THE EFFECT OF JUDICIAL SELECTION METHOD ON JUVENILE INCARCERATION

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BY

GRACE SLAPAK

APPROVED:

PATRICK TESTA, Ph.D.
Co-Director of Thesis

CAMilo LESLIE, Ph.D.
Co-Director of Thesis

STACY OVERSTREET, Ph.D.
Third Reader
Juvenile court judges hold a distinguished position as the sole decision-makers in delinquency trials—affording them immense latitude in juvenile sentencing. Using previous empirical research and a novel game theory model, I examine how different judicial selection methods, election and appointment, influence the propensity for judges to incarcerate the juveniles under their purview. There is a dearth of precise data that can be used to accurately quantify the effect of differential judicial accountability schemes on incarceration, so I aim to apply theoretical means to understand how judicial motivations and voter preferences, or lack thereof, interplay to affect sentencing decisions. Through the election model, I find that elected judges are pressured by voters to choose between retaining their seat and imposing overly punitive sentences. As such, electoral schemes of judicial selection introduce perverse incentives for judges to incarcerate more than they would under an appointive scheme. Principally, I find that a juvenile justice system with elected judges and voters that overvalue incarceration for the sake of immediate crime reduction becomes detrimentally and progressively more punitive as lenient judges are voted off of the bench. At the end of the thesis, I consider various reform efforts, using intuition gained from the game theory model, that could alleviate over-incarceration and its harms. This thesis contributes to a larger conversation surrounding ineffective criminal justice policies and practices and attempts to provide an approachable illustration for understanding how our political institutions contribute to a flawed juvenile justice system that impedes progress and alienates societal goals.
DEDICATION

To the many children who have suffered from an unjust system, may the wrong be rectified and future strife prevented.

“There is much to be said critically and constructively about laws and policies that divert tax dollars from vital purposes, solidify the entrenchment of an already powerful enforcement-correctional complex, and leave the public as insecure and unsafe as ever… intuition alone isn't a sound basis for judging what will or won't work, at what cost, and with what side effects.”

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CHAPTER I: Setting the Stage

INTRODUCTION

In many ways, the juvenile court is representative of wider societal beliefs about civility, community, and humanity. How we treat our children, especially in their weakest or most vulnerable moments, showcases the lengths of our compassion, and too often, the limits of our commitment to rehabilitation and true justice. In this thesis, I seek to pull together the threads of institutionalized bad incentives, ingrained bias, flawed standard procedures, and voter apathy to understand why the juvenile justice system still fails to achieve its intended purpose—to offer a chance for reformation, recovery, and opportunity. The crux of the thesis is a game theory model that I will use to demonstrate the systemic and perverse inducement that elected juvenile judges face to be overly punitive toward the children who fall under their preview. This chapter is focused on providing context for the theoretical and empirical examinations of the juvenile court to come in subsequent chapters. Additionally, the chapter intends to familiarize the reader with the two broader issues at hand which will be combined under further analysis: the juvenile justice system and judicial election. Lastly, this chapter answers the instrumental question of why studying juvenile judicial election is particularly important, including its overlooked impact on determining court outcomes and its potential for ameliorative change. I begin with a condensed overview of the juvenile justice system with a focus on juvenile courts and incarceration.
JUVENILE JUSTICE SYSTEM

The Basics

The juvenile justice system mirrors the adult criminal justice system with the exception of several key differences. First, juvenile prosecutions are separated into two different types of cases, delinquent and status offenses. Delinquent offenses are those which would be considered criminal regardless of one’s age, including theft, property damage, drug possession, and violent crimes while status offenses are those which are only illegal for people under a particular age. This could include alcohol possession, curfew violations, or truancy. The rest of the thesis most often concerns delinquent offenses because they are much more likely to lead to pre-trial detention and incarceration than minor status offenses.

Second, and most importantly for this thesis, juveniles do not have the same constitutional guarantee as adults of a jury trial for offenses that can potentially result in long terms of incarceration. Additionally, juveniles are not constitutionally guaranteed the right to bail. In an adult trial, a jury hears the arguments from the defense and prosecution, determines guilt or innocence, and wields some degree of control over the outcome of the case, despite the judge getting to make the ultimate sentencing decision (within bounds). A juvenile, on the other hand, faces only a judge at every stage of the case. An “adjudicatory hearing” takes the place of a trial, with the judge acting as the sole fact-finder in the case, ruling the juvenile delinquent (guilty) or not-delinquent (not guilty), and imposing a disposition (sentence).

1 I will use these terms interchangeably when discussing the juvenile court system for the sake of simplicity unless otherwise clarified.
There are two stages in the adjudicatory process at which juveniles are incarcerated, by which I mean kept by the state in secure facilities often resembling adult prisons. Juveniles can be incarcerated pre-adjudication (pre-trial); such juveniles are considered “detained.” Juveniles are usually detained because judges believe they are a danger to themselves or the community if released. Juveniles could also be detained because they pose a flight risk, though this is far less of a concern than in adult court. Children typically lack the financial resources or the desire to flee from their homes and families. As a reminder, the juveniles who are detained need not be assigned bail; they may be required to remain in state custody for the duration of the pre-trial phase with no option for release.

The second stage at which a juvenile may be incarcerated is at a dispositional hearing (analogous to a sentencing hearing) after they have been ruled delinquent by a judge. Judges often have numerous options in sentencing juveniles, including probation, community programing, and community service. Incarceration should ideally be reserved for children who would not succeed in any other program and are exceedingly likely to reoffend or threaten the safety of those around them. Incarceration at this dispositional stage is termed “commitment.”

Thus, there are both detained and committed juveniles in secure detention facilities. In real terms, detention and commitment are effectively only differentiated by length of stay; both kinds of incarceration have similar bad effects on juveniles’ outcomes and detention should not be seen as a lesser burden than commitment. The model in Chapter Three will be applicable for considerations of both types of incarceration because both reflect on a judge’s ability to keep dangerous children off the
street in voters’ eyes. Now that we have grasped the essential components of the juvenile court process, we can turn to an overview of the development of the juvenile justice system in America, before concluding with a survey of its present state and problems.

**A Brief History**

Experts often categorize the development of the juvenile justice system into four distinct periods (Birckhead and Mouthaan 2016, Feld and Bishop 2012, and Feld 2017). The first aligns with the Child Saver’s Movement that arose and fell with many other progressive and charitable programs around the end of the 19th century. The period was defined by the belief that children were worthy of mercy and capable of reform, and that a system separate from the more punitive and unforgiving adult criminal courts and prisons should be formed to ensure these values were realized. Prior to the establishment of the first juvenile court in Cook County, Illinois, in 1899, children (almost always boys) were kept in the same harsh prison conditions as hardened adult criminals (Blomberg and Lucken 2000). Growing social awareness of this communal mistreatment of society’s most vulnerable caused juvenile courts to spread across the country rapidly.

By 1920, “every state in the country had established a juvenile court based on . . . the rehabilitative model” (Albanese 1993, 68). Despite this surface-level achievement for reformers, further investigation by the U.S. Children’s Bureau2 revealed that “only 16 percent of all so-called juvenile courts in fact had separate hearings for children. . . . A similar survey conducted . . . in 1966 revealed significant gaps still existing between ideal and actual court structures, practices, and personnel” (Albanese 1993, 68). These

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2 Founded in 1912, U.S. Children’s Bureau was established to investigate and tackle the problems facing children which the Progressive Era brought to the social fore. In addition to children’s poor treatment in the adult penal system, the Bureau sought remedies to high infant mortality, child homelessness, and dangerous labor conditions (Children’s Bureau n.d.).
concerns over fair and standardized treatment prompted the second period of juvenile justice development—the due process era (Birckhead and Mouthaan 2016).

The second era, the due process era (1960s-70s), saw numerous Supreme Court cases that would define the current rights of juveniles on trial as they relate to the Fifth, Sixth, and Fourteenth Amendments. Most of the decisions can be considered rights-granting in that they expanded the rights of the juvenile and set them on similar footing as those of adult defendants. *In re Gault* and *Kent v. United States* established that juveniles are afforded the same rights to due process, including a full investigation by law enforcement, cross-examination of witnesses, notification of right to counsel, and freedom from self-incrimination (“In re Gault” n.d.). *In re Winship* enforced that the standard of evidence in juvenile delinquent cases be the same as in adult criminal court—beyond a reasonable doubt—than that of civil cases—a preponderance of evidence, which would only require that a defendant is more likely than not to have committed the delinquent act (“In re Winship” n.d.).

The lone rights-limiting case of the era is *McKeiver v. Pennsylvania* which denied juveniles the right to a jury trial for delinquency charges (“McKeiver v Pennsylvania” n.d.). The plurality opinion found that jury trials were not integral to the fact-finding mission of courts which necessitated the allocation of other due process rights to juveniles. The court maintained that delinquency cases were neither strictly criminal nor civil matters, and juveniles could therefore be denied rights granted to *criminal* defendants. The Juvenile Justice Delinquency Prevention Act was first passed in 1974 along with the establishment of the Office of Juvenile Justice and Delinquency Prevention which is still tasked with establishing and monitoring standards for juvenile
justice institutions around the country today. After two decades of positive reform, the end of the 20th century would see a complete reversal of the original benevolent sentiment behind the establishment of juvenile court with a forceful push to punish juveniles more harshly in the tough-on-crime era.

The third era, defined by tough-on-crime sentiment, was congruent with the wider-spread War on Crime and War on Drugs spurred by the Nixon and Reagan Administrations and continued into the 1990s, fueled by public fear of uncontrollable and irredeemable “super predators”—children whose very natures were criminal. Perhaps the most visible and influential case involving juveniles during the get-tough era was the Central Park Five case in which five teenagers, aged 14 to 16, were charged with the rape and assault of a female jogger which took place during a riot in which a few dozen kids descended on Central Park in New York City to disturb the peace (see Birckhead and Moutshaan 2016). The case was fraught with poor police conduct and due process violations, but the public outcry against the boys, all Black or Latino, motivated verdicts against their favor and harsh sentences. The oldest boy was tried as an adult and placed in the notoriously violent Rikers Island Prison Complex. Representing the overarching tone of the period, former president Donald Trump took out an ad in the New York Daily News calling for the boys to be tried under the death penalty. All five boys were later exonerated in 2002, twelve years after their convictions in 1990. This case was unfortunately not an aberration. The tough-on-crime era saw a dramatic spike in adolescents being transferred out of juvenile court and into the adult system, facing adult convictions and sentences in adult facilities. As a direct response to the harsher sentences
imposed on juveniles in this era is the final period of juvenile justice that extends to the present.

For about two decades, we have been in the fourth phase, distinguished by the incorporation of neuropsychology into the legal considerations for how adolescents’ capacity for understanding wrongdoing (their *mens rea*) and their potential for rehabilitation should be handled within the courts. This period is marked by sequential Supreme Court cases that restrict excessively punitive sentences for juveniles in light of their still-developing brain and the fact that their actions are likely not representative of the adult they will or can become. *Roper v. Simmons* first made it unconstitutional for juveniles to receive the death penalty, pursuant with the Eighth Amendment protection against cruel and unusual punishment. The majority opinion held that popular opinion had turned against the juvenile death penalty in the U.S., and the practice was exceedingly rare anywhere else in the world ("Roper v. Simmons” n.d.).

