12 Unnecessary Men: The Case for Eliminating Jury Trials in Drunk Driving Cases

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Over the last few decades, states have imposed tougher punishments on drunk drivers. This article argues that increasing punishments is counterproductive. If legislatures are seeking to hold guilty offenders accountable and deter drunk driving, they should keep punishments low and instead abolish the right to jury trials. Under the petty offense doctrine, the Supreme Court has authorized states to abolish jury trials when defendants face a maximum sentence of six months' incarceration. Social science evidence has long demonstrated that judges are more likely to convict than juries, particularly in drunk driving cases. And researchers have also found that the certainty of punishment, not the severity of punishment, is the key factor in maximizing deterrence. Thus, by keeping maximum sentences for most drunk drivers at six months or less, states can abolish jury trials, thereby raising conviction rates and improving general deterrence. Additionally, bench trials will be far more efficient because the greater certainty of conviction will give defendants an incentive to plead guilty rather than taking their cases to trial. When trials do occur they will be much faster because lawyers will not have to select juries or present detailed background testimony to already knowledgeable judges. At present, only a handful of states have eliminated jury trials for drunk drivers. This article outlines the specific steps that states should take to abolish jury trials and thereby increase convictions, maximize general deterrence, and more efficiently handle one of the most common crimes in the United States.
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Introduction

Over the last few decades, states have become much tougher\(^1\) on defendants charged with driving while intoxicated (“DWI”).\(^2\) Legislatures have increased penalties not only for recidivists but also for first-time offenders.\(^3\) In most states, first-time DWI defendants now face up to six months in jail, and many jurisdictions authorize maximum sentences of a year or longer.\(^4\) While states should be commended for addressing the DWI problem,\(^5\) a primary focus on punishment is insufficient and may actually be counterproductive.\(^6\) Legislatures would be better served by maintaining modest sanctions for first-time offenders while invoking the perfectly constitutional – though rarely used – option of eliminating the right to a jury trial for DWI defendants who face no more than six months in jail. Bench trials before more conviction-prone judges will “get tough” on DWI offenders by holding more defendants accountable and enhancing general deterrence prospects through greater certainty of punishment. At the same time, a bench trial regime will decrease the importance of high-priced criminal defense lawyers available only to wealthy defendants and will vastly improve the efficiency of processing one the most common crimes in the United States.

For over four decades, social science evidence has demonstrated that, when presented with identical cases,\(^7\) judges are more willing to convict than juries.\(^8\) Jurors’

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1 See H. Laurence Ross, Can Mandatory Jail Laws Deter Drunk Driving? The Arizona Case, 81 J. CRIM. L. & CRIMINOLOGY 156, 156 (1990) (“The political climate of the 1980s in America has led to the view that drunk driving is a violent crime, properly punishable with time served in jail.”).
2 States have various names and degrees of severity for drunk driving offenses. For ease of exposition, I will refer to them as “DWI” prosecutions throughout this article.
4 See infra notes 36-38 and accompanying text.
5 Drunk driving is an enormous problem that kills over ten thousand people every year and causes billions of dollars in property damage. See MOTHERS AGAINST DRUNK DRIVING, CAMPAIGN TO ELIMINATE DRUNK DRIVING: STATISTICS (available at http://www.madd.org/Drunk-Driving/Drunk-Driving/Statistics.aspx).
6 There has been a modest reduction in the rate of DWI in recent years, see BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, DWI OFFENDERS UNDER CORRECTIONAL SUPERVISION 1 (June 1999). However, to the extent drunk driving has declined, that may be due less to legislation and more to the moral campaign waged by groups like MADD to make drunk driving stigmatic. See Dan M. Kahan, Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem, 67 U. CHI. L. REV. 607, 634 (2000).
7 On their face, trial statistics seem to show that judges acquit more than juries. Yet, this is misleading. The most commonly accepted explanation is that juries are less accurate at determining guilt so smart defendants waive their right to a jury when the evidence is weakest and stick with juries when the evidence of guilt is most compelling. See Richard A. Posner, An Economic Approach to the Law of Evidence, 51 STAN. L. REV. 1477, 1501 (1999) (“If juries are less accurate guilt determiners than judges, innocent defendants will choose to be tried by judges
reluctance to convict cuts across a range of offenses, but it appears to be particularly troublesome for the crime of DWI. Unlike most offenses in the criminal code – think of murder, arson, or theft, for instance – many jurors in DWI cases can put themselves in the defendant’s shoes and imagine “there for the grace of God go I.”

And unlike judges who are repeat players in the criminal justice system and see hundreds of DWI cases, juries are likely much more susceptible to courtroom theatrics or meritless challenges to the validity of the prosecution’s case. Defendants who take DWI cases to trial are often middle-class or wealthy and can afford to hire the best lawyers who specialize in DWI defense. These lawyers challenge the complicated sobriety tests that prove intoxication and are more likely to make headway with jurors who have never seen a DWI case before than a judge who has presided over numerous DWI trials and is aware of the reliability of the tests. Moreover, unlike most other areas of law in which appointed defense lawyers are often out-matched by experienced prosecutors, DWI cases actually represent the reverse scenario. Because DWI cases are usually low-level misdemeanors, it is often inexperienced prosecutors who are left to square off against highly paid defense attorneys.

Put simply, jurors in DWI cases are more likely to be confronted with extra-legal factors that favor the defense or demand a higher standard of proof than the law specifies. Shifting from jury trials to bench trials would therefore almost certainly increase the DWI conviction rate.

A higher conviction rate will not only increase the number of guilty defendants held accountable, but it will also further general deterrence goals. Researchers have long found that the certainty of punishment, not the severity of punishment, is the single best deterrent to future misconduct. By moving to bench trials and increasing

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10 See Andrew D. Leipold, Why Are Federal Judges So Acquittal Prone, 83 WASH. U. L.Q. 151, 187 (2005) (surveying lawyers about preference for jury trial or bench trial and explaining that “[a] few defense counsel also acknowledged that judges were less likely to be persuaded by creative defense techniques (as one lawyer put it, ‘judges are more likely to see through our strategy’), perhaps a tacit admission that juries are more easily misdirected than judges are.”).
11 See infra note 119 and accompanying text discussing the quality of DWI defense lawyers.
12 The classic example is death penalty cases where many defendants are represented by inexperienced or inadequate defense lawyers and prosecuted by experienced district attorneys. See Adam M. Gershowitz, Statewide Capital Punishment: The Case for Eliminating Counties’ Role in the Death Penalty, 63 VAND. L. REV. ___ (2010).
13 See Leipold, supra note 10, at 181 (explaining that in misdemeanor cases “[t]he prosecutor assigned to the case is probably going to be less experienced than those assigned to felonies”).
14 See infra notes 157-80 and accompanying text.
conviction rates, states will be more likely to maximize the chances of deterring future drunk driving.

At the same time that eliminating jury trials would increase conviction rates, states would also save considerable money and resources. Moving exclusively to bench trials would eliminate the time-consuming process of jury selection and would considerably reduce the need for trial lawyers to present lengthy background information at trial that must be conveyed to first-time DWI jurors but not experienced judges.

More importantly, eliminating jury trials would reduce prosecutors’ caseloads. Not only would trials take less time, but there would actually be fewer cases that make it all the way to trial. Defendants forced to appear before more conviction-prone judges would have even greater incentive to plea bargain, thus moving cases off of prosecutors’ dockets. In a world without jury trials for DWI cases, prosecutors would be in a position to devote more time to their other cases.

