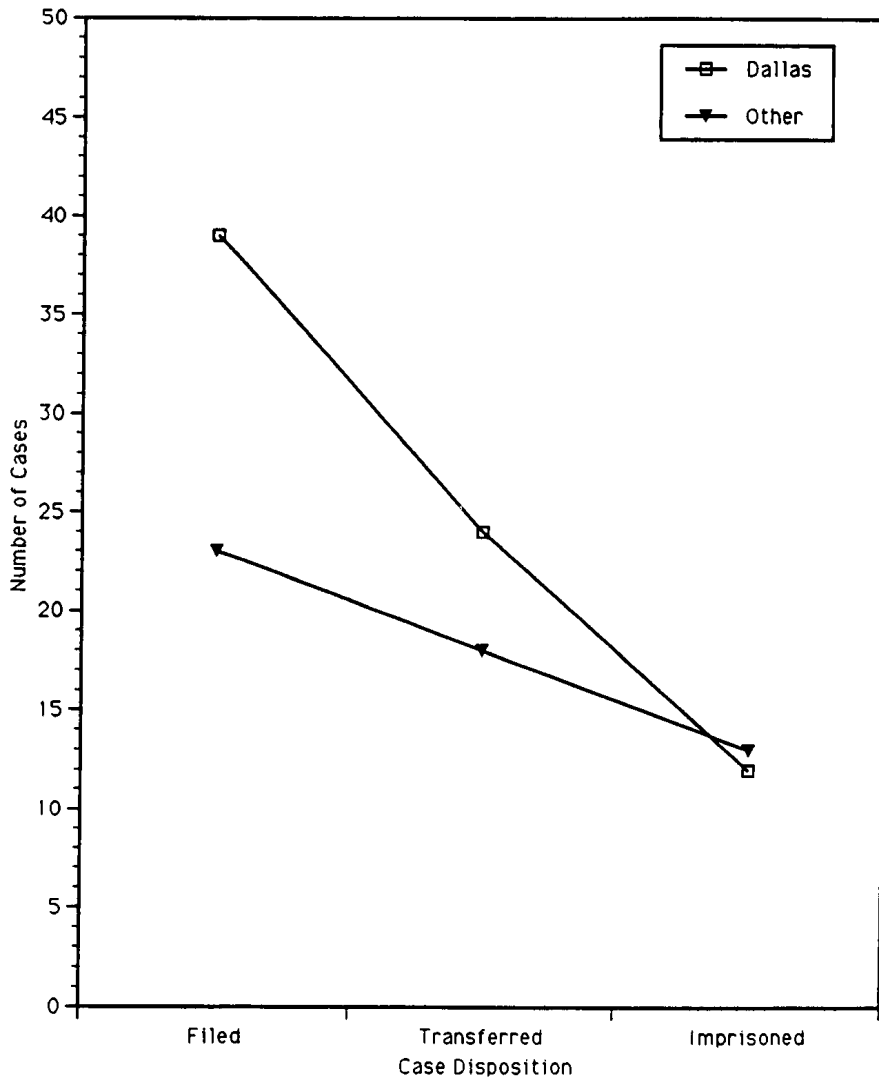
244. See *supra* Table 42.

245.  $X^2 (1 \text{ df}) = 4.8630$  for a 2 by 2 table of robbery v. others and Dallas County v. other 3 counties.  $p \leq .05$ .

246. See *supra* Table 55.

*Transfer Process: Dallas County v. Other Three*

Figure 3  
Transfer Process in Dallas County  
and Other Three Large Counties.\*



\* The other large counties include Harris, Tarrant, and Bexar. See text for further discussion

tent in the other three counties, but is particularly important in Dallas County. The attrition rate in cases in which motions to transfer were filed is much greater in Dallas County than in the other three counties. That suggests less effective prosecutorial screening of cases in Dallas County, a deliberate prosecutorial policy of filing transfer motions in cases in which transfer and/or imprisonment seem unlikely, or both.

### IX. THE *KENT* CRITERIA IN PRACTICE

If the *Kent* criteria are intended to guide juvenile court judges in making the transfer decision—which is their stated purpose—they fail to do so in practice. It is not that juvenile courts ignore the criteria or that the criteria are unworkable in the sense that they are not relevant to the juvenile court's task. It is that the same factors have already been employed by prosecutors in selecting cases in which to file transfer motions. Consequently, the juvenile court judge is presented with transfer cases that have been selected using *Kent* criteria. That makes further winnowing of cases using the same criteria difficult.

The transfer criteria promulgated by the District of Columbia Juvenile Court, published by the United States Supreme Court in the *Kent* opinion, and copied by thirty-seven states, including Texas, call for the juvenile court to make comparative judgments among different cases. They are not absolute standards.

The criteria speak of the "seriousness of the alleged offense."<sup>247</sup> Seriousness compared to what? They also speak of whether the alleged offense was committed in an "aggressive, violent, premeditated or willful manner."<sup>248</sup> Again, compared to what? The "sophistication and maturity"<sup>249</sup> of the child obviously also calls for a comparative judgment, as does "the record and previous history of the juvenile"<sup>250</sup> and "the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile . . . by the use of procedures, services and facilities currently available to the juvenile court."<sup>251</sup> Each of these in fact, although not in form, requires the juvenile court to make a comparative judgment.

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247. See *supra* text accompanying note 23 (listing *Kent* criteria).