Five years later, *Graham v. Florida* made it unconstitutional to have a mandatory sentencing scheme that requires juveniles to serve life in prison without the possibility of parole for a non-homicidal offense ("Graham v. Florida” n.d.). The court majority again found that such a sentence would be cruel, both because it is disproportional to the offense and because it fails to take into account the difference between adolescents and adults in attributing full culpability. Importantly, this decision did not ban *considered* life without parole sentences for non-homicidal offenses, only those which are mandatorily imposed. *Miller v. Alabama* extended *Graham*’s rule to homicidal cases; as of 2012, all mandatory juvenile life without parole (JLWOP) sentences are disallowed ("Miller v. Alabama” n.d.).
After four more years, *Montgomery v. Louisiana* made *Miller* retroactive, meaning that all people currently serving a life sentence without parole as a result of a mandatory juvenile sentencing scheme had to have their sentences reconsidered (“*Montgomery v. Louisiana*” n.d.). There is still immense room for progress in juvenile sentencing restrictions, and activists and reformers are hoping to capitalize on the recent sympathy of the courts to scientific research that demonstrates lower levels of impulse control, greater susceptibility to peer pressure, and lack of foresight that often contributes to juveniles’ commission of delinquent acts.

**Current Conditions/Concerns**

The United States is the only member of the United Nations who has not adopted the UN Convention on the Rights of the Child, which would outlaw life imprisonment without the possibility of parole for juveniles, including JLWOP that is considered instead of mandatory, as is still allowed post-*Miller*. Moreover, the U.S. has the highest rate of juvenile incarceration per capita of any industrialized nation (“*World Report*” 2015). Using the most recent data from 2019, the Prison Policy Initiative finds that “on any given day, over 48,000 youth in the United States are confined in facilities away from home as a result of juvenile justice or criminal justice involvement” (Sawyer 2019, n.p.). Over 32,000 of these children are in long-term secure juvenile facilities, shorter-term juvenile detention centers, or adult prisons and jails, while the rest are in more programmatic facilities like residential treatment programs, group homes, shelters, and boot camps (Sawyer 2019, n.p.). Luckily, there is a clear trend toward decarceration for juveniles: “since 2000, the number of youth in confinement has fallen by 60%, a trend that shows no sign of slowing down” (Sawyer 2019, n.p.). In spite of this overall decline,
there are still very troublesome disparities in which children are being incarceralted and 
how their pathway to a childhood behind bars takes shape. 

First, there is a racial disparity against BIPOC (Black, indigenous, and people of 
color) children at every stage of the juvenile justice system. Black, Latinx, and Native 
youth are more likely to be arrested, detained pre-adjudication, petitioned (prosecuted), 
transferred to adult court, adjudicated delinquent, and committed through judicial 
disposition than their white counterparts (“Key Facts” 2016). Some of the most striking 
statistics come when juveniles are tried as adults: “African-American youth are 8.6 times 
as [sic.] likely than white youth to receive an adult prison sentence;” Latino children are 
“40% more likely to be admitted to adult prison” than white youth; and “the average rate 
of new commitments to adult state prison for Native youth is 1.84 times that of white 
youth” (“Key Facts” 2016, 7). Arrest rates for Black children have remained relatively 
stable over time independent of the overall youth arrest rate, meaning that the system 
becomes more inequitable with each passing year (Rovner 2014, 3). BIPOC children are 
also more likely to come into contact with the juvenile justice system as a result of status 
offense violation, which are more often handled without arrests or go unpunished for 
white youth (Rovner 2014, 3-4). For instance, “in 2011, black youth were 269 percent 
more likely to be arrested for violating curfew laws than white youth” (Rovner 2014, 3). 
A major contributing factor to this higher rate of contact with the system for BIPOC 
youth is the school-to-prison pipeline 

Second, starting in the get-tough era, schools in neighborhoods that were deemed 
crime-ridden by (usually white) politicians began to incorporate police officers, usually 
termed something along the lines of ‘school resource officers,’ into public school
administration (for a brief discussion, see Drinan 2018, 46-52). In general, minority youth are more likely to be disciplined for infractions against the school code than white youth, and the disparate treatment starts at a young age. “Black children make up 18 percent of preschool enrollment and 48 percent of suspended preschoolers” (Rovner 2014, 6).

Furthermore, the over-presence of law enforcement officers in primarily minority-populated schools has led to more minority children being disciplined legally instead of internally through school mechanisms (Rovner 2014, 6-7). This dual persecution—that BIPOC youth are more likely to be reprimanded and additionally more likely to be reprimanded legally—has compounded racial disparities in the juvenile justice system, to the extent that increased policing in schools and referral to the court system through that policing has been dubbed the school-to-prison pipeline, indicative of the heavy flow of youth through this channel. However, this is not a minority issue alone, in total, the influx of police and legal consequence in schools has worked to treat all children increasingly like criminals and less like juveniles in need of benevolent intervention.

Lastly, juvenile incarceration has not proved effective in curtailing criminal behavior or setting children on a better path once their sentences are up. Multi-state studies have shown high rates of recidivism after incarceration: “38 to 58 percent of youth released from juvenile corrections facilities are found guilty of new offenses (as a juvenile or an adult) within two years and 45 to 72 percent within three years” (Mendel 2011, 10). The numbers only get worse the longer recidivism is tracked. “In New York State, 89 percent of boys and 81 percent of girls released from state juvenile corrections institutions in the early 1990s were arrested as adults by age 28” (Mendel 2011, 10).
Educational prospects are also limited in juvenile correctional facilities. Though most long-term facilities provide educational programming derived from state or local curricula, the incarcerated juveniles have less access to learning accommodations and advanced track courses, have high teacher to student ratios, and often spend far less time in “school” than their nonincarcerated peers (Mendel 2011). In fact, many schools that reside in correctional facilities have consistently received failing ratings by educational review boards (Mendel 2011). These poor educational conditions and outcomes limit the higher-educational and job opportunities available to previously incarcerated juveniles after their release, feeding into a cycle of low earning, poverty, and criminality (Mendel 2011). On top of the issues of racial inequity, the school-to-prison pipeline, and ineffective intervention, my research attempts to throw another wrench in the already broken system—elected juvenile judges.

JUDICIAL ELECTION

Article III of the Constitution grants a great deal of freedom to states in the selection of their judges. Across the country, there are four main categories of judicial selection: appointment by other elected or appointed officials, partisan election, nonpartisan election, and merit selection in which a panel of various experts and leaders evaluate and score candidates for judgeships, with those receiving the highest scores being awarded vacant seats. States can mix their selection method across the courts in their jurisdiction, or have the same method for all courts. For instance, Alaska fills its Supreme Court, Court of Appeals, and Superior Court seats with gubernatorial appointees who are vetted by a nominating commission; Texas selects all of its judges through partisan election; and New York appoints its Court of Appeals and Supreme Court
Appellate Division judges, but holds partisan elections for its Supreme Court and County Court Seats (“Methods of Judicial Selection” n.d.). Partisan elections are distinguished by the presence of party politics in the judicial race; candidates’ parties are listed on the ballot, candidates can be financially supported by party funds, and they campaign and fundraise using their party identification. In non-partisan elections, there is no party affiliation on the ballot, and judicial candidates are thus often freer to establish a personalized platform, but are still very much beholden to the interests of the voters, as well as dependent on their financial contributions to run a successful campaign.

Judicial election is peculiar for two main reasons. First is that the judiciary is commonly touted as a politically independent branch of government that remains above the fray of partisanship, and indeed is even supposed to counteract and repair the issues that arise from partisan disagreements and power grabs in the executive and legislative branches. Clearly, this principle is less concrete when judges are (a) subject to political backlash through election, and (b) directly implicated in party-specific politics through partisan election. Judges naturally tend to become less independent when they are elected and appointed, with elected judges ruling in a more partisan way than the more centrist leanings of appointed judges (see Lim 2008). For criminal courts particularly, election tends to cause judges to be more punitive than their appointed counterparts out of fear of voter rebuttal against mismanaged cases in which lenient sentences or rulings (appear to) lead to criminal re-offense in the community (see Pfaff 2017 and Berry 2015). Thus, election places judges in the pocket of voters and parties, and seems far removed from the ideal of the unbiased arbiters of legal fact and critical interpretation they are portrayed as.
Second, judicial election typically occurs with limited voter knowledge or interest, and voter turnout is often low in part because people feel as though they are not familiar enough with the candidates to make an informed decision (Schaffner and Diascro 2007). Seventy-three percent of respondents to a national opinion poll about state-wide judicial elections conducted in 2001 said “that they had only some or a little information about candidates; 14 percent said they had no information at all about those in the race for positions on the state court bench” (Schaffner and Diascro 2007, 115). Across multiple analyses of media coverage about State Supreme Court elections from 2000 to 2004, Schaffner and Diascro (2007, 129) show that coverage is “lacking in both magnitude and substance,” meaning that coverage is rare, and the information contained in what little coverage exists is often unhelpful for voters trying to decide which candidate most closely fits their juridical values. Judicial campaign coverage more often focused on personal history, party affiliation, and judicial independence than issue coverage such as candidates’ positions on crime or policy.

Substantive coverage has increased somewhat since Republican Party v. White in 2002, which required many states to alter their restrictive codes of judicial conduct to allow for candidates to discuss politically and legally disputed issues during campaigns (for a discussion, see Caufield 2007). However, coverage remains low relative to highly publicized legislative and executive races. Voters continue to work with limited information when selecting their preferred judicial candidate which results in a misrepresentation of voter values and difficulty for activist oriented candidates to make headway on their platform alone.
WHY STUDY JUVENILE JUDICIAL ELECTION SPECIFICALLY?

The combination of juvenile court and judicial election is important to investigate for two reasons. (i) The decisions made by elected juvenile court judges have a powerful impact on juveniles who come in contact with the justice system. The magnitude of judges’ influence has been largely neglected in reform efforts, including their potential to directly transform the bad practices that contribute to an inequitable and harmful system. (ii) The issue is timely. Successes in juvenile justice policy makes juvenile judge election reform more propitious than in previous decades.

To the first point, judges are a critical component in reform efforts because of their distinct position as unilateral decision-makers in the adjudication delinquency and dispositional hearing. Because juveniles are not guaranteed the right to trial, juvenile judges may single-handedly determine how juveniles should be treated within the system, eventually constituting larger patterns in sentencing that uphold or dismantle the juvenile incarceration complex. Moreover, because juvenile judges are these lone actors, their decisions are representative of their own values and considerations, and as such, they face more direct feedback from voters based on their rulings than other judges who are mediated by panel voting or jury findings. Low-information elections and perverse election incentives that make bad-press avoidance far more potent than positive-press generation in winning an election force juvenile court judges to overincarcerate juveniles in a rational bid to retain their seat. This positive feedback loop, in which judges willing to incarcerate juveniles are re-elected, and they perceive their incarceration tendencies as condoned, and incarcerate more, is foundational to the overly punitive and ineffective system we have today. It is necessary to examine this cycle in order to break it.
Addressing juvenile judge selection is a pragmatic way to instigate reform from the top down.