Finally, unlike more serious crimes, increasing DWI convictions would not clog already overcrowded jails. Despite lobbying efforts by Mothers Against Drunk Driving and other organizations to toughen maximum sanctions, the vast majority of misdemeanor DWI defendants are actually sentenced to probation or very short jail sentences.

While eliminating the right to a jury trial may initially seem to be a radical idea, it is actually a realistic proposal that can be easily implemented under existing precedent. Longstanding Supreme Court doctrine provides that defendants only have a federal constitutional right to a jury trial when they face more than six months in jail. Because many states impose a maximum sentence of only a few months in jail for first-time DWI offenders, states are free to try such defendants in bench trials so long as their state constitutions do not provide a more expansive jury trial protection than the United States Constitution. Legislatures would only have to amend their existing statutes to strike out the jury trial guarantee.

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15 The time includes not just the questioning of jurors, but argument over which jurors should be struck for cause and whether any peremptory challenges have been improperly used based on race or gender. See William T. Pizzi, Batson v. Kentucky, Curing the Disease But Killing the Patient, 1987 SUP. CT. REV. 97, 139-40 (discussing how time consuming voir dire was before Batson and explaining that the decision adds “a new level of complexity” and amounts to “a step in the wrong direction as far as the efficiency of the system is concerned”).

16 See Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial, 117 HARV. L. REV. 2463, 2501-02 (2004) (explaining that when defendants have less control and less cause for optimism they are more willing to plea bargain).

17 A 1997 study by the Bureau of Justice Statistics found that of 513,000 DWI offenders under supervision of the criminal justice system, more than 450,000 were on probation. See DWI OFFENDERS UNDER CORRECTIONAL SUPERVISION, supra note 6, at 1.

18 The proposal is foreclosed in a small number of states that have interpreted their state constitutions to require a right to a jury trial in all criminal cases. See infra note 235 and accompanying text.

19 See infra Part II.
In sum, eliminating jury trials in misdemeanor DWI cases would likely increase conviction rates, further deterrence goals, save states money, and enable prosecutors to focus their attention on other cases, all while leaving jail populations largely unaffected. Yet, only a handful of states have adopted this approach.\(^\text{20}\)

This article offers a detailed explanation why eliminating the right to a jury trial for misdemeanor DWI defendants is the right approach. Part I briefly surveys the development of DWI laws from around the country over the last few decades. Part I explains how despite considerable legislative efforts to decrease the DWI problem, the vast majority of first-time DWI defendants face maximum sentences of six months or less. Part II then reviews Supreme Court precedent holding that such defendants have no federal constitutional right to a jury trial. Part III is the heart of the paper. It first reviews the social science literature demonstrating that judges are typically more likely to convict than juries. Part III then goes beyond the empirical literature to discuss reasons why juries in DWI cases may be more reluctant to convict than experienced judges. Part IV then sets forth the argument why eliminating the right to a jury trial would be a positive step forward. Part IV reviews the literature demonstrating that increased conviction rates serve as a better deterrent than harsher punishments. Part IV also explains how the use of bench trials rather than juries will save time and resources that prosecutors’ offices can redirect to other important areas. Finally, Part V discusses the particular steps that states should take to revise their statutes to eliminate the right to a jury trial for misdemeanor DWI prosecutions.

I. The Development of DWI Laws Over the Last Few Decades

Although drunk driving has existed as long as there have been vehicles, the movement to combat it did not begin in earnest until the late 1970s and early 1980s.\(^\text{21}\) Prior to this “modern era,” DWI was treated as just another traffic violation.\(^\text{22}\)

In 1978, the group Remove Intoxicated Drivers (RID) was founded in upstate New York and in 1980 the more well-known Mothers Against Drunk Driving was formed in California.\(^\text{23}\) Shortly thereafter, chapters of both organizations, as well as Students Against Drunk Driving, began to spring up around the country.\(^\text{24}\) In subsequent years, lobbying by these organizations led to a toughening of DWI laws around the country.\(^\text{25}\)

\(^{20}\) See infra note 60 and accompanying text.

\(^{21}\) See JAMES B. JACOBS, DRUNK DRIVING: AN AMERICAN DILEMMA xv (1989).

\(^{22}\) See Andrew Taslitz, A Feminist Fourth Amendment?: Consent, Care, Privacy, and Social Meaning in Ferguson v. City of Charleston, 9 DUKE J. GENDER LAW & POLʼY, 1, 67-68 (2002) (explaining that drunk driving prohibitions were sumptuary offenses like “blue laws” and that “[s]ignificant penalties for violating sumptuary laws were long inconsistent with popular attitudes”).

\(^{23}\) See JACOBS, supra note 21, at xv.

\(^{24}\) See id. at xvi.

\(^{25}\) See ROBIN, supra note 3, at 8-14.
In the early 1980s, Congress passed legislation conditioning federal highway funding on states adopting a .10 blood alcohol level for intoxication and raising the drinking age to 21. Not only did states respond to this legislation to keep their federal dollars, they also passed legislation of their own to impose more severe punishments on drunk drivers. As Professor James Jacobs has explained, states “enacted mandatory jail terms, more severe fines, and automatic lengthier suspensions and revocations.”

Despite the considerable toughening of DWI laws over the last thirty years however, the maximum sentences for DWI remain comparatively light in many jurisdictions. This is particularly true for first offenders. In New Hampshire and Pennsylvania, first offenders face no jail time, only a fine. In Mississippi, the maximum sentence for first offenders is forty-eight hours incarceration. First-time defendants in Hawaii face a maximum of only five days, while New York offenders risk fifteen days. The maximum sentence in Kentucky, New Jersey, North Dakota, and South Carolina is thirty days in jail. Indiana, Maryland, and Nebraska cap punishment for first offenders at two months. Another three states impose maximum punishments of roughly three months.

Most states are slightly tougher on first offenders. The most common statutory design, adopted by nearly twenty states, imposes a maximum sentence of six months for first-time offenders. About a dozen states have regimes that carry a possible

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27 See Jacobs, supra note 21, at xvii. Today, every state in the nation has enacted per se laws making it unlawful to operate a motor vehicle with a blood alcohol level in excess of .08. See Tina Wescott Cafaro, You Drink, You Drive, You Lose: Or Do You?, 42 Gonz. L. Rev. 1, 25 (2009).

28 Id. States also stepped up police enforcement through roadblocks and patrols, leading to a 50% increase in drunk driving arrests between the mid-1970s and mid-1980s. See id. at xviii.

29 See N.H. Rev. Stat. Ann. § 263-A18; 75 Pa. Code § 3804(a)(1) & (c)(1) (setting a maximum punishment of probation and a $300 fine if the offender took the blood test, but imposing at least 72 hours incarceration for offenders who refused the breath test).


35 See Mich. Stat. § 257.625(9) (ninety-three days); Minn. Stat. § 169A.27 (ninety days); N.M. Stat. Ann. 66-8-102 (ninety days).

sentence of one year. Only three states have adopted a scheme in which first-time offenders face a possible sentence in excess of a year. In sum, in more than two-thirds of the states, defendants face a maximum sentence of six months incarceration, and often much less.

Yet, even these low maximum sentences are deceiving because it is rare to see defendants sentenced anywhere close to the statutory maximum. Defendants facing months or even a year in jail often receive only probation. For instance, in Texas, a first-time DWI is a Class B misdemeanor punishable by a maximum sentence of 180 days in jail. Although the statute provides for a minimum term of 72 hours imprisonment, first offenders with clean criminal records regularly receive probated sentences and serve no jail time. In Massachusetts, first-time offenders face the toughest penalty in the nation – two-and-a-half years – but even a single day in jail is rarely imposed.