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

Because the criteria require the juvenile courts to make comparative judgments among cases and respondents, it is important to know what the basis of comparison should be. Assuming the State in a transfer hearing has shown a Texas juvenile court that the respondent is charged with a felony, was fifteen or older at the time it was committed, and that there is probable cause to believe him or her guilty of the offense, then the juvenile court must exercise discretion in deciding whether to transfer to criminal court. Presumably, to the extent discretion is exercised, the juvenile court will select the most egregious offenses and most worthy respondents for transfer.

The *Kent* criteria appear to assume that the base for comparison is all referrals to the juvenile court or at least all felony referrals of respondents within the appropriate age bracket. But, of course, that is not the case because prosecutors select from those referrals a very small number—less than two percent in this study—on which to file transfer motions. Once those cases are further winnowed by plea bargaining by the parties and by cases in which the State is unable to show probable cause at the hearing, there is very little left for the juvenile court judge's exercise of discretion.

The judge is supposed to select serious cases from among the most serious, aggressiveness from among the most aggressive offenses, prior record from among respondents with serious prior records, et cetera. The *Kent* criteria assume that it is the mine run of referrals that should be the base for the comparative judgement about who should be transferred and who retained. However, that comparative judgement has already been made by prosecutors in selecting the less than two percent of those cases in which to seek transfer. Therefore, the role of the juvenile court judge is limited to finding required facts and reviewing prosecutorial exercise of discretion to determine whether it was abused—much more limited functions than the *Kent* criteria suppose.

### Appendix A

CERTIFICATION PROCEEDINGS - Section 54.02 Texas Family Code  
PART I

Complete this form for each case in which a Section 54.02 motion has been filed. Send to TJPC upon the entering of a final disposition in juvenile court or indictment in criminal court. Send to: Texas Juvenile Probation Commission, P. O. Box 13547; Austin, Texas 78711-3547.

A. GENERAL INFORMATION

Referral County \_\_\_\_\_ Referral Case No. \_\_\_\_\_ Referral Date \_\_\_ / \_\_\_ / \_\_\_  
 Referral Offense \_\_\_\_\_ Date of Offense \_\_\_ / \_\_\_ / \_\_\_ Date Transfer Motion Filed \_\_\_ / \_\_\_ / \_\_\_  
 Child's D.O.B. \_\_\_ / \_\_\_ / \_\_\_ Child's Sex (M/F) \_\_\_\_\_ Child's Race  White  Black  Hispanic  Other

Prior Referrals

Disposition (check appropriate)

Date	Offense	Informal Adjust.	Probation	TYC	All Other
___ / ___ / ___	_____	_____	_____	_____	_____
___ / ___ / ___	_____	_____	_____	_____	_____
___ / ___ / ___	_____	_____	_____	_____	_____
___ / ___ / ___	_____	_____	_____	_____	_____
___ / ___ / ___	_____	_____	_____	_____	_____

If more than five use reverse side.

B. JUVENILE COURT ACTION

Court Name \_\_\_\_\_ Cause No. \_\_\_\_\_  
 Motion Denied/Withdrawn  Case Returned to Juvenile Court, date \_\_\_ / \_\_\_ / \_\_\_  
 Show Juvenile Court disposition, date \_\_\_ / \_\_\_ / \_\_\_  
 Indeterminate TYC Commitment  Determinate TYC Commitment  
 Probation  Other, describe \_\_\_\_\_

C. INITIAL ADULT COURT ACTION

Child Transferred, date \_\_\_ / \_\_\_ / \_\_\_  
 Indictment, date \_\_\_ / \_\_\_ / \_\_\_, Court \_\_\_\_\_ Cause No. \_\_\_\_\_

D. SUPPLEMENTAL INFORMATION

No. Court Hearings \_\_\_\_\_, Child in Detention? (Y/N) \_\_\_\_\_ No. of Days \_\_\_\_\_  
 Additional Comments: \_\_\_\_\_

Prepared by:  
 Name \_\_\_\_\_ Title \_\_\_\_\_ Phone \_\_\_\_\_

TJPC  
11/13/87



Appendix B

CERTIFICATION PROCEEDINGS - Section 54.02 Texas Family Code  
PART II

Complete this form for each case in which a Section 54.02 motion was granted and an indictment was returned in criminal court. Send to TJPC upon entering of a final sentence in criminal court. Send to: Texas Juvenile Probation Commission, P. O. Box 13547; Austin, Texas 78711-3547.

A. GENERAL INFORMATION

Referral County \_\_\_\_\_ Referral Case No. \_\_\_\_\_ Referral Date \_\_\_ / \_\_\_ / \_\_\_  
Juvenile Court Name \_\_\_\_\_ Adult Court Name \_\_\_\_\_ Adult Court Cause No. \_\_\_\_\_  
Date of Juvenile Court Transfer \_\_\_ / \_\_\_ / \_\_\_  
Date of Grand Jury Indictment \_\_\_ / \_\_\_ / \_\_\_

B. ADULT COURT PROCEEDINGS

Date of Final Adult Court Action \_\_\_ / \_\_\_ / \_\_\_  
Sentence/Findings  
 Not Guilty     Case dismissed/not prosecuted     Probation, Years: \_\_\_\_\_  
 TDC, Years \_\_\_\_\_     Other, describe \_\_\_\_\_

C. SUPPLEMENTAL INFORMATION

Child held in jail after transfer to adult court? (Y/N) \_\_\_\_\_  
Child released on bond? (Y/N) \_\_\_\_\_, date \_\_\_ / \_\_\_ / \_\_\_  
Total number of days child in jail pending final disposition \_\_\_\_\_  
Additional Comments: \_\_\_\_\_  
Prepared by:  
Name \_\_\_\_\_ Title \_\_\_\_\_ Phone \_\_\_\_\_

TJPC  
11/13/87