To the second point, the study of juvenile judges is gainful because there is an active and successful movement to reform the juvenile justice system. Studying juvenile judges at this moment in time can allow activists to capitalize on the momentum of other reform efforts to push for further change. On top of recent victories in the Supreme Court, several states have legislated major reform policies to push for an overhaul of juvenile justice system, defunding carceral facilities and investing in community programs. The New Jersey plan, signed by Governor Murphy at the beginning of 2020, is a paragon policy for systemic relief. The comprehensive package includes a discontinuation of mandatory minimums and court assessed fines and fees, encourages the expansion of incarceration alternatives, and makes parole more available to children who have already served time (O’Dea 2020). New Jersey does not hold any judicial elections, all judges are appointed by the governor and confirmed by the senate. Moreover, COVID-19 has expedited juvenile decarceration in many states, and many reformers are hopeful that policymakers will continue to invest in alternatives to incarceration and be wearier of correctional institutions, even once the pandemic is no longer a concern.

**CONCLUSION**

We began this chapter with a discussion of the juvenile court system and its historical context, building the picture of how the oscillation of sentiment toward juveniles has led the justice system to its current period of scientifically-minded reform.
and also its current issues with racial inequality and perverse political incentives to encourage punitive measures over restorative ones. By focusing on judicial election within juvenile courts, we can shed light on the contribution that individual judges make to the arc of the juvenile justice system. What we unearth in our exploration can be readily converted into useful and practical policy prescriptions for legislators and activists during this swell of reform.
CHAPTER II: Relevant Literature

ELECTED VS. APPOINTED OFFICIALS

There is an extensive body of work on the behavior of elected and appointed officials, spanning the fields of political science and economics. In particular, principal-agent models have frequently been used to explain the differences in incentive schemes faced by public officials, and as a result, their relative strengths and weaknesses in completing a range of policy actions. Principal-agent models follow a common structure whereby a principal entrusts an agent to perform a task. The principal has the ability to punish the agent if the task is not done, or is done poorly, but they lack the ability to fully monitor the agent’s performance. The agent would prefer to put as little effort into the task as possible while still evading detection and punishment by the principle, considering that the negative effect of the punishment will be worse than the positive effect of putting in less or no effort.

The principal-agent model is readily applied to job performance, in which the manager (principal) assigns work to an employee (agent) and has the power to fire the employee, but may never know if the employee cuts corners or acts lazily. For application to the question of public officeholders’ behavior, voters take the role of the principal while elected officials take the role of the agent. Voters have the ability to remove the officials from office if they perform poorly, but much of the work that they do is never truly observed, thus, there is a balancing act between work that satisfies

1 An in-depth discussion of principal-agent models and their application to politics can be found in Besley (2006, ch. 3).
voters and behavior which benefits the officeholder alone. When principal-agent models are used in this election context, they are referred to as political agency models.

Besley (2006) maps the evolution of literature involving political agency models, beginning first with seminal works by Barro and Ferejohn that center around voters’ ability to constrain politicians to act in the best interests of their constituency despite the opportunities that politicians have to undercut their campaign promises or democratic duties once in office. Barro (1973) focuses on the problem of politicians using their knowledge and influence to increase their wealth to the detriment of the general public. He argues that politicians’ impulse to take advantage of their powerful position is constrained by the threat of being ousted from office during the next election should voters become aware of their greed. Necessary for this dynamic to hold is that politicians gain more from serving an additional term than they do from giving fully into their impulses for the present term before being removed. Ferejohn (1986) focuses more on exploring the extent to which an electorate can control the behavior of an elected official using retrospective voting. He shows that depending on the cohesion of the electorate and the value of holding office, i.e., serving more than one term in office, the voters can be varying degrees of particular about who to re-elect and who to replace.

The subsequent iterations of political agency literature, as described by Besley (2006), introduce the notion of good and bad politicians, or often “congruent” and “noncongruent” politicians. Congruent generally means that the politician is competent, holds the same values as the voters, and acts in their interest, where as a noncongruent politician may be incompetent, corrupt, or may hold values that pushes them toward policy choices that are dispreferred by the electorate. This is in contrast to Barro (1973)
and Ferejohn (1986) which implicitly assumed all politicians were equally able to act in a way that would ensure their reelection. In these new models, voters attempt to deselect noncongruent politicians and retain congruent politicians when they are considered for re-election. Canes-Wrone et al. (2000) presents this kind of model. The authors construct a world in which there are high-quality politicians who have access to high-quality information and low-quality politicians who do not. Low-quality politicians are less able to take appropriate policy action because of their limited information. If it is revealed that a politician has taken an incorrect policy action, they will not be re-elected because they have been revealed as a low-quality type.

Jennings (2011) adds a unique dynamic to this selection-focused model. In addition to “good” and “bad” politicians, he adds “populists” who only seek to gain majority approval. A populist politician is different from a good politician in the model because the good politician will choose the policy that actually benefits the public, even if it is an unpopular action, while the populist will always choose the most popular action, even if they know it is worse for the public. The populist gains and keeps power when there is an informational asymmetry that disadvantages the voters, who have less correct information (willingly or unwillingly) than the politicians or do not learn the consequences of politicians’ actions until after they are re-elected.

The last main subset of political agency models is of those which incorporate components of both previous model types—voters try to reveal and remove noncongruent politicians, but politicians are able to alter their behavior so that their dispreferred type is not revealed and they are re-elected. Berganza (2000) is an example of this kind of work. He presents a model in which politicians are assigned high or low competence and can
exert effort to mask low competence. Voters can only observe the final output, which is a function of competency and effort, but they cannot observe the component parts, such that a high competence politician who puts in no effort can look the same as a low competence politician who puts in effort. Voters are tasked with choosing a re-election rule or threshold of utility provided such that low competence politicians are still incentivized to put forth effort once selected. If the threshold is too high, for instance only achievable by high quality high effort politicians, low competence politicians will put forth no effort during their one term knowing that they will not win re-election anyway, and the voters will be at a detriment for setting too high a standard.

The takeaway from these papers focusing solely on political agency in elections is that elected officials and voters are mutually dependent on each other for their respective payoffs. Voters must set achievable standards for re-election and politicians must meet those standards to be re-elected. Officials who routinely or noticeably act in contrast to majority opinion or preference will not remain in office for a second term, and this rule holds even in increasingly complex models. In fact, Pettersson-Lidbom (2006) set out to prove this empirically. Using data from Swedish local elections, budget data, and the Swedish Election Studies which poll voter preferences, he found that voters do vote retrospectively, using the utility they received when a government was in control to decide whether they should be re-elected or replaced. Pettersson-Lidbom discovered that re-elected governments provided greater utility to voters than both removed governments and new governments on average. Voters appear to effectively select for good governments, rather than simply vote based on platforms or promises. They update their
beliefs about a government’s ability and values based on its performance and replace it if it does not serve them well enough.

Looking at the central question of this section, Alesina and Tabellini (2007a; 2007b) wrote a pair of complementary papers comparing appointed and elected officials through the lens of political agency. They found, consistent with previous works, that elected officials—“politicians” in their terminology—strive to meet a re-election threshold of support. In contrast, appointed officials, termed “bureaucrats,” strive to maximize their perceived intellect and ability in order to receive promotions and accolades from their professional associates and academic peers. While politicians must receive majority support to remain in office, bureaucrats can afford to act against majority opinion or wellbeing as long as their peers realize they made an informed or appropriate choice. This idea that employees are motivated to prove their skill was championed in Holmstrom (1999) which showed that concerns over one’s perceived ability in the labor market, a “reputation,” is enough to enforce good work despite difficulties of surveilling many employees and the incentive to slack on effort. Because bureaucrats care about their reputation in their field rather than public opinion more broadly, they will make different policy decisions than politicians.

Alesina and Tabellini showed that bureaucrats are often better suited for more technical and complex tasks, such as monetary policy, because they are rewarded for putting in maximum effort and may choose an action that is unpopular in the short term, like raising interest rates, but beneficial in the long term without fearing retribution from the general public. Additionally, bureaucrats’ freedom from public accountability allows them to act in the interest of the minority, which can either be a benefit or a risk,
depending on their character. Politicians, on the other hand, may be better suited for actions that require “splitting the cake,” like budget allocation, because they are beholden to a majority that they must please and so are less able to bow to special interests. Neither bureaucrats or politicians are guaranteed to perform all acts of governance best; the question is rather which tasks should be left to whom?

Political agency models lend important insight into how elected and appointed officials are motivated to act in different ways. The next section explores how the incentive schemes faced by elected and appointed judges alter their behavior.

**ELECTED VS. APPOINTED JUDGES**

The issue of judicial selection schemes has likewise received immense attention from social scientists and academics of jurisprudence. I will focus here mainly on the empirical literature which demonstrates the observable differences in elected and appointed judge behavior, although there is an equally robust portion of this literature which is rooted in the philosophical and legal arguments for certain selection methods. In particular, Behrenst and Silvermantt (2002) and Bright (1999-2000) offer impassioned and substantive arguments in favor of an appointed judiciary, citing the need for judicial freedom from public backlash and campaigning. Hall (1983) provides a counterweight to these perspectives; he offers a detailed account of the introduction of elected judgeships to America’s legal institutions. Critically, in the mid 1800s when election judgeships became more popular, many citizens believed that an appointed judiciary was not impartial, but rather, partial toward the government and political elite (see also Overton 1988-1989). Elected judgeships offered the electorate a chance to remove judges who
were biased in this way and select ones who more closely shared their values of justice. With these arguments to the side for a moment, I will present key quantitative research into elected and appointed judges in two categories: studies about state supreme court justices and studies about criminal trial court judges.

Many studies of judicial behavior revolve around state district and supreme courts because there is a wealth of data and variance in how judges are selected and retained. Ash and MacLeod (2016) use nearly 50 years of data from state supreme courts to compare judicial performance between judges who were elected in partisan races, elected in non-partisan races, and appointed through merit selection and gubernatorial confirmation. They measure judicial performance by looking at factors like total opinions written, the length of the opinions, and the impact their opinions had on future jurisprudence as measured by citations in out-of-state opinions. They find that judicial performance was lowest for partisan elected judges, second lowest for non-partisan elected judges, and highest for merit selected judges. This result was relatively unsurprising—they posit that selection commissions have the best information about candidates’ qualifications, followed by voters participating in non-partisan elections, and finally, that partisan elections are so overshadowed by party politics and voters’ party allegiance that voters have little opportunity to select candidates based on their judicial ability. Additionally, Ash and MacLeod (2016) discovered that non-partisan systems distract judges from their official work more during election years than those facing partisan elections or uncontested retention elections. Again, this is most likely because a more contested election requires more campaigning and energy than one which is more assured because of party allegiance or incumbency. While merit selection produced better
judges than either election method, it remains unclear whether nonpartisan election is strictly preferable to partisan election, given the added campaigning strain that nonpartisan judges must endure during the end of their elected term.

Instead of considering the quality of judicial output Shepherd (2009a) looked at the kinds of decisions judges were making. Shepherd (2009a) also turned to state supreme courts for data and found that both Democratic and Republican judges skewed their decisions to match the ideologies of the electorate, with the most prominent effects among those facing partisan re-election. When looking at the records of judges not up for re-election, he finds no such significant effect. He also observed that judges already on the bench would change their decisions to more closely match the presumed ideology of the electoral majority when the majority shifted parties. For instance, a Democratic judge would begin to rule more conservatively if the state voted to replace a Democratic governor with a Republican one. Together Ash and MacLeod (2016) and Shephard (2009a) show that selection methods affect both the quality and content of judicial decisions at the state supreme court level.