At bottom, the reality of DWI prosecutions in the United States is that most defendants are first offenders facing a maximum sentence of six months and that in practice they have very low odds of being sentenced to jail at all, no less the statutory maximum. Yet, DWI trials are very common occurrences in criminal courthouses across the country. Defendants often fight very hard to avoid conviction, thus utilizing enormous prosecutorial and judicial resources. As the next section discusses, many (though not all) states can take relatively simple measures to improve efficiency, conviction rates, and deterrence prospects by eliminating jury trials in DWI cases.


39 Of course, repeat offenders face more severe sentences. Yet, most DWI offenders are not recidivists and the overwhelming majority of criminal prosecutions are for first-time DWI offenses. See AAA FOUNDATION FOR TRAFFIC SAFETY, DRUNK DRIVING: SEEKING ADDITIONAL SOLUTIONS vi (2002) (“About one-third of all drivers arrested or convicted of DWI are repeat offenders.”).

40 See Tex Pen. Code § 49.04(b) (classifying the crime as a Class B misdemeanor); Tex. Pen. Code § 12.22 (providing that Class B misdemeanors can be punished by “confinement in jail for a term not to exceed 180 days”).

41 Lawyers specializing in DWI defense are not reluctant to advertise that properly defended DWI prosecutions can result in no jail time. See, e.g., TYLER FLOOD, FREQUENTLY ASKED QUESTIONS (available at http://www.texaswidefenselawyer.com/drunk-driving-faqs.html) (“If you have a clean criminal record and there were no serious injuries resulting from your first misdemeanor DWI, you should not have to worry about doing any additional jail time. In Harris County, probation is an option as an alternative to jail time.”).

42 See infra notes 226-29 and accompanying text.
II. There Is No Federal Constitutional Right to a Jury Trial for Petty Offenses Carrying Six Months or Less Incarceration

Although popular culture portrays criminal defendants’ right to a jury trial as sacrosanct, there are actually numerous restrictions on the jury trial right that conflict with public perception. Defendants are not entitled to the infamous jury of twelve,\(^\text{43}\) nor to a verdict that is unanimous.\(^\text{44}\) Indeed, in many criminal cases, defendants actually have no federal constitutional right to a jury trial at all. The so-called “petty offense doctrine” provides that certain minor crimes are exempt from the right to a jury trial. A review of the history of that doctrine shows how run-of-the-mill first-time DWI charges fit in this category and can therefore be exempt from the jury trial guarantee.

In 1968, during the height of the Warren Court’s criminal procedure revolution, the Supreme Court incorporated the right to a jury trial. In \textit{Duncan v. Louisiana}, the Court considered the case of a black defendant accused of assaulting a white victim in a racially tense environment.\(^\text{45}\) Duncan, who faced up to two-years imprisonment under the battery charges, had no statutory right to a jury trial under Louisiana law.\(^\text{46}\) The Supreme Court found the Louisiana procedure to be unconstitutional on the ground that the Sixth Amendment right to a jury was fundamental and cannot be eliminated by the states.\(^\text{47}\) Yet, although the Court used sweeping language to explain the importance of the jury trial right, the Court refused to apply it to all cases. As the Court explained,

\begin{quote}
It is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States. Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses. But the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment.\(^\text{48}\)
\end{quote}

Looking to English common law and the colonial period, the Court stated that petty offenses were regularly tried without juries.\(^\text{49}\) Citing the benefits of efficiency and simplicity, the \textit{Duncan} Court concluded that the benefits of eliminating jury trials

\(^{44}\) See Johnson \textit{v. Louisiana}, 406 U.S. 356 (1972) (permitting nine to three jury verdict).
\(^{45}\) 391 U.S. 145 (1968).
\(^{46}\) See \textit{id.} at 146.
\(^{47}\) See \textit{id.} at 162.
\(^{48}\) \textit{id.} at 159-60.
\(^{49}\) See \textit{id.} at 160.
outweighed any negative consequences to criminal defendants charged with petty offenses.\textsuperscript{50} And from a historical point of view the Court found no reason to believe that the framers disagreed with eliminating jury trials for petty offenses.\textsuperscript{51}

When it came to drawing the line separating petty from serious offenses, the Court was more equivocal. Relying on the approach in the federal system, the Court appeared to endorse the idea that petty offenses were those where the defendant could be sentenced to no more than six months’ incarceration.\textsuperscript{52} Yet the Court left the “exact location” for another day.\textsuperscript{53}

A few years later, in \textit{Baldwin v. New York},\textsuperscript{54} the Court sought to clarify the parameters of the petty offense doctrine. In a case where the defendant faced up to one year of imprisonment for a misdemeanor offense of pickpocketing, the Court concluded that states could not eliminate the right to a jury trial.\textsuperscript{55} Drawing a brighter line rule than in \textit{Duncan}, the Court held that “no offense can be deemed ‘petty’ for purposes of the right to trial by jury where imprisonment for more than six months is authorized.”\textsuperscript{56} Thus, every criminal defendant facing more than six months in jail was guaranteed a jury trial.

The \textit{Baldwin} Court declined to resolve at least one remaining question: Are all offenses punishable by six months or less in jail automatically deemed petty? Put differently, could a crime carrying a short jail sentence still be serious enough to require a jury trial if it also imposed other punishments such as stiff fines or loss of other rights? The Court addressed this question in \textit{Blanton v. City of North Las Vegas}, a DWI case where the defendant faced a maximum sentence of six months in jail as well as a $1,000 fine and forty-eight hours of community service while dressed in clothing identifying him as a DWI offender.\textsuperscript{57} The Court accepted the proposition that collateral sanctions could guarantee a defendant facing six months or less in jail a right to a jury trial,\textsuperscript{58} but it rejected the argument that Blanton’s case rose to that level. The Court concluded that a DWI defendant facing six months’ incarceration, a stiff fine, community service, and possible shaming from having to wear clothing identifying him as a DWI offender did not guarantee the right to a jury trial.\textsuperscript{59}

The \textit{Blanton} decision was unanimous and signaled with unmistakable clarity that states are free to punish defendants with up to six months in jail as well as ancillary penalties without first providing them with a jury trial. Yet, fewer than ten states have

\textsuperscript{50} See id.
\textsuperscript{51} See id.
\textsuperscript{52} See id. at 161.
\textsuperscript{53} Id.
\textsuperscript{54} 399 U.S. 66 (1970).
\textsuperscript{55} See id. at 67, 69.
\textsuperscript{56} Id. at 69.
\textsuperscript{57} 489 U.S. 538, 544 (1989).
\textsuperscript{58} See id. at 542.
\textsuperscript{59} See id. at 545.
invoked the option to eliminate the right to a jury trial for low-level DWI offenses.\textsuperscript{60}

III. Eliminating Jury Trials Will Lead to Higher Conviction Rates in DWI Cases

As outlined below, there is considerable empirical and qualitative evidence that judges are more willing to convict than juries. The evidence is particularly robust in DWI cases.

A. Empirical Research Has Found That Judges Are More Willing To Convict Than Juries

Over forty years ago, researchers Hans Zeisel and Harry Kalven published a landmark study that analyzed the extent to which trial judges agreed with juries’ verdicts in more than 3,500 criminal jury trials.\textsuperscript{61} After juries made the decision whether to convict or acquit, the trial judges completed questionnaires stating whether they disagreed with the verdict and the reasons for that disagreement.\textsuperscript{62} The Kalven and Zeisel study remains the gold standard for jury analysis to this day.\textsuperscript{63} Kalven and Zeisel found that juries and judges agreed in approximately 78% of cases.\textsuperscript{64} In the remaining cases, the data indicated that judges were much more willing to convict than juries. Juries convicted in only 3% of cases where the judge would have acquitted.\textsuperscript{65} By contrast, in 19% of cases, juries acquitted a defendant who the judge would have convicted.\textsuperscript{66} In sum, jurors were more lenient than judges in 16% of cases.\textsuperscript{67}


\textsuperscript{61} See Kalven & Zeisel, supra note 8, at 33.

\textsuperscript{62} See id. at 44-54.

\textsuperscript{63} See Valerie P. Hans & Neil Vidmar, The American Jury at Twenty-Five Years, 16 LAW & SOC. INQUIRY 323, 323 (1991) (describing The American Jury as “arguably one of the most important books in the field of law and social sciences”).

\textsuperscript{64} See Kalven and Zeisel, supra note 8, at 56. The authors distributed the 5.5% of hung juries evenly between convictions and acquittals. See id. at 57-58. Separating out the hung juries results a slightly lower percentage of agreement (75%) as well as slightly lower percentages of disagreement between judges and juries. See id. at 56 tbl. 11.

\textsuperscript{65} See id. at 59.

\textsuperscript{66} See id.
Based on the narrative responses provided by judges, Kalven and Zeisel determined that juror leniency resulted not from confusion about the evidence or the law, but because jurors demanded a greater degree of proof than judges to find a defendant guilty beyond a reasonable doubt.\footnote{See id.}

Even more telling than the overall 16% leniency rate was the unwillingness of jurors to convict in DWI cases. Kalven and Zeisel studied forty-two categories of crime ranging from murder and kidnapping on the serious end to petty larceny, and public disorder on the less serious end.\footnote{See id. at 67.} Interestingly, the most common crime in the study by a considerable margin was DWI.\footnote{See id.} Of the 3,576 cases Kalven and Zeisel studied, a total of 455, or nearly 13% of the sample, were DWI prosecutions.\footnote{See id. at 469.} Remarkably, the jury leniency rate in these cases jumped from 16% (the total for all crimes in the entire study) to 24% in DWI offenses.\footnote{See id. at 468.} Once again, judges would have acquitted in only 3% of cases where juries convicted.\footnote{See id. at 468-69.} By contrast, in a staggering 27% of DWI cases, judges believed the evidence merited a conviction even though juries acquitted.\footnote{See id. at 469.}

Of course, one might be inclined to explain the high percentage of DWI cases in which juries acquitted as a product of the times. Public attitudes toward DWI certainly were more tolerant in the 1950s than they are today thus making it difficult to draw any present conclusions from a study that is nearly a half-century old. Yet, Kalven and Zeisel took a step toward controlling for this problem by questioning judges whether the community considered its DWI laws to be too severe. In jurisdictions where the perception was that DWI laws were too strict, jurors acquitted in 33% of cases where judges would have convicted.\footnote{See id. at 468-69.} Yet, even in jurisdictions where the community did not believe DWI laws were too harsh, the jury still acquitted in 22% of cases where judges believed convictions should have occurred.\footnote{See id. at 294 ("In many cases the issues seems to be entirely evidentiary, with the jury showing hostility to the use of drunkometers and alcometers, so frequently relied upon in these cases.")}

Kalven and Zeisel offered a number of possible reasons for juror leniency in DWI cases. First, they believed that juror hostility to breathalyzers accounted for many acquittals.\footnote{See id. at 294} Second, many jurors believed the punishment for DWI was too severe.\footnote{See id.}

\footnote{See id. at 106-11.}
\footnote{See id. at 67.}
\footnote{See id.}
\footnote{See id. at 468.}
\footnote{See id.}
\footnote{See id.}
\footnote{See id. at 468-69.}
\footnote{See id. at 469.}
\footnote{See id. at 294 ("In many cases the issues seems to be entirely evidentiary, with the jury showing hostility to the use of drunkometers and alcometers, so frequently relied upon in these cases.")}
\footnote{See id.}
Less commonly, jurors acquitted because while there was proof of a sufficiently high blood alcohol ratio (which was legally sufficient to convict), there was no evidence that the defendant drove badly.\textsuperscript{79} Finally, Kalven and Zeisel found that some jurors voted to acquit because they too were drinkers and feared “[t]here but for the grace of God go I.”\textsuperscript{80}

More than four decades after its publication, Kalven and Zeisel’s work remains the definitive study on the rate of agreement between judges and juries.\textsuperscript{81} Despite calls for replication,\textsuperscript{82} funding problems and the inability to interest busy actors in the criminal justice system have impeded scholars from producing a study of the same breadth. Nevertheless, smaller studies confirm Kalven and Zeisel’s central conclusion that judges are more willing to convict than juries.

The most thorough follow-up study was undertaken by Theodore Eisenberg and his colleagues in 2005.\textsuperscript{83} Using data assembled by the National Center for State Courts, researchers questioned judges, attorneys, and jurors who had participated in felony trials in four locations: Los Angeles County, Maricopa County (Phoenix), Bronx County (New York), and the District of Columbia.\textsuperscript{84}

The 2005 study of judge-jury agreement largely replicated the results of Kalven and Zeisel’s 1966 work.\textsuperscript{85} Whereas Kalven and Zeisel found a 78\% agreement rate between judges and juries, Eisenberg and his colleagues found a 75\% agreement rate.\textsuperscript{86} The breakdown of disagreement between judges and juries was likewise similar to what Kalven and Zeisel had found four decades earlier. The 2005 study found that judges would have acquitted in 6\% of cases where juries convicted (a slightly higher figure than the 3\% found in 1966), but that judges would have convicted in 19\% of cases in which the jury acquitted (the exact figure found by Kalven and Zeisel).\textsuperscript{87}

Through the use of detailed questionnaires to judges and juries, Eisenberg and his

\textsuperscript{79} See id.

\textsuperscript{80} See id. at 296. As I explain below, there are additional reasons why juries may be more prone to acquit than judges. See infra Part III.B.

\textsuperscript{81} See Wayne A. Logan, Reflections on Kalven and Zeisel’s The American Jury, 39 CRIM. L. BULL. 4, 5 (2003) (“Now over thirty-five years old, The American Jury remains the benchmark in U.S. jury research.”).

\textsuperscript{82} See Hans & Vidmar, supra note 63, at 347 (“Replication of the Kalven and Zeisel research is much overdue.”).


\textsuperscript{84} See id. at 174. The study was both broader and narrower than the Kalven and Zeisel study. It was broader in that it inquired not just of judges, but also jurors and attorneys. It was narrower in that it was limited to felonies and had a sample size of 382 viable cases. See id. at 174-75.

\textsuperscript{85} See id. at 204 (“By controlling for multiple observers’ views of evidentiary strength, we can confirm with additional rigor, albeit in a smaller sample, Kalven and Zeisel’s finding that judges tend to convict more than juries – at least in the class of cases selected for trial by jury.”).

\textsuperscript{86} See id. at 180-81.

\textsuperscript{87} See id.
colleagues concluded that the legal and factual complexities of the cases were “not a promising explanation of judge-jury disagreement.” Rather, by looking to how jurors and judges coded the strength of the evidence as weak, medium, or strong, the researchers were able to conclude that judges and juries have different conviction thresholds. As Professor Eisenberg and his colleagues explained “[j]udges and juries seem to be reacting to the evidence in a similar manner, except that juries require stronger evidence to convict than judges do.” Put differently, the primary explanation for judges and juries reaching different conclusions appears to be that juries have a more stringent view of the proof beyond a reasonable doubt standard.