Gordon and Huber (2007) and Lim (2013) found similar results when looking at Kansas district courts, particularly at sentencing decisions for criminal convictions. District court judges in Kansas are either appointed by the governor or elected through partisan elections. Gordon and Huber (2007) find that judges in districts with partisan-elected seats give more harsh sentences on average than judges who are appointed and retained through retention elections. Moreover, judicial punitiveness increases the closer a sentence is handed down to the judge’s election date. Using a slightly different data set and methodology, Lim (2013) finds that elected judges vary greatly in their punitiveness.
while appointed judges tend to fall in the center of either extremely lenient or extremely harsh. She argues that this is likely because elected judges reflect the preferences of individual districts, which vary from Republican to Democratic and conservative to liberal, while appointed judges reflect the preferences of the entire state through the governor’s office. Like Gordon and Huber, she finds evidence that the elected judges are swayed by the ideologies of their constituents: judges in liberal districts were far more likely to choose lenient sentences than judges in conservative districts, even when personal ideology was taken into account.

Last of the studies on criminal courts is Huber and Gordon (2004) which used Pennsylvania’s trial courts as the basis of their research. Judges on Pennsylvania’s trial courts are initially elected through partisan elections and face a noncompetitive retention election every 10 years. Even in this environment in which incumbents do not face a challenger when up for re-election, Huber and Gordon found what they call a “unidirectional convergence” on punitiveness, meaning that judges from both parties became more punitive the closer they got to their retention election. This result implies that judges on the whole and across the political spectrum fear being seen as too soft on crime. Subsequently, they adjust their sentencing habits, against their uninterfered judgement, and hand down harsher sentences. There is a mass of evidence that elected judges rule in response to what they believe the public desires, but appointed judges are influenced by outside forces as well.

Choi et al. (2010), in another study of state supreme court, demonstrates that, while appointed judges write higher quality opinions, elected judges write considerably more opinions. The authors harken back to the difference in motivation between
appointed and elected officials to explain this result. Elected judges seek to display their competence to voters who are, on average, far more able to discern the quantity of decided cases than the quality of those decisions. Appointed judges, in contrast, wish to demonstrate their jurisprudential merit to other legal scholars, or possibly to form a legacy of intellectual import. They achieve their end much more readily by producing fewer decisions, but ones which are of a higher quality. Shepherd (2009b), also using state supreme court decisions, finds that judges facing reappointment are more likely to rule in favor of government litigants than those who are not. In much the same way that judges face re-election become more punitive to appease constituents, judges facing reappointment pander to government agencies with the power to retain or replace them. This was the precise concern that voters had when they decided to install elected judgeships. I would argue that concern over a judge siding with the government is less persuasive when considering trial court judges, at the very least because bias toward the government would lead to the same punitiveness that electoral influence causes now.

More importantly, there is a large difference between striking down a statute at the state supreme court level before needing legislators’ votes for retention and ruling against a prosecutor more often.

In total, elected and appointed judges are influenced by those who have the ability to strip them of their judgeship. There may be no way to avoid this reality, but it should be accounted for when trying to explain why judges perform the way they do. Ultimately, it is up to the American public to decide which biases should be avoided and which should be tolerated, but the truth of those biases must first be investigated, understood, and presented for consideration. The next section looks more closely at how juvenile
judges decide cases and what can be done to counteract unintentional biases in dispositions.

**JUVENILE COURT JUDGE ADJUDICATION FACTORS**

The reasons behind judicial decisions can be incredibly difficult to quantify and study, especially at the trial level where judges need not make their rationale behind a ruling known. Given this dearth of naturally occurring data, multiple researchers have set out to uncover the factors that influence judicial decisions in the juvenile court system through vignettes and surveys. Applegate et al. (2000) uses vignettes posed to juvenile judges in Ohio for this purpose. The vignettes consist of randomized case details such as the juvenile’s age, race, seriousness and type of crime committed, whether the juvenile is in school or has a stable home life, etc. Judges were instructed to respond with the likelihood with which they would commit the child in a dispositional hearing. Interestingly, researchers found that judges who were currently or previously married, served in an urban area, or considered themselves liberal were less likely to recommend incarceration across the board.

Additionally, younger judges were more likely to recommend incarceration (Applegate et al. 2000). The judges’ responses also revealed that the type of offense committed and the child’s previous record were the most significant factors in determining whether to commit the child or not. Legal factors in general were significant to judges’ decisions, which further included the presence of a weapon during the commission of the crime and the physician harm or monetary damage incurred by the victim. While these results may not be particularly surprising, what is more interesting is
how insignificant many of the social factors were to the judges’ determinations. For instance, there was no observed difference in sentencing recommendation between children who regularly attended school and those that did not, those with stable home lives and those without, and those whose crime was committed alongside peers or alone.² Lastly, of extreme interest, judges’ self-reported attitudes toward rehabilitative incarceration alternatives were insignificant; those who considered themselves to support rehabilitative programs recommended incarceration at similar rates to those who were less open to alternatives.

Applegate et al. (2000) proposes that these results can be explained in a variety of ways, including that juvenile courts are converging with criminal courts in which social factors are of little importance and incapacitation is prioritized over rehabilitation. Another explanation involves viewing the juvenile court as a problem solver, with a duty not only to the children under their purview, but also to the community in which it operates. In this context, the court may sacrifice the interest of the child to reach outcomes which satisfy multiple parties to the greatest extent with limited programmatic resources.³

D’Angelo (2002, 2007) assess juvenile judges’ perceptions of a child’s rehabilitative potential across social and demographic characteristics. Using responses to a survey posed to juvenile judges nationally, D’Angelo (2007) reports that a majority of

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² A much earlier study, Thomas and Cage (1977), found that social factors indeed did impact judicial dispositions, including that school dropouts received harsher sentences than those still enrolled. These differing results could be the product of differing methodologies, judges, and time period, or it could indicate that the juvenile court is bending toward the tendencies of the criminal court system by regarding social factors less over time.
³ Another set of factors which researchers have explored the effects of are mental health diagnoses. Overall, it appears that juvenile judges take mental health diagnoses into account in their dispositions, but some diagnoses are more influential than others. Cappon and Vander Laenen (2013) provide a meta-analysis of studies into the influence of these factors on juvenile judge decisions.
judges believe that younger children are more likely to be rehabilitated than older children, those in gangs are less likely to be rehabilitated than those who are not, high school dropouts are less treatable than those still in school, and those who live with both biological parents are more likely to be rehabilitated than those who live with only one or neither of their biological parents. These responses stand in contrast with at least some of the results from Applegate et al. (2000). It is possible that these discrepancies arise either because judges do not routinely let these perceptions alter their dispositional decisions, or because their influence is minor enough to be overshadowed by other, more important factors.

One way to indirectly observe, and possibly protect against, judicial bias in the juvenile justice system is through the use of Risk Assessment Instruments or RAIs. RAIs are algorithmic tools which use information about juvenile defendants to assign a risk score that corresponds to their juvenile’s likelihood to reoffend. RAIs are often administered by a caseworker and incorporate a juveniles’ demographic information, delinquent history, information about their home life, school record, and even their outward emotions about their crime and respect for authority. RAIs can be used at multiple stages of the justice process, from pretrial intake to dispositional recommendations and probation and parole considerations. A full overview of RAIs in the juvenile justice context is provided by Slobogin (2013). Though questions have been raised about their applicability across race, ethnicity and gender, particularly that they disadvantage children of color, Baglivio and Jackowski (2013) demonstrate that a prominent RAI called PACT is predictively valid for all demographics. Goel et al. (2018) offers a more comprehensive review of these concerns and possible solutions.
Papp (2019) and McCafferty (2017) both use data from Ohio’s juvenile courts, which utilize an RAI at multiple steps in the justice process, to compare the predictive validity of RAI outputs and judicial overrides. Judicial overrides occur when a judge raises or lowers the risk assessment level assigned to a child by the RAI based on their opinion or experience with the juvenile. In almost every case, judges issue overrides to raise the risk level of a juvenile. A higher risk level allows more strict treatment, including detainment pre-trial, commitment if found delinquent, or retention in a non-secure program like probation. Papp (2019) and McCafferty (2017) find that risk assessment levels which include judicial overrides are actually less predictively valid than the untampered or pure risk levels, though the effect of judicial overrides is not statistically significant.

McCafferty (2017) argues that this small move away from predictive accuracy is because judges raise the risk levels of many who never reoffend. In fact, after overrides are accounted for, those in the medium-risk category reoffend at a slightly higher rate than those in the high-risk category because judicial overrides often move juveniles from a mid-risk to high-risk designation. Chappell et al. (2013) finds racial and gender disparities in the issuing of adult criminal judicial overrides, including that African Americans juveniles were a third less likely than white defendants to receive overrides which lowered their risk level, while women were just under three-fourths less likely to receive overrides that increased their risk level than males.

The disparities between predictive validity when including and disincluding overrides in Papp (2019) and McCafferty (2017), though small, indicate that overrides insert judicial bias into the system rather than correcting or supplementing a flawed
algorithm. Chappell et al. (2013) furthers this point by demonstrating the inequality with which overrides are applied—for instance, Black youth were both less likely to receive overrides which lowered their risk level and more likely to receive overrides which increased their risk level than their white counterparts. Additionally, the tendency to raise risk levels and subject defendants to greater institutional control is in line with Huber and Gordon’s (2004) theory of unidirectional convergence on punitivism. The wide variety of results from the survey and vignette studies also point to inconsistent, biased, and otherwise inefficient rulings within the juvenile justice system. Although RAIs are widely used today, continuing to expand their applications and discouraging excessive overrides may help to alleviate these undesirable attributes of the courts. Despite the bad effects of human error, there is a need for human discretion within the system as well. Better understanding the sources and effects of bias may help subvert them. The final section looks at the attributes of judicial elections and the voters who participate in them.

QUALITIES OF JUDICIAL ELECTIONS

Judicial elections differ from typical political elections for multiple reasons, but I will survey two of the most influential: low information and voter preferences. As mentioned in the first chapter, judicial elections receive far less media coverage than political elections (Brandenburg and Schotland 2008, Sheldon and Lovrich 1983). As a result, voter turnout is low, and even those who do vote often make decisions about candidates with limited information (Sheldon and Lovrich 1983). The effects of low

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4 In 2013, more than 85% of US juvenile court jurisdictions used an RAI during some stage, including pre-trial, pre-sentencing, or post-sentencing in consideration of release from custody or probation and parole (Slobogin 2013).
information judicial elections are manifold, but some include an exceptionally high retention rate among retention-specific elections (Dann and Hansen 2001) and a focus on policy issues that erodes the impartiality of the courts (Brandenburg and Schotland 2008).

The solitary issue of the death penalty wields disproportionate influence on judicial re-election in particular. With a dearth of other information available about candidates’ qualifications and performance, coverage focuses on sensationalistic cases in which judges failed to punish a criminal harshly enough (Weiss 2006). Although it is relatively rare for judges to be removed from office through elections—many judicial elections are uncontested because the incumbency advantage is presumed to be insurmountable (Brandenburg and Schotland 2008)—Brace and Boyea (2008) and Bright (1999-2000) detail many elections where judges who were “soft on crime” lost because of media coverage that alleged such, primarily in elections for state supreme court seats for which the incumbent had unpopularly overturned a death penalty conviction. Brace and Boyea (2008) found that in states where the supreme court justices face re-election, death penalty cases were less likely to be overturned than in states where justices were not directly accountable to voters, and that higher rates of public support for the death penalty were correlated with lower rates of overturn.