Additional, albeit smaller, studies have also replicated the findings of Kalven and Zeisel. In a study of juror decision-making, Larry Heuer and Steven Penrod studied how legal and evidentiary complexity affected jurors’ performance in criminal and civil cases. Although the primary purpose of the study was not to study the rate of judge/jury agreement, Heuer and Penrod did analyze 77 criminal cases for rates of agreement. As in the previously discussed studies, they found that judges were more likely to convict, with a net jury leniency rate of 18.2%. In the Heuer and Penrod study, judges would have convicted in 20.8% of cases where juries acquitted, while acquitting in only 2.6% of the cases where juries convicted.

One final study of judge/jury agreement specifically examined whether judges and juries reached the same conclusion in DWI cases. Rebecca Snyder Bromley, a Colorado judge, studied sixty DWI trials in Colorado by using post-trial questionnaires of judges and jurors. As in previous studies, Bromley found that judges would have convicted more often than juries. In 26.7% of cases, judges would have convicted even though juries voted to acquit. Although judges would have acquitted in a surprising 15% of cases where juries convicted, overall the judges were still considerably more lenient than juries.

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88 See id. at 191.
89 See id. at 189.
90 See id.
91 See id. at 185.
93 See id. at 48.
94 See id.
95 See id.
96 See Rebecca Snyder Bromley, Jury Leniency in Drinking and Driving Cases: Has It Changes?, 20 LAW & PSYCHO. REV. 27 (1996).
97 See id. at 27. The use of post-trial questionnaires is less desirable than having judges offer their opinions before the jury verdict. As Professor Robbennolt has observed, “[k]nowing the jury’s verdict may cause a judge to differently evaluate aspects of the case that might affect his or her agreement.” Jennifer K. Robbennolt, Evaluating Juries by Comparison To Judges: A Benchmark for Judging?, 32 FLA. ST. U. L. REV. 469, 473 (2005).
98 See Bromley, supra note 96, at 42 (“[J]uries continue to be more lenient than judges overall.”).
99 See id.
willing to convict. Bromley found that judges would have convicted in 73.4% of DWI cases they observed while juries only convicted in 61.7% of cases.100

In sum, the studies to address the issue have consistently found that judges are willing to convict more often than juries when presented with identical cases.101 This research is not without its concerns though. First, even expansive studies like Kalven and Zeisel’s suffer from a sampling problem because of the sheer size of the United States and the difficulty of achieving fair geographical representation.102 Second, even with a representative sample, there is a possibility of reporting bias. Judges who are only presiding over trials may have an easier time saying they would convict than if they were actually the ultimate fact-finders.103 With those concerns in mind though, there appears to be sound basis for criminal defense lawyers’ intuition that guilty defendants have a better chance of being acquitted if their cases are heard by juries rather than judges.104

B. The Realities of DWI Trials Likely Lead Juries To Convict Less Often

As explained in Part III.A, social science studies (including analysis of DWI prosecutions in particular) have found that trial judges are more willing to convict than juries. This is not surprising. As I describe in greater detail below, there are a variety of reasons – ranging from the quality of DWI defense lawyers to the sympathies of jurors – that explain why jurors are more likely to acquit than judges.

1. The Imbalanced Quality of Lawyering in DWI Cases Favors Defendants and Is Likely To Distract Juries

The first, and perhaps most important, reason why juries are less likely to convict

100 See id.
101 Of course, as Daniel Givelber and Amy Farrell have recently explained, just because judges would convict more often than juries does not tell us that judges are more accurate at determining guilt. See Daniel Givelber & Amy Farrell, Judges and Juries: The Defense Case and the Differences in Acquittal Rates, 33 LAW & SOC. INQUIRY 31, 33 (2008). It could be argued that moving to bench trials will raise the conviction rate for DWI cases at the expense of convicting the innocent. While this concern cannot be dismissed, I do not see it as likely. Prosecutors rarely bring DWI cases to trial when the defendant is very close to the legal limit. Moreover, even in weak cases where the defendant can allege that the breathalyzer is incorrectly calibrated, there is still evidence that the defendant had alcohol in his system and was driving an automobile, thus lowering (though not eliminating) the odds of a wrongful conviction.
102 See KALVEN AND ZEISEL, supra note 8, at 36 (raising this concern with their own study).
103 See Robbennolt, supra note 97, at 473.
104 See Leipold, supra note 10, at 151 (“Conventional wisdom tells us that criminal defendants are better off in front of a jury than in front of a judge.”).
D WI defendants is the quality of lawyers on both sides of the courtroom. DWI defendants are often in a position to hire expensive and effective defense lawyers. Conversely, the prosecutors handling DWI prosecutions are usually far less experienced than prosecutors handling more serious cases. To see how unusual this scenario is and how it might affect juries more than judges, let us take a step back to describe a typical (non-DWI) criminal case.

Run of the mill criminal defendants – upwards of 80% – are indigent and cannot afford counsel.105 These defendants receive the services of the local public defender or the lawyer appointed by the court. And the representation these indigent defendants receive is notoriously (though not universally) poor.106 Public defenders, while highly committed to their jobs, are tremendously overworked and under-resourced.107 They often have caseloads far in excess of what guidelines recommend and they work in offices that lack basic necessities such as investigative support, paralegals, and legal research databases.108 Appointed lawyers in many jurisdictions suffer from the same problems:109 too much work, too little assistance, and far too little pay to incentivize them to devote the necessary time to each case.110

Worse yet, when average indigent defendants do take their cases to trial they will likely face talented and experienced prosecutors. When an ordinary case fails to be resolved by plea bargaining it is often (though not always)111 because the defendant has been offered a plea bargain requiring a very long prison term and he sees no reason not to roll the dice at trial. Seasoned prosecutors with considerable trial experience

109 See Gershowitz, Raise the Proof, supra note 107, at 91-99.
110 The problem is actually worse than it first appears. The crushing caseload facing indigent defense lawyers results in an enormous push toward plea bargaining. Thus, to the extent defense lawyers have an opportunity to develop their legal skills they will likely become talented negotiators, rather than skilled trial lawyers. As such, the imbalance at trial between prosecutors and indigent defense lawyers may be even greater than expected. As Professors Scott and Stuntz have argued, “lawyers’ skill surely matters more in a trial than in a plea bargaining session.” Robert E. Scott & William J. Stuntz, Plea Bargaining as Contract, 101 YALE L.J. 1909, 1933 (1992).
111 Other possible explanations include (1) that the defendant irrationally refuses to accept that the evidence against him is strong and incorrectly believes he has a good chance with the jury or (2) that the prosecution’s case is so strong – what some prosecutors call a “whale of a case” – that the Government refuses to make an attractive plea bargain offer. Either of these scenarios could occur with misdemeanor charges carrying relatively short jail sentences.
typically handle such serious cases.

Thus, in the run-of-the-mill criminal case that proceeds to trial, the imbalance in power is considerable: overworked, under-resourced, and often inexperienced defense lawyers will face experienced prosecutors who have tried numerous cases. To the extent that the jury is swayed by factors beyond the evidence itself – for instance, lucid presentation of witnesses or a compelling closing argument – it is not hard to see how prosecutors will have the upper hand. This is not to say that the imbalance of power and resources is a good thing – it surely isn’t – but simply that it is a reality of most criminal prosecutions.

The imbalance of power is exactly the opposite in DWI cases. Many DWI trials are handled by retained (not appointed) defense lawyers who have greater time, resources, and experience than most of the prosecutors they are facing.

Starting with the obvious, while there are only a few affluent defendants charged with robbery, murder and other violent crimes,112 there are a considerable number who are charged with DWI.113 Each year, there are nearly 1.5 million DWI arrests114 and many are affluent defendants. As the Bureau of Justice Statistics found, “[c]ompared to other offenders, DWI offenders are older, better educated, and more commonly white and male.”115

And while both rich and poor defendants are charged with DWI, it is the middle or upper-class individuals who have a much greater incentive to fight the charges all the way to trial in the hopes of an outright acquittal. As explained in Part I, most first-time DWI offenses carry very modest maximum penalties of only a few months in jail. In practice, most defendants who plead guilty to these charges will not receive anywhere near the maximum sentence and will instead receive only a fine or perhaps a few days in jail. For poor defendants -- particularly those who are lingering in jail because they could not afford to post bail -- pleading guilty would result in a sentence of time served and an immediate exit from jail.116 Such a plea bargain is obviously very desirable.

Moreover, for indigent defendants who are either unemployed or work in low-skill jobs, the collateral consequences of being a convicted misdemeanant are not significant. It is very unlikely that they will be fired from their jobs because they now have a misdemeanor conviction on their record. Indeed, pleading guilty (and thus getting out of jail) will help them to avoid being fired for being absent from work. And with respect to future employment, a misdemeanor conviction will not prevent indigent

113 See JACOBS, supra note 21, at xxi (“[D]runk driving is not a crime associated with the poor.”)
114 See BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, DWI OFFENDERS UNDER CORRECTIONAL SUPERVISION 1 (1999).
115 Id.
116 See, e.g., Lise Olsen, Thousands Languish in Crowded Jail: Inmates Can Stay Locked Up for More Than a Year Waiting for Trial in Low-Level Crimes, HOUS. CHRON., Aug. 23, 2009 (finding that 200 currently incarcerated inmates in the Harris County jail had already served the minimum jail sentence for the crimes they were charged with).
individuals from attaining the types of jobs – laboring jobs or low paying service jobs – that they would likely seek in the future. Thus, for indigent defendants there is little disincentive to plea bargain DWI cases and forego a trial.

Middle and upper-class DWI defendants face a much different calculus. First, for an affluent defendant, this will likely be his first run-in with the criminal justice system and the prospect of spending even a few days in jail may be scary enough to gamble on a trial in the hopes of an outright acquittal. Second, and more importantly, even if the affluent defendant were offered a plea bargain with only a fine or a very short jail sentence, the collateral consequences of a conviction might be too significant to allow him to accept an otherwise attractive plea bargain offer.  

A conviction on the affluent DWI defendant’s record might prevent her from being admitted to the law school or medical school of her choice. It might prevent the individual from being hired for a desirable job that has many other applicants (none of whom have been convicted of a crime). The conviction might even ruin an individual’s political aspirations or standing in the community. For these reasons, affluent defendants have reason to turn down attractive plea bargain offers and to gamble on going to trial.

If they are smart, affluent defendants do not gamble on trial with just any lawyer. Instead, they hire DWI specialists. Every major city has DWI defense specialists. These lawyers devote almost their entire practice to DWI defense. They are often former prosecutors who handled DWI cases while in the district attorney’s office. They know the ins and outs of how the breathalyzer machines work and every argument – some genuine and others facetious – that can be raised to cast aspersions on such devices. They have cross-examined hundreds of police officers and can raise myriad questions impugning their training generally and their handling of sobriety tests in particular. Experienced DWI defense lawyers are in a position to put the police departments and breathalyzers on trial, thus raising numerous avenues for jurors to find reasonable doubt to acquit.

By contrast, many of the prosecutors handling DWI cases will be ambitious and hardworking but inexperienced. Because most DWI cases are low-level misdemeanors and it is well known that it is harder to convince jurors to convict in DWI cases, many district attorneys’ offices assign such cases to junior prosecutors. In Houston, Texas, where the author has taught criminal procedure to dozens of entry-level prosecutors, most have gone on to litigate a DWI case as their first (and often their second and third)

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117 See Steven Klepper & Daniel Nagin, The Deterrent Effect of Perceived Certainty and Severity of Punishment Revisited, 27 CRIMINOLOGY 721, 723 (1989) (“[A] felony conviction with a suspended sentence would generally ruin the career of a physician, but it might be of little consequence to an unskilled laborer without strong community ties.”).

118 See John S. Dzienkowski, Character and Fitness Inquiries in Law School Admissions, 45 S. TEX. L. REV. 921, 923 (2004) (explaining that a majority of law schools ask applicants character and fitness questions and that “most of the questions relate primarily to criminal offenses as well as those related to applicants’ prior educational history.”).

119 A Google search of “DWI” and the name of any medium or large city brings up dozens of webpages for attorneys specializing in DWI.
trial after joining the district attorney’s office. Anecdotally, these junior prosecutors report being outmatched by the experienced DWI defense lawyers who they faced at trial.

Of course, if the evidence is overwhelming and the defendant is on video getting out of the car drunk and falling over, the quality of the lawyers will be irrelevant. Even the best defense lawyers cannot perform magic. But those cases rarely proceed to trial because DWI defense specialists can typically convince their clients to plea bargain when they have no plausible chance of prevailing at trial.

The real question is what happens in the closer cases. For instance what is the result at trial when the defendant’s breathalyzer reading was .12 in a jurisdiction that sets the legal limit at .08? Or what is the outcome when the defendant refused to take a breathalyzer test and all the prosecutor has to work with is a grainy police video and the testimony of officers that the defendant failed the walk-and-turn test or the other field sobriety tests? In these cases, a top-flight defense lawyer can effectively raise doubts in the jury’s mind. For instance, the defense lawyers may lead a jury to believe that the .12 breathalyzer reading was inaccurate because the machine had not been calibrated immediately before the test was administered, even if such calibration is not legally required. If the main evidence against the defendant is a police officer’s testimony that the defendant failed field sobriety tests, a skilled defense lawyer may convince jurors that the field sobriety tests were inaccurate because the defendant was wearing dress shoes instead of sneakers or because overhead street lights were too distracting.

Of course, in some cases these arguments might be genuine. Police do occasionally fail to perform sobriety tests properly. But in other cases, talented defense attorneys can convince juries to acquit through baseless challenges to the evidence. For instance, DWI defense specialists might be able to convince jurors that breathalyzer machines are never accurate or that field sobriety tests such as the one-leg stand or the walk-and-turn test cannot be trusted. In support of their claims, they may cite to isolated studies that are complete outliers from the other scientific literature, or studies that are outdated. DWI defense specialists will often also present testimony from their own expert witnesses to attack the prosecution’s case.

This is not to say that jurors are stupid and gullible or that some trial judges would not fall for the same tactics. I also do not mean to suggest that DWI defense lawyers are unethical. They are vigorously defending their clients by raising every possible argument that could amount to reasonable doubt. The reality however is that trial

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120 See, e.g., People v. Schaefer, 516 N.Y.S.2d 391, 394 (N.Y. City. Ct. 1987) (noting that breathalyzer had not been calibrated in six months).

121 See, e.g., NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, PSYCHOPHYSICAL TESTS FOR DWI ARREST 1 (1977) (finding a 76% accuracy rate with a “high rate of false-arrest decisions”).