Pfaff (2017) and Huber and Gordon (2004) describe this tendency for voters to heavily emphasize single instances of leniency in low information elections for prosecutors and judges, respectively. The rationale is that instances of over-punishment

5 Aspin et al. (2000) finds incredibly low rates of incumbency defeat within retention elections specifically, around 1%, over a span of 30 years and 10 states. Although such low rates of overturn can themselves raise concerns about democratic participation and voters’ access to information, politicization of these elections, which produces more voter interest and subsequent incidences of incumbency loss, inserts new issues of judicial independence into such elections (Dann and Hansen 2000).
largely go unobserved, or if they do, they usually are not known until many years after the fact (Huber and Gordon 2004). Instances of under-punishment are more easily observable and occur with a faster turnaround, such as when someone charged with armed robbery is released on bail and soon commits another felony.

Aside from low information, which leads to poorly informed and single-issue decision making, judicial elections are also characterized by widespread voter favor for greater punitivity. This can be seen in the aforementioned literature about the sentencing practices of elected judges. As Huber and Gordon (2004) assert, there is a unidirectional convergence on tough-on-crime judicial action regardless of party affiliation. It is clear from much of the rhetoric used in judicial elections that there is little to be gained and much to be lost from running on a reformative platform. Bandyopadhyay and McCannon (2014) find similar evidence of understanding from legal officials that harder stances on crime lead to better election outcomes. They show that prosecutors are more likely to bring cases to trial, rather than plea bargain them, the closer they are to an election, and this effect increases if the election is contested. Bandyopadhyay and McCannon (2014) theorize that prosecutors want voters to see them exerting more effort to obtain longer sentences for criminals as the election nears.

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6 Park (2017) uses a more recent data set, encompassing Kansas criminal cases from 1996 to 2011, and finds similar, yet more nuanced results than Huber and Gordon (2004). Although Republican and Democratic judges tended to increase sentence lengths in the year leading up to election, this effect was statistically insignificant for Republicans, but highly significant for Democrats (Park 2017). Park hypothesizes that this seemingly contradictory outcome is actually a manifestation of judges’ fear of being seen as too lenient; Democratic judges are already assumed by voters to be less punitive than Republicans, and so there is more pressure to demonstrate their willingness to be punitive leading up to an election (Park 2017). This effect aligns well with unidirectional punitivism—even judges affiliated with a political party that tends to promote criminal justice reform are incentivized to punish defendants more harshly to gain re-election.
Lastly Baker et al. (2015) conduct a survey of randomized American households to assess how personal fear of crime and risk of victimization affects attitudes toward crime policy. Although they found that a majority of people agreed (63%) that more resources needed to be devoted to rehabilitative programs, respondents also demonstrated a correlation between fear of crime and risk of victimization with a lack of support for rehabilitative programs. Support for more punitive programs was second after rehabilitation. Those in geographical areas with a higher Black population were also more supportive of punitive measures, indicating an undercurrent of racism that causes white people to be more “supportive of punitive policies as a means to socially control a population they deem threatening” (Baker et al 2015, 457). While fear of crime and victimization may be a legitimate reason to vote for officials who will uphold more punitive policies and practices, it is likely also heavily rooted in racial biases that are irrational and unproductive to the cause of reducing crime and increasing safety.

Thus, judicial elections operate fairly differently from political elections: if they are contested, they are often single-issue because of low information and candidates benefit from pooling their ideologies around punitivism rather than reform due to consistent majority voter preferences. The next chapter applies the relevant literature presented here to compose models of juvenile judicial decision making that are coherent with empirical observations about appointment, election, judicial behavior, the juvenile court, and voters.
CHAPTER III: The Model

INTRODUCTION

Having established the basic processes of juvenile court adjudication and surveyed similar literature, I will now introduce a model of judicial decision making intended to capture the dichotomy between elected and appointed judges—how their different systems of accountability impact their choices, particularly the choice to commit a juvenile to a secure facility or release them back into the community. Of course, juvenile judges often adjudicate on other matters such as statutory violations or custodianship, but I focus on decisions about delinquency cases to craft the model because they are of most import to voters, easily observed, and more readily classified. Although the model is a simplification of how each selection and retention method actually functions in the real world, the theoretical results manage to capture those shown in empirical studies, as I explicate in the discussion section.

My goal is that by condensing the complicated processes that inform judicial and voter behavior into a straightforward payoff scheme, I can aid readers in understanding the role that these processes play in perpetuating an unjust and overly punitive juvenile justice system that has avoided much academic and popular scrutiny on account, in part, of its non-transparency and complexity. This chapter lays the groundwork for the final chapter, in which I use intuitions derived from the model to investigate possible avenues for reform. I begin by presenting the context and structure of the model before explaining the equilibria and finally analyzing the equilibria against previous research and observation.
MODEL

Framework

I first discuss the model which represents an electoral scheme before contrasting it with the appointment version. Both variations on the model are composed using a similar framework. To begin, I assume two types of judges exist, those that are purely motivated by office holding and those that are motivated to impose just or accurate rulings. This is an adaptation of previous public choice election models that contrast “good” and “bad” or “populist” politicians (Jennings 2001), “congruent” or “non-congruent” politicians (Alesina and Tabellini 2007a; 2007b), and “high-quality” versus “low-quality” politicians (Canes-Wrone et al. 2000), among other dichotomies. For the present issue, I adopt the terms election-motivated and evidence-motivated judges. In the model, election-motivated judges occur with probability $\pi$ and evidence-motivated with probability $(1 - \pi)$. The purpose of this comparison is to understand how differentially motivated judges respond to the election system, and how that response in turn shapes the system and its outcomes.

The other core assumption of both models is that players are only concerned with the present and immediately next term even though the game is repeated across many election cycles. This formulation reflects the presumption that voters look at judicial performance in the present term to decide whether to re-elect them, while judges choose how to behave in the present based on their total desire to hold office only in the next term. While myopic beyond the next term, players may be infinitely lived. In this case, payoffs can be seen as shifting at time progresses to incorporate the present and closest future term. For example, a judge in term one is concerned about terms one and two; once
term two is reached, if the judge is re-elected, they are now concerned with terms two and three, etc. Voters as a conglomerate are infinitely lived yet myopic in this way. Although out of the scope of this thesis, it may be interesting to analyze the game in infinitely-repeated form in future work to see how the results would change and whether they more precisely or robustly capture real-world behavior.

Lastly, in both model types, there is a second probabilistic variable (beyond that which decides the motivation of the judge) imposed upon judicial decisions. Every juvenile is also assigned a type, recidivist or compliant, but this type is unknown to judges when they make their decision to release or incarcerate. Recidivist juveniles are those who reoffend after release, or would have reoffended if they had been released, while compliant juveniles comply with the law and would not or do not reoffend. In the game, juveniles are a compliant type with probability $(1 - \theta)$ and a recidivist type with probability $\theta$. The model is asymmetrical in part because this quality of juveniles is revealed (to voters and judges) if they are released but concealed if they are incarcerated, due to the fact that they would be unable to prove compliance or recidivism while committed. It is difficult or impossible to know how a juvenile would have behaved in a different setting, thus while some judges are internally concerned with avoiding false positives, in which they incorrectly identify a juvenile as a recidivist and incarcerate a compliant type, only false negatives, in which recidivist types incorrectly thought to be compliant are released, are punished by voters at the polls in the election model. This probability factor accounts for judges’ imperfect ability to determine which juveniles pose a risk of reoffending. Judges in the game and in reality are not omnipotent; their
information is limited to that which can be revealed and conveyed through an often-impersonal legal system.

**Structure**

With this framework in mind, the election game proceeds as follows (see Figure 3.1 on page 39). Beginning chronologically, judges are assigned by nature to be election- or evidence-motivated. This model is not concerned with the original selection of a judgeship, but rather starts with a judge already in the position. Next, the judge, knowing their type, assesses their payoffs and decides to incarcerate or release a juvenile based on which option is associated with their highest expected payoff. If the judge incarcerates the juvenile, the juvenile’s type is unobserved by voters or judges, and voters decide to re-elect or replace the judge with only the knowledge that the juvenile was incarcerated. If the judge releases the juvenile, the juvenile’s type is revealed to both players by virtue of them reoffending or not reoffending before the election. After observing the judge’s decision to release and also observing the juvenile’s type, voters decide to re-elect or replace the judge with a candidate from the judicial pool. The game repeats with either a new judge or a re-elected one.

Most essentially, this is a signaling game in which judges signal their type to the voters based on their decision to incarcerate or release. Again, judges know their type, but voters can only estimate type based on judicial behavior. The game is a reduction of the real court process; in the model, judges only deliberate over one case before voters decide to re-elect or replace them. With a small stretch of the imagination, one could apply this basic formulation instead as a propensity for judges to release or incarcerate
Figure 3.1
across many cases, though I refrain from doing so to maintain simplicity in my current analysis.

**Payoffs**

Both judge types receive a payoff of \( \alpha \) for each term in office, considered to be the value of office-holding that encompasses the salary, prestige, connections, and any other benefits. Election-motivated and evidence-motivated face differential payoffs because evidence-motivated judges receive a disutility of \( \beta \) for each term that they produce either a false positive or a false negative, meaning when they needlessly incarcerate a compliant-type or release a recidivist type and threaten the safety of the community. Election motivated judges are solely concerned with re-election and face no disutility for inaccurate rulings.

Voters’ payoffs track with actual crime exhibited in the current term and perceived threat of crime in the next term. They get a payoff of 1 for each period that the community is crime-free and 0 otherwise. The model operates in a closed circuit, such that the only crime of concern is that produced by the juvenile. Voters receive a payoff of 1 when any juvenile type is incarcerated (preventing them from reoffending) and when a compliant juvenile is released, but voters see the judge’s willingness to release in this term, regardless of the current juvenile’s type, as a willingness to release in the next where there is a possibility that the juvenile will be a recidivist. This assumption that judicial action will be repeated across terms can be captured by the set of voter beliefs that \( \text{Pr}[\text{release in the future} \mid \text{release in the present}] = 1 \) and \( \text{Pr}[\text{incarcerate in the future} \mid \text{incarcerate in the present}] = 1 \). Although these beliefs may be more complex in the real world, this simplification does not seem drastically far off from voters’ assessment of
judges as soft-on-crime or tough-on-crime based on few publicized cases. Voters especially seem to hold that judges who are have a history of leniency will be lenient, to the constituency’s detriment, in the future (see discussion about the removal of justices who fail to support the death penalty in major cases, Brace and Boyea 2008; Weiss 2006). Given these beliefs, voters only expect a full payoff of 2 when judges incarcerate in the first term and voters re-elect that judge. When replacing a judge, voters evaluate their payoff by considering the likelihood that the judge is of a certain type and the probability of that type to keep the community crime-free, either through incarceration or releasing a compliant-type.