122 See Gil Sapir & Mark Giangrande, Right to Inspect Breath Alcohol Machines: Suspicion Ain’t Proof, 33 J. MARSHALL L. REV. 1, 26 (1999) (arguing that “[e]xpert testimony is essential to establishing an effective defense against the per se drunk driving charge”).
judges who have seen hundreds of DWI cases will not be swayed by weak arguments. Trial judges who have presided over numerous DWI cases would certainly have heard of studies casting doubt on the accuracy of breathalyzer machines and field sobriety tests. But they also would be aware of the far more numerous and scientifically accepted studies that demonstrate the accuracy of the tests.\(^\text{123}\) Put differently, trial judges with considerable background knowledge (unlike jurors who are likely hearing their first DWI case) will not have to rely on prosecutors to debunk the thin arguments made by DWI defense specialists. And that is important because many junior prosecutors handling DWI cases are inexperienced and lack the time and foresight to counter all the arguments that DWI defense specialists will raise.

In sum, DWI defense specialists will have a harder time dazzling (or confusing) trial judges and raising reasonable doubt.\(^\text{124}\) Eliminating juries from misdemeanor DWI trials will therefore lead to outcomes that are based more on the evidence and less on the quality of lawyers handling the cases.

2. Jurors Likely Have More Compassion for DWI Defendants Than Judges

A second reason why juries are more likely to acquit DWI defendants is simple compassion and a sense of “there but for the grace of god go I.”\(^\text{125}\)

To be selected for jury duty in most jurisdictions, prospective jurors must have clean records and no felony convictions.\(^\text{126}\) Ordinarily, this helps the prosecution because a panel of law-abiding citizens who have rarely if ever gotten into trouble with the law stands in judgment of a defendant who is charged with offensive behavior and who jurors usually believe is not “one of them.” While jurors hopefully give the defendant a fair shake and refuse to convict unless the evidence is compelling, in most cases it is unlikely that law-abiding jurors will place a thumb on the scales of justice to give the defendant an extra edge.\(^\text{127}\) Put simply, when presented with a defendant charged with murder, rape, theft and a host of other offenses, most jurors would have trouble saying to themselves “there but for the grace of god go I.”

Once again, the dynamic in DWI cases is quite different. First, although jurors in DWI cases are usually law-abiding citizens, the odds are that many of them can see

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123 See, e.g., National Highway Traffic Safety Administration, A Florida Validation Study of the Standardized Field Sobriety Test (S.F.S.T.) Battery 28 (1997) (concluding that officers’ decisions to arrest based on field sobriety tests were accurate in 95% of cases).

124 See Posner, supra note 7, at 1491-92 (“Trial by jury also magnifies differences in ability between opposing counsel” and it permits “the unscrupulous mastery of deceitful rhetorical tricks” in jury trials).

125 See Robin, supra note 3, at 7.


127 There are exceptions. For instance, there has been a push toward jury nullification in some communities. See Paul Butler, Let’s Get Free: A Hip Hop Theory of Justice (2009).
themselves in the defendant’s shoes. Many jurors have driven an automobile after consuming at least some alcohol.\textsuperscript{128} A smaller number of jurors may be heavier drinkers who have actually driven while intoxicated once or twice, yet simply not been caught.\textsuperscript{129} And another group of jurors – perhaps as high as ten percent of the population – are what can be termed “problem drinkers,” many of whom will have driven while intoxicated multiple times.\textsuperscript{130} While none of these jurors would applaud drunk driving, in the back of their minds they may be willing to show leniency given that they have committed (or come close to committing) the same offense themselves.

Second, some jurors who have never driven after ingesting alcohol will nevertheless look at DWI charges through the lens of their own personal traffic stops. Most jurors have been stopped by the police for basic traffic offenses at one time or another in their lives.\textsuperscript{131} Many have received traffic tickets for speeding, failure to signal, or running a stop sign. A substantial number of jurors may believe that officers treated them unfairly with respect to such traffic offenses. They may believe that they were not really speeding as fast as the officer contended or that, regardless, they were still driving safely and did not deserve a ticket. Thus, even jurors who have no personal experience with DWI may distrust the power and judgment exercised by police with respect to traffic infractions generally. In turn, this may make them more compassionate to DWI defendants and less likely to convict.

Third, and perhaps most importantly, jurors in DWI cases can look over at the defense table and see someone who looks remarkably like themselves.\textsuperscript{132} Unlike most offenses in the criminal code that are committed by a disreputable group of people who “are not like me,” DWI is a crime committed by the entire spectrum of society, including many middle class people.\textsuperscript{133}

Of course, there are many crimes that are committed by mainstream people. Lots of middle-class Americans, for instance, violate the law by possessing and ingesting marijuana and other illegal drugs. Yet, it is often difficult for law enforcement to detect

\textsuperscript{128} See JACOBS, supra note 21, at 44 (discussing a study in which 37% of 1,491 adults over eighteen admitted to driving after consuming alcohol). The percentage is likely higher because respondents are often unwilling to admit stigmatic behavior in surveys.

\textsuperscript{129} See id. at 43 (“A second category, perhaps amounting to 15% of all drivers, comprises heavy social drinkers who sometimes may be on the road at illegal BACs.”).

\textsuperscript{130} See id. (“Ten percent of all drivers are problem drinkers, whose drinking patterns are likely to bring them frequently into conflict with the DWI laws.”).

\textsuperscript{131} Each year there are nearly 30 million traffic stops in the United States. See BUREAU OF JUSTICE STATISTICS, CHARACTERISTICS OF DRIVERS STOPPED BY POLICE, 1999 at 1,4 (2002) (noting that in 1999 more than ten percent of all licensed drivers were stopped by police).

\textsuperscript{132} See John Clark, The Social Psychology of Jury Nullification, 24 LAW & PSYCH. REV. 39, 49 (2000) (explaining how jurors who acquitted Lyle and Eric Menendez could not believe that they killed their parents because they “looked like nice young men”).

\textsuperscript{133} See JACOBS, supra note 21, at xxi (“[D]runk driving is not a crime associated with the poor and dispossessed. According to the FBI’s Uniform Crime Reports (UCRs), drunk drivers have the highest percentage of white offenders (90 percent) of any arrest group.”).
this wrongdoing among the middle-class and bring criminal charges against them. As Professor Bill Stuntz has explained, constitutional privacy protection is often unequally distributed in favor of the wealthy. The affluent can commit drug offenses from the privacy of their (heavily Fourth Amendment protected) homes and be unlikely to face arrest and prosecution. Thus, when juries look to the defense table in drug cases they are less likely to see people like them. The same is not true of DWI cases, which by their very nature are committed in public. Because there are so many traffic offenses in the criminal code and automobiles receive very limited Fourth Amendment protection, it is quite easy for police to pull over and arrest not just the poor, but also the middle-class and the wealthy for DWI offenses.

And once arrested, wealthy DWI defendants – unlike poor defendants – have the incentive and financial ability to go to trial. As explained in Part III.B.1 above, affluent defendants may have a greater aversion to prison than poor defendants and the collateral consequences of pleading guilty on school admissions and career prospects may make them more likely to gamble on trial. And, of course, affluent defendants have the money to hire the best DWI defense lawyers to handle their cases at trial.

In sum, when jurors look over to the defense table in DWI trials, they are likely to see a middle- or upper-class individual who holds a respectable job, has never been in trouble with the law before, and looks very much like the jurors themselves. This in turn raises two questions. First, will jurors who identify with defendants be less likely to convict? And second, would judges – who also can identify with middle-class or affluent defendants – be immune from that temptation?

The first question seems fairly easy to answer. Individuals are typically willing to give the benefit of the doubt to those who they identify with. Social scientists have found that trust correlates with race, ethnicity, and income level.