As I will show in the equilibria section, election-motivated judges will incarcerate in both equilibria, and will therefore always keep the community crime-free, meaning that voters can expect a full payoff of 1 every time they replace a judge with an election-motivated type, which will occur with probability $\pi$. Voters can represent their uncertainty about how a newly elected evidence-motivated judge will behave with the variable $\gamma$, which is the probability that a non-incumbent evidence-motivated judge will incarcerate. Unlike election-motivated judges, evidence-motivated judges change their behavior depending on the equilibrium so that voters cannot be sure of a new judge’s preferred action. So, with $(1 - \pi)$ probability, a newly elected judge will be evidence-motivated, with $\gamma$ probability, that judge type will incarcerate, and with $(1 - \gamma)$ probability that judge type will release, with a $(1 - \theta)$, that released juvenile will be compliant, granting voters a payoff of 1. Altogether, then, the expected payoff from replacing a judge with one of unknown type or real payoffs can be captured by the expression $\pi + (1 - \pi)[\gamma + (1 - \gamma)(1 - \theta)]$. 
ELECTION EQUILIBRIA

In this section, I solve for Perfect Bayesian Equilibria in the election model, such that neither player has an incentive to unilaterally deviate from their strategy and player beliefs are consistent with strategy on and off the equilibrium path.

Separating Equilibrium

Figure 3.2 on page 43 shows the separating equilibrium, under which judicial motivation causes a divide in judicial decision-making.

**Definition:** The separating equilibrium is a Perfect Bayesian Equilibrium (PBE) in which (i) election-motivated judges incarcerate, (ii) evidence-motivated judges release, and (iii) the voter re-elects a judge if and only if incarceration is observed.

For this equilibrium to occur, the expected payoff for an election-motivated judge to incarcerate must be at least as high as their expected payoff of releasing, and the expected payoff for an evidence-motivated judge to release must be at least as high as their expected payoff of incarceration. Mathematically, this entails:

**Proposition 1:** The separating equilibrium occurs only when conditions for evidence-motivated judges are such that \( \theta \leq \frac{2}{3} - \frac{\alpha}{3\beta} \)

We can construct this condition through the following process. Election-motivated judges are always incentivized to incarcerate for a payoff of \(2\alpha\), given that they will be voted out of office if they release for a payoff of just \(\alpha\). Because election-motivated judges will always incarcerate under this payoff scheme, the establishment of a separating equilibrium rests on the behavior of evidence-motivated judges.
Figure 3.2
With the knowledge that voters will replace an evidence-motivated judge if they choose to release, and will replace them if they choose to incarcerate, the expected payoff for an evidence motivated judge for releasing is \((1 - \theta)\alpha + \theta(\alpha - \beta)\), and their expected payoff from incarceration is \(2\alpha - 2\beta(1 - \theta)\). These payoffs reflect that evidence-motivated judges face a disutility from generating false positives, which they will do with probability \((1 - \theta)\) upon incarcerating and producing false negatives with probability \(\theta\) upon releasing. For the expected payoff of releasing to be greater than or equal to the expected payoff of incarcerating, it must be the case that \(\theta \leq \frac{2}{3} - \frac{\alpha}{3\beta}\).

Keep in mind that \(0 \leq \theta \leq 1\) because \(\theta\) represents the probability of a recidivist-type occurring and \(\alpha\) and \(\beta\) are positive values. Holding \(\theta\) fixed, the expected payoff condition is more likely to be met when \(\beta\), the disutility from generating a false negative/positive is high and when \(\alpha\)—the value of office holding—is low. Holding \(\alpha\) and \(\beta\) fixed, the condition is more likely to be met when \(\theta\), the likelihood of releasing a recidivist type, is lower.

From these observations, we can conclude that low values of office, high internal pressure to reach correct decisions, and a lower possibility of releasing a recidivist all help to establish a pooling equilibrium. Intuitive off-equilibrium path beliefs by voters to uphold this equilibrium are \(Pr[\text{evidence-motivated} \mid \text{incarcerate}]=0\) and \(Pr[\text{election-}\)

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1 The evidence-motivated judge’s payoffs assume that they make the same decision (either to release or incarcerate) in both terms being considered, the present and the immediately following term. In the case of incarceration, incarcerating guarantees the judge two terms in office, \(2\alpha\), but imposes the risk of incarcerating a compliant type for both of those terms, represented by the moral disutility, \(\beta\), of the probability of that circumstance occurring \((1 - \theta)\), twice, which is subtracted from the value of holding office. To clarify the evidence-motivated judge’s payoff for the off-equilibrium release–recidivist–re-elect path, the judge again would receive \(2\alpha\) for holding office twice, but would face a certain disutility of \(\beta\) for releasing a juvenile revealed as a recidivist, and an additional disutility based on the probability \((\theta)\) that their same decision to release in the second term would release a recidivist into the community.
motivated | release]=0. In plainer terms, neither judge type would have an incentive to deviate from the pooling equilibrium if even voters thought that no incarcerating judges were evidence-motivated, and so re-elected all incarcerating judges, and thought that no releasing judges were election-motivated, and so replaced all releasing judges.

Most importantly, under this equilibrium, we get the result that:

**Proposition 2:** If the separating equilibrium prevails, a judge will be re-elected if and only if they are election-motivated.

Voters will choose to replace evidence-motivated judges, seeking to elect an election-motivated judge to reliably incarcerate and circumvent the risk of crime that releasing entails. This result is dependent upon voter’s belief that a judge releasing in the present will continue to release in a future term, inevitably leading to the release of a recidivist when \( \theta > 0 \) if retained indefinitely. Voters can be conceptualized as responding to the revelation that a judge is soft-on-crime, even if their decision does not immediately lead to observed crime in the present term. Moreover, if the game is repeated, as it would be in an actual jurisdiction, and voters consistently observe the separating equilibrium, their assessment of \( \gamma \) will trend downward, approaching 0, as evidence-motivated judges are repeatedly revealed as releasers. Voters will then be wearier of replacing judges and more certain of their preference for retaining election-motivated judges, thereby affirming and solidifying the equilibrium. In total, by removing evidence-motivated judges from office regardless of their success at preventing crime, voters seek to ensure the incapacitation of potential criminals in the following term that may receive too much leniency if the evidence-motivated judge had been re-elected. I consider the implications of this result further in the discussion section.
**Pooling Equilibrium**

The pooling equilibrium is shown in Figure 3.3 on page 47.

**Definition:** Under the pooling equilibrium, (i) election-motivated judges incarcerate, (ii) evidence-motivated judges also incarcerate, and (iii) the voter re-elects a judge if and only if incarceration is observed.

The opposite mathematical conclusion from above is necessary for the pooling equilibrium, where both judge types incarcerate, to prevail. As stated before, election-motivated judges will always incarcerate, so we are concerned with what conditions cause the evidence-motivated judges to incarcerate.

**Proposition 3:** The pooling equilibrium occurs only when conditions for evidence-motivated judges are such that \( \theta \geq \frac{2}{3} - \frac{\alpha}{3\beta} \).

Plausible and sufficient off-equilibrium path beliefs by voters to uphold the pooling equilibrium are \( \Pr[\text{evidence-motivated} \mid \text{release}] = 1 \) and \( \Pr[\text{election-motivated} \mid \text{release}] = 0 \). Or, voters believe that any judge who deviates from the equilibrium path by releasing is evidence-motivated and will thus be replaced. For this equilibrium, higher values of \( \alpha \) (more value of office-holding) or lower values of \( \beta \) (weaker internal motivation for accurate sentencing) make the condition more satisfiable. Holding \( \alpha \) and \( \beta \) fixed, the condition is more likely to be met when \( \theta \), the likelihood of releasing a recidivist, is higher.

In contrast to the separating equilibrium, we see that:

**Proposition 4:** If the pooling equilibrium prevails, both evidence-motivated and election-motivated judges are re-elected by voters.

The caveat to this initially promising proposition is that evidence-motivated judges are only retained because they have been incentivized by voters and the prevailing conditions
Figure 3.3
by voters to act like election-motivated judges. From a broad view, outcomes are the same for juveniles under both equilibria because the judges who comprise the system routinely incarcerate to remain in office. Although evidence-motivated judges will face a smaller payoff than election-motivated judges while in office, their actions and influence are indistinguishable to voters and the juveniles they adjudicate. In contrast to the separating equilibrium, consistent observation of the pooling equilibrium would lead voters to increase \( y \) until it reached 1, signifying that all evidence-motivated judges are also expected to incarcerate. More than anything, this upward trend in \( y \) demonstrates voter’s effective control over judicial behavior in the pooling equilibrium regardless of type. Eventually, repetition of the pooling equilibrium should produce a result in which all judges invariably incarcerate to the point that voters are ultimately indifferent about the specific judge or judge-type that holds the seat. Chapter 4 considers why such an outcome is undesirable for all participants.

**APPOINTMENT COMPARISON**

The key difference between the appointment and election models is the absence of the voter as a player in the former. Under appointment, judges automatically retain their seats for the duration of the game, and only their intrinsic motivations affect their decision between incarcerating and releasing. Instead of having election-motivated and evidence-motivated judges, the kinds of judge could be considered to be evidence-motivated or evidence-indifferent. An evidence-indifferent judge, like the election-motivated judge, enjoys the benefits of judicial office regardless of their decision-making
accuracy, while evidence-motivated judges still face a disutility for inappropriate placement.

In the appointment model, the decision-making onus is on the comparative risk of producing false positives and negatives to the strength of the judges’ intrinsic motivation to avoid those undesirable outcomes. The value of office is uninfluential in their decision precisely because they are guaranteed to keep their seat. Without voter retribution involved, judges are freer to act in accordance with their knowledge of the case (i.e. the likelihood of having a recidivist-type or compliant type) and their sense of justice. These are broadly valued characteristics of beneficial and benevolent justice systems, and stand in sharp contrast to the compelling forces of office-holding present in the election model that distort judicial intuition and basic fairness.

Extrapolating beyond the strict model, voters as players also skew the juvenile justice system toward punitivity over time; their influence is wider reaching than the incentives they impose on the currently sitting judge. If one contemplates the model being played out across many jurisdictions and many election cycles, it becomes apparent that election-motivated and incarceration-willing evidence-motivated judges come to dominate the juvenile bench as releasing judges are ousted and incarcerating judges are retained, possibly across many decades of continued voter support. Though I have treated the judicial pool as exogenous for the equilibria analysis, it may be illuminating to consider how the pool may realistically fluctuates in response to election results. The proportion of election-motivated judges, \( \pi \), in the judicial candidate pool may increase as evidence-motivated candidates, especially those existing in a separating-equilibrium, learn that they will not be retained after their first term. As \( \pi \) increases, the chance of
getting an evidence-motivated judge upon replacement of another judge becomes increasingly less likely, until the entire system is served and replenished by those supporting incarceration (a related discussion of the capture of government by “bad politicians” in a democratic system can be found in Caselli and Morelli 2003). An appointment system avoids this eventuality, because each judge type is equally guaranteed an additional term, such that one is not retained at greater proportions than the other, and because it interferes less with \( \pi \) to the extent that each type should find candidacy equally rewarding. Overall, appointment thwarts both the immediate and long-term voter pressures that push the juvenile justice system toward incarceration-biased outcomes. The following section compares the equilibria elucidated in the election section to the empirical studies and observation presented in Chapter II about the functioning of judicial systems.

DISCUSSION

There are a few key aspects of the models, revealed through their equilibria, that may be linked to previous empirical research. First, of primary importance, is the pressure voters place on judges to act punitively in the electoral system. If one imagines this game being played in separate jurisdictions across the country, incarceration patterns nationwide can be explained as the effects of the separating and pooling equilibria. The increasing punitivism observed closer to election, discussed in greater detail in Chapter II, is congruent with judges’ fear of landing on the wrong side of a separating equilibrium (Gordon and Huber 2007, Huber and Gordon 2004, Bandyopadhyay and McCannon 2014). Campaigning to be seen as “tough-on-crime,” or at least, not the softest-on-crime,
is revealing of judges’ knowledge of voter preference against leniency, and their willingness to abide by that preference to retain their seat. Beside the having effect of swaying current judges to behave more punitively, the repeated game intentionally deselects for lenient judges while retaining harsh ones, resulting in a system that grows its share of punitive judges over time. This could partially account for the dramatic rise in incarceration over the last several decades, from roughly 30,000 people in 1980 to just shy of 1,500,000 people in 2018 (“Trends in U.S. Corrections” 2020, 1). Although juvenile incarceration has been decreasing for over a decade, the massive rise in juvenile incarceration during the 1990s, fueled by voter fear and support for harsher treatment, has meant that current progress only restores the (high) incarceration rate of the mid 1980s (“Trends in U.S. Corrections” 2020, 6). Thus, there emerges this powerful dual effect, that seated judges are pushed to be more punitive under certain conditions and that punitive judges are disproportionately retained by voters. Both the separating and pooling equilibria contribute to an unbalanced justice system that advantages judges willing to use incarceration to avoid voter disapproval.

Second, an important assumption embedded in the model is that voters view leniency disfavorably, even when it is proven to be harmless in the present. This is born out specifically in voter payoffs on the release-compliant path. Despite the fact that an incarceration and release-compliant result lead to the same voter payoff in the current term, 1, the release-compliant path signals to voters that they face a higher risk of a release-recidivate result in the next term if they re-elect rather than replace the current judge. Extrapolating beyond the immediate considerations of the model, it may become more apparent why voters would disprefer a lenient judge, even when leniency was
appropriate for the situation. According to the deterrence view of criminal punishment, the purpose of disciplining criminals is to establish precedent, generate a warning, that crime will not be tolerated or treated lightly. Voters may dislike supporting standard practices that “go easy” on criminals because they believe that it creates a hospitable environment for criminal activity that may drive up crime and recidivism rates, which is in direct opposition to their future payoffs based on living in a crime-free area. Also, as discussed in Chapter II, Brace ad Boyea (2008) and Bright (1999-2000) describe many state Supreme Court elections shaped by judges’ perceived leniency, particularly relating to overturning death penalty cases. One of the main philosophical arguments for the death penalty is that it serves as a deterrent to major crimes; the possibility of death is intrinsically more compelling than the possibility of imprisonment, at least for most. Research has mostly dismissed a related deterrent effect of the death penalty, but seems open to the possibility of deterrence impacting less serious crimes (Dölling et al. 2009).

There are, of course, other ways to quantify and project voter preferences into their payoffs. Valuing retribution or rehabilitation may lead to different outcomes than valuing incapacitation and deterrence, as the current payoffs seem to lend themselves. The complexities of these concepts across individual voters and for different crimes make them harder to generalize, e.g. does proper retribution for shoplifting entail incarceration? What about shoplifting for the fifth time? Does rehabilitation mean secure placement or community supervision? Support for deterrence and incapacitation is much easier to standardize across an electorate, usually following that more incarceration leads to more deterrence and more incapacitation. Extensions on the current models may provide greater insight into voters’ full thought processes and strategy, although they would
require significant theoretical and possibly empirical input which is outside the scope of this project.

When comparing the conditions under which equilibria prevail between the election and appointment model, the inefficient and unjust incentives in the electoral scheme radiate through. In the electoral model, evidence-motivated judges are influenced by the relative value of office holding to their inclinations toward justice and the likelihood of erring in their decision. This balance between doing the just thing and retaining office opens the door for corruption to tip the scales or for the concreteness of money and power to erode at one’s resolve for fairness. Even if appointed judges are concerned with the opinions of their superiors and career or academic peers as Holmström (1999) and Alesina and Tabellini (2007a; 2007b) would argue, these performance pressures would be geared toward correct and exacting determinations that uphold just outcomes rather than subvert them. While appointment is by no means a solution to all of the ills of juvenile justice, it would go a long way in eliminating the bad incentives within the current system.

**FUTURE RESEARCH**

Aside from extending the model to consider it as an infinitely repeated game, it may also be advantageous to include a third option (aside from incarcerate and release) for judges—juvenile transfer to adult court. Currently, 16 states have judicial transfer systems in place which allow juvenile judges to move juvenile delinquency cases to adult criminal courts, where the juvenile will be tried as an adult (Teigen 2021). This means that the juvenile has the added right to a jury trial, but is also subject to harsher
sentencing and mandatory minimum schemes and may have the convictions on their adult record, possibly counting toward three-strikes policies and felony-related restrictions for voting or employment. Transferring cases, especially high-profile cases, could be especially strategic for judges because it allows them to avoid direct responsibility for any outcome—they would be exempt from voter outrage for under- or over-sentencing. Importantly, transfer to adult court and subsequent conviction is likely the worst outcome for juveniles compared to any sentence possible from juvenile court. Incarceration in an adult facility is often more detrimental to juvenile health and life trajectories (as discussed more in the next chapter) than detention in a juvenile-specific facility. This coincidence between optimal judicial strategy (in an election scheme) and minimal juvenile wellbeing is striking and provides yet another rout to understanding how voter pressure may distort just or efficient outcomes. As of 2019, roughly 10% of all incarcerated juveniles are confined in adult facilities as a result of transfer laws, including judicial transfer; the issue is non-trivial and may warrant more attention in a future attempt to quantify the causes and harms of more facets of juvenile incarceration (Sawyer 2019).

Lastly, my hope is that these models may eventually be tested empirically. The current data publicly available from the Office of Juvenile Justice and Delinquency Prevention is disjointed, incomplete, and out of date because it relies on states and local jurisdictions to self-report. Ideally, one would be able to analyze the juvenile population, juvenile crime rate, and number of juveniles brought before a judge on delinquency charges that resulted in confinement compared to the method of judicial selection to see if electoral systems really did show more punitivity. Until this can be accomplished, we can
look toward other data as proof of juvenile judges skewing toward harsher treatment, such as Papp’s (2019) and McCafferty’s (2017) investigation into the use of judicial overrides in Risk Assessment Instruments, which are almost always evoked to increase a juvenile’s risk level and keep them detained, to the detriment of the predictive validity of the instrument. Electoral pressures to avoid leniency would make sense of this tendency for override among Ohio’s elected juvenile judges.

Even once (or if) workable data becomes available to compare state systems, the true causal effect of having one scheme over the other will likely still be muddled. More targeted research may seek to answer whether areas with a progressive polities sought out an appointment system or whether simply having an appointment system is enough to create large-scale change regardless of previously prevailing ideology. There are many avenues for further research that can contribute to our understanding of the mechanisms of juvenile sentencing, and the model is intended as a solid foundation for that expansion. In line with this purpose, the next chapter uses different features of the models to explore and contextualize policy solutions aimed at alleviating harsh sentences for juveniles.
CHAPTER IV: Implications and Solutions

INTRODUCTION

This concluding chapter argues for the suboptimality of the equilibria in the election model from the previous chapter and examines possible solutions to alleviate the causes and consequences of this inefficiency. The primary reason the equilibria are suboptimal is that they are inherently short-sighted. They impose overincarceration—a long-term, self-perpetuating societal ill—for the sake of reducing current crime prevalence. The separating equilibrium is particularly suboptimal, because it results in more false positives than the pooling equilibrium given that recidivism risk, represented through recidivistic type prevalence ($\theta$), is likely low in the first place to generate the separating equilibrium—high incarceration of a low recidivist population is naturally less desirable than high incarceration of a high recidivist population. Despite this, the pooling equilibrium, likely arising because of a high recidivist population, also has the potential to be suboptimal because voters are still unable to account for the unobserved, though fewer, false positives that do occur. A blanket decree of incarceration generates unforeseen negative effects, to the detriment of juveniles and society, even when incarceration is warranted some of the time. In other terms, there is a negative externality in the market for incarceration, driven by a misinformed inflated voter demand, that leads the equilibrium quantity of incarceration to be greater than the overall socially optimum quantity. The size of this externality is reduced in the pooling equilibrium as compared to the separating equilibrium due to there being fewer false positives in the former case, but it is present in both scenarios nonetheless. There is thus reason to believe that reducing incarceration in the present, although it may result in a temporary increase in crime due to
a loss of deterrent and incapacitation effects (Clarke 1974), would benefit voters and juveniles alike by eliminating or alleviating this negative externality. More philosophically, the equilibria are also suboptimal because they unduly place the burden of crime reduction on the innocent or compliant. High crime prevention, or the elimination of false negatives, comes at the cost of producing many potentially unfair false positives. There are, therefore, both practical and moral reasons for wanting to alter these equilibria. The following section discusses the detriments of incarceration for voters and juveniles with these reasons in mind. The final two sections survey possible solutions, divided by policy scope.

**HARMS OF OVER-INCARCERATION**

Recognizing the harms of over-incarceration is essential to understanding why the carceral status quo is in need of change. Although the election model equilibria maximize voter preferences within the bounds of the narrow options available, this should not be confused with a result that maximizes social welfare generally speaking, outside of the constraints of the payoffs represented in the model. When considering the harms to juveniles and to society overall, and especially, over time, the success of voters in imposing their ill-informed preferences lies in sharp contrast with a having broadly beneficial and efficient juvenile justice system. This wedge between voter preferences and all-encompassing optimal outcomes arises precisely because false positives go unobserved by voters, meaning that their impact is difficult to quantify or incorporate into self-recognized voter payoffs even though it weighs heavily on the system as a whole. Moreover, the effects of incarceration naturally take longer to manifest than a typical
election cycle; altered life-long trajectories for incarcerated youth are less easily connected to judicial decisions, are less readily sensationalized by the media, and ultimately impact voters’ election decisions much less than narratives about false negatives and current crime prevalence. Nonetheless, these bad effects exist, and continue to impact juveniles and voters in important ways.

Most notably for voters, increased juvenile incarceration has been shown to be ineffective at reducing crime in the long term. In a longitudinal study of California’s youth justice system, Stahlkopf, Males, and Macallair (2010) find the incapacitation theory of criminal punishment to be inapplicable to juvenile detention. Incapacitation theory holds that high incarceration should yield low crime rates and the reverse, under the assumption that there are a limited number of criminal actors that can either be prevented from perpetrating or not (Stahlkopf, Males, and Macallair 2010). Contrary to the theory, the authors discover that reductions in the state juvenile incarceration rate since the 1990s has been met with a commensurate decrease in juvenile crime (Stahlkopf, Males, and Macallair 2010). Moreover, in the same period, Texas significantly increased their juvenile incarceration rate, and saw precisely the same decrease in the juvenile crime rate as California (Stahlkopf, Males, and Macallair 2010). These results, though derived from a small subsection of overall juvenile justice trends in the United States, call into question the premise that incarceration helps achieve a lower crime rate. The possibility that low incarceration is met with low crime, as it was in California, points to the importance of other overlooked factors in generating and preventing juvenile delinquency, such as prevailing socioeconomic conditions, resource access, and the use of non-commitment dispositional programs, to be discussed further in the next section.
In addition to such evidence that juvenile incarceration is unpredictably correlated with youth crime, a number of studies have found that incarcerated youth are actually more likely to reoffend in the future than those who received other kinds of intervention (Lambie and Randall 2013); this high recidivism occurs both in the few years following release (Mendel 2011) and later in life as adults (Gatti, Tremblay, and Vitaro 2009). Although incarceration eliminates the possibility of re-offense for the duration of the sentence or detainment, it often leads to connections with other individuals involved in illegal activity and reduces legitimate economic opportunities after release due to poor educational access and an inability to develop work experience. All of these factors culminate in a need and sufficient information to participate in further in the criminal sphere upon release (Lowenkamp and Letessa 2004).

The recidivism effect of incarceration is incredibly easy to trigger—Ogle and Turanovic (2016) consider the impact of short-term detention imposed on juveniles who fail to appear in court on their scheduled hearing date. They find that mostly low-risk offenders who were originally released into the community before being detained under a failure to appear policy were more likely to reoffend and be re-detained within two years of their failure to appear detention than their non-detained counterparts (Ogle and Turanovic, 2016). Lowenkamp and Latessa (2004) focus particularly on the disparity in recidivism rates after court intervention between high- and low-risk offenders. Data from juveniles placed in half-way house programs in Ohio show that more than half of the programs increased likelihood of recidivism among low-risk offenders, while more than half, though not the exact same set of programs, also reduced the likelihood of recidivism for high-risk offenders (Lowenkamp and Latessa 2004). The authors explain
this phenomenon by evaluating the relative influence of the programs on the juveniles; for high-risk juveniles, these programs often introduce structure and provide them with the support that was lacking in their previous environments, leading to less recidivism as compared to other repeat or serious offenders treated through different programs. For low-risk juveniles, these programs instead disrupt previously existing structure and support and introduce poor behavioral influences if grouped with high-risk offenders, resulting in greater recidivism compared to other low-risk peers (Lowenkamp and Latessa 2004). In this context, the detriments of producing false positives are especially pronounced. The desire to avoid overly punishing low-risk offenders, or, in terms of the models, compliant types, is not only grounded by moral considerations to select the least injurious option for the juvenile while maintaining community safety, it is also rooted in the practical concern for eliminating crime.

Incarceration is not only largely ineffective at preventing crime across time, but it is also extremely expensive relative to other interventions that are at least as effective. A study of different intervention methods in Washington state found that incarceration offered the least crime-reduction value to tax payers per dollar (Holman and Ziedenberg 2006). Taken together, research indicates that juvenile incarceration, in the best case, has little influence on juvenile crime rate, and in the worst case, increases crime and recidivism, converts previously low-risk youth into re-offenders, and ineffectively utilizes tax-payer dollars. Justifying incarceration thus becomes difficult when the end-goal of voters is to alleviate youth crime.

Juveniles face steep costs with incarceration as well. On the whole, juvenile incarceration is linked to worse mental health (Fazel, Doll, and Långström 2008;
Wasserman et al. 2010), higher substance abuse rates (Welty et al. 2016), poorer academic achievement (Katslyannis et al. 2008), and limited job opportunities (Bullis and Yovanoff 2006). Aside from employment, these attributes of incarcerated or formerly incarcerated youth can be readily understood as bi-directional. For instance, low educational achievement or poor schooling may push a juvenile toward delinquency, and once in the juvenile system, they receive more poor schooling, and their overall scores and degree attainment decrease. Likewise, previous mental health or substance abuse issues may lead a juvenile into the court system, while incarceration only increases mental health burdens and the need for substance-dependent relief. While these issues most directly impact juveniles themselves, wider society does not escape the consequences of these statistics. Publicly funded programs that support those with mental health and substance abuse issues and the unemployed expand to accommodate the demand for services. Taxes are thus counteractively and ineffectively spent to (over)incarcerate and to address the issues caused by (over)incarceration. On the whole, incarceration is an unwise investment in crime reduction upfront and also imposes a delayed liability on society and juveniles to face the harms generated by the misguided investment. The next sections explore ways to reduce the burden of crime while avoiding the unnecessary harms of excessive incarceration.

**ELECTION SCHEME-SPECIFIC SOLUTIONS**

The proceeding solutions use intuitions gained from the election model in Chapter III to target over-incarceration while operating in the confines of the flawed system.
Pre-Trial Practices

One way to reduce voter opposition to judges who decide to release juveniles is to remove the uncertainty surrounding juvenile type. If voters know that judges are confident they are only releasing juveniles that are very unlikely to reoffend, voters should be more willing to accept judges who choose to release because the perceived crime risk is reduced. If uncertainty is sufficiently reduced, the separating equilibrium could be thwarted—voters will have no incentive to replace evidence-motivated judges who choose to release so evidence-motivated judges may remain retain their seat despite choosing not to incarcerate. The administratively simplest way to improve judicial accuracy about juvenile type is to implement risk assessment instruments (as discussed in Chapter II) which have been shown to be more accurate than judicial determinations that are often influenced by human biases (McCafferty 2017; Papp 2019). Another option is to introduce community or school monitoring programs pre-trial that better inform a judge about the juvenile’s behavior before the dispositional stage. These programs would operate in some ways like an additional signaling game, in which juveniles signal their type as compliant or recidivistic based on the effort they put into adhering to the program guidelines. A recidivistic juvenile who values re-offense would find it more costly to obey the rules of the program than a compliant type; thus, their behavior in a controlled environment can be used to predict their type, rather than the limited information a judge can gather during a few court appearances.

Improved Sentencing Options

Another way to reduce the threat of recidivism in the eyes of the voter is to invest in better dispositional programming that is less invasive than incarceration but still
effective against recidivism. Restorative justice programs, which focus on mending the relationship between an offender and victim or offender and community, have been shown to be more effective at reducing recidivism than ‘releasing’ programs that only focus on containment or control, such as probation (Rodriguez 2007). The Washington cost-effectiveness study found that the three most cost-effective programs for reducing recidivism were functional family therapy, aggression replacement therapy, and multi-systemic therapy (Holman and Ziedenberg 2006). These services lie in sharp contrast to the deindividuated and punitive approach of methods typically thought to reduce crime through threat of further punishment or intense surveillance. In general, programming that addresses the root cause of delinquency, rather than just its presentation, is better at preventing it in the future.

**Changing Voter Preferences**

Finally, the most direct means of changing the equilibria in the election model is to alter voter preferences to account for the harm caused by excessive incarceration. Shifting the focus of judicial campaigning and juvenile justice media coverage away from sensationalism about re-offense to more objective messaging about genuine policy issues would go a long way toward accomplishing this goal. If the script can be flipped enough to draw attention to the long-term negative effects of incarceration, the equilibria could switch to favoring evidence-motivated judges, which would result in outcomes comparable to those under an appointment system. There is already evidence that suggests voters are beginning to disfavor excessive incarceration for juveniles. Piquero and Steinberg (2010) found that residents in three of four states surveyed were more willing to pay additional money in taxes for expanded rehabilitative programs than
expanded incarceration. (The state that preferred increased spending on incarceration over increased rehabilitation was, ironically, Louisiana). The researchers also found that, on average, when survey participants were informed that rehabilitation was similarly effective to incarceration for crime reduction, their willingness to contribute taxes toward rehabilitation increased by 20% (Piquero and Steinberg 2010, 5). These findings point to voter mis-information or under-information that leads them to over-value incarceration compared to other intervention methods. Additionally, Piquero and Steinberg (2010) observe that there is a disconnect between politicians and voters about preferences for incarceration; politicians viewed voters as more supportive of incarceration than they reported to be. Because of this misperception, politicians are likely to push legislation that increases incarceration beyond true voter preference. Despite these informational issues, it does appear that preferences are moving away from the hardline punitivism of the War on Crime era that oversaw a drastic rise in juvenile incarceration. Recent events with the COVID-19 pandemic may accelerate growing voter tolerance or even preference for non-incarceration alternatives.

**BIG SOLUTIONS**

This section looks specifically at solutions that work outside of or seek to depose an electoral judicial selection scheme. These solutions are admittedly more complex than the targeted solutions presented in the last subsection, but they are important to acknowledge because of their potentially dramatic impact on the system. Although the first two solutions, welfare and school reform, are not narrowly considered to be juvenile
justice policy initiatives, they interact with the juvenile justice system in extremely influential ways.

**Income Support**

Delinquency is impossible to disentangle from child poverty. As Tamar Birckhead (2012) chronicles, poverty or low socioeconomic status, interacts with every step of the juvenile justice process. Impoverished children face more economic, familial, and community instability, which often leads to introduction to the juvenile justice system through common points of entry, including schools, police, retail stores (because of theft), and the child welfare system (Birckhead 2012). Once they reach the juvenile justice system, juveniles from poorer families are more likely to be initially detained, are less able to afford quality defense counsel, and are ultimately more likely to be assigned intensive intervention by judges who believe that less invasive solutions will be ineffective (Birckhead 2012).

Insidiously, adult incarceration is directly related to child poverty rates (DeFina and Hannon 2010). Along with the knowledge that youth incarceration commonly correlates with recidivism in adulthood, this vicious and inescapable cycle of incarceration and poverty across generations is revealed. Income support in the form of tax credits, universal basic income, direct payment for children, or any number of income subsidies would alleviate the prevalence of child poverty in the juvenile justice system; hopefully leading to a decrease both in initial crime committed and in incarceration.

**Better Equipped Schools**

I already discussed the robust school-to-prison pipeline in the first chapter, so I will only make brief mention of it here. Many youths find their way to the juvenile justice
system through schools that have increasingly treated disciplinary issues as legal ones. Funding shortages force schools to criminalize matters that could otherwise be dealt with through in-school counseling or individualized instruction or attention. Equipping schools with more resources to handle disciplinary matters before elevating the problem to the courts would drastically reduce juvenile contact with the justice system, reducing incarceration and its lingering effects.

Appointment

As described in the previous chapter, replacing electoral schemes for juvenile judges with appointment schemes would eliminate the voter-driven equilibria that consistently produce over-incarceration. An anticipated critique of this solution is that it forsakes a democratic process that rightfully prioritizes the welfare of the entire community over that of the limited population of youth affected by the juvenile justice system. This critique would be significantly more powerful if voters were more completely informed about their election decisions and were thus able to come closer to maximizing their wellbeing. Unfortunately, the voter, in this situation, is unable to accurately compile the information required to make a sufficiently well-educated decision given the nature of the inherently hidden and delayed adverse effects of incarceration in the present. Although the transition from an election to an appointment system is incredibly unlikely, as it would probably require voters to voluntarily relinquish their agency over juvenile judges, it remains a solution that would have a significant positive impact on juvenile incarceration and social welfare generally.
CONCLUSION

The goal of this chapter, and indeed this thesis, was to understand why maintaining an elected juvenile judiciary enforces suboptimal juvenile court outcomes and how we may go about remedying them. The good news is that there is a multiplicity of ways in which to reduce incarceration and alleviate its negative effects, varying in political and administrative feasibility. The challenging news is that the implementation of these measures is largely dependent upon the same voter preferences that impose the suboptimal outcomes in the first place. It is only the continued discussion of the juvenile justice system and advocacy for its improved conditions that will allow for inroads into the popular acceptance of these socially, economically, and ethically consequential reforms.
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