The second question is harder to answer. Do judges have a better ability to put aside their sympathies and compassion for those they identify with so that they can convict guilty defendants? There are a number of reasons to think the answer is yes. First, almost all judges are trained lawyers who have been socialized to look at problems with a focus on logic and analysis. That is not to say that lawyers are always able to compartmentalize their biases and their compassion to sympathetic individuals. But their analytical legal training would seem to make them more likely to avoid such biases than jurors who have not received such training. Second, and more importantly, judges who have presided over many trials have often become jaded. After one-hundred DWI trials, the judge is less likely to see the defendant as an individual from the same social and economic class – and more likely to look at her as a cog in the

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135 See Donald A. Dripps, The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules, 74 Miss. L.J. 341, 393 (2004) (explaining that “[n]o one disputes the proposition that full compliance with all traffic regulations is impossible for any significant distance”).
machine. Once the judge fails to see the defendant as an individual who looks like him, the disincentive to convict diminishes.\(^{137}\)

In sum, there are a number of reasons -- ranging from personal drinking history, prior traffic tickets and identification with middle-class defendants – that likely make jurors more compassionate toward DWI defendants and less likely to convict. Judges certainly face the same biases, but because of legal training and a long history of handling DWI cases, they are more likely to be able to set aside those biases that would favor defendants.

3. **Juries Are More Likely To Acquit Because They Are Unaware of the Punishment That Will Be Imposed on DWI Offenders**

In virtually every aspect of the criminal justice process, juries possess far less information than judges.\(^{138}\) In the DWI context, one important information deficit is punishment ranges and likely sentences. The average juror probably has no idea what the punishment range is for first-time offenders and, more importantly, what actual sentence is likely to be imposed within that range if the defendant is convicted. As explained below, this lack of information may lead jurors to acquit guilty defendants out of unjustified fears that the defendant would receive a long prison sentence.

Most first-time DWI defendants face relatively short maximum sentences of a few months in jail, or even less.\(^{139}\) Outsiders who do not work in the criminal justice system – those most likely to end up as jurors – may mistakenly believe otherwise though.\(^{140}\) Over the last few decades, advocates such as MADD have vigorously campaigned to stamp out drunk driving. Due to these legislative efforts and the accompanying public informational campaign, many jurors may wrongly assume that the statutory penalties for DWI are more severe than they actually are. In fact, social scientists have found that

\(^{137}\) See Janet A. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. Rev. 1083, 1124 (1991) (“Judges try hundreds, even thousands of cases every year, while jurors hear only a few during their service. Over and over again, the juvenile court judge hears testimony from the same police and probation officers, inevitably forming a settled opinion on their credibility. Worse yet, the judge may well have heard earlier charges against the accused, and thus may come to hold a fixed view on the juvenile’s credibility and character.”). While Professor Ainsworth identifies the same data-point as me, she reaches the opposite conclusion. She maintains that, in the juvenile context, judges’ familiarity with the types of cases makes them worse fact-finders because they become less meticulous. See id.


\(^{139}\) See supra notes 29-36 and accompanying text.

\(^{140}\) See Bibas, *Transparency and Participation, supra* note 138, at 913 (explaining that “[p]ublic information about criminal justice is notoriously inaccurate and outdated”).
law-abiding citizens, such as those who would serve on juries, tend to overestimate the severity of penalties authorized for criminal defendants.\textsuperscript{141} Worse yet, the law generally forbids lawyers from correcting such misperceptions by discussing possible sentences during the guilt phase of trials.\textsuperscript{142}

More importantly, the maximum sentences are actually deceiving to criminal justice outsiders because most first-time offenders never receive anywhere close to the maximums. Despite statutory maximum sentences of six months or longer, most defendants convicted of first-time DWI receive no jail time whatsoever.\textsuperscript{143} And, of course, prosecutors and defense lawyers are absolutely forbidden from informing jurors during the guilt stage of a trial that the defendant likely will not receive anywhere close to the maximum sentence.\textsuperscript{144}

As jurors sit through the guilt stage of a DWI trial they are either uninformed about the defendant’s possible sentence or (if they are aware of the maximum sentence and believe the defendant might receive it) misinformed about what punishment the defendant will likely receive. This, in turn, likely makes it harder for jurors to convict DWI defendants. Imagine that our DWI defendant is a sympathetic young college student who has never been in trouble with the law before.\textsuperscript{145} He is neatly dressed and looks as though he would never harm a soul. His parents are sitting in the front row of the courtroom and they look anguished at the prospect of their child going to jail. The evidence fairly clearly indicates that our defendant is guilty: police officers testified that he stumbled while walking and that he blew a .13 on the breathalyzer in a jurisdiction that sets the legal limit at .08. He is by all rights guilty of the crime, but jurors might be very reluctant to send a nice young man who has made a single mistake to jail for weeks or months or even longer. There is therefore an incentive for at least one juror to discount the evidence and vote not guilty so that a stiff punishment is not

\textsuperscript{141} See Raymond Paternoster et al., Assessment of Risk and Behavioral Experience: An Exploratory Study of Change, 23 CRIMINOLOGY 417, 418 (1985) (“Prior research has suggested that most people perceive legal penalties to be more severe than they actually are and, compared with offending populations, nonoffenders generally overestimate the presumptive severity of legal penalties.”).

\textsuperscript{142} See Stephanos Bibas, White Collar Plea Bargaining and Sentencing After Booker, 47 WM. & MARY L. REV. 721, 734 (2005) (“Courts keep juries in the dark about punishments, forbid lawyers to mention them, and instruct juries not to think about them.”).

\textsuperscript{143} See Cafaro, supra note 27, at 9 (“A first time [drunk driving] offender generally receives probation, a fine, some form of alcohol counseling and some form of driver’s education schooling.”).

\textsuperscript{144} See, e.g., Thompson v. State, 89 S.W.3d 843, 850 (Tex. App. –Hous. 1st Dist 2002) (reversing a sentence when prosecutor told the jury that “[t]here’s a very important reason [why you should sentence the defendant to ten years] but legally I’m not allowed to tell you” because such argument invited speculation and was improper).

\textsuperscript{145} Although many DWI offenders are older, college-age men are common DWI defendants as well. See BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: DRUNK DRIVING 1 (Feb. 1988) (finding that “[a]rrest rates for DUI were highest among 21-year olds”).

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meted out. By virtue of having far less information about sentencing realities, jurors may be less willing to convict sympathetic defendants out of fear of excessive punishment.

Now imagine instead that the same case is tried before a judge who has full knowledge of the sentencing range and typical punishments. While the judge may have empathy toward the young defendant and hate to see him sent to jail, the judge will be unlikely to acquit the defendant as a result of that empathy. Instead, the judge will recognize that even if convicted, the defendant will likely receive probation or, at most, a few days in jail. Because that same judge will be in charge of sentencing the defendant, she need not worry that convicting the defendant will open him up to a long and horrible jail sentence that is beyond her control as the trier of fact. Indeed, given that the judge controls sentencing, she might be even more willing to convict, knowing that she can mitigate any damage to the defendant by imposing a light sentence. In short, the judge’s superior knowledge about what will happen at the next stage of the criminal justice process helps her to avoid acquitting sympathetic (but nonetheless factually guilty) defendants.

4. Juries Are More Likely To Acquit Because They Are Not Subject to Pressure From Interests Groups

In addition to possessing less information, jurors also differ from judges because their participation in the criminal justice process is fleeting and largely anonymous. Because jurors are present for only a single trial and will almost never be in the public view, there are usually no repercussions if jurors fail to convict in a case where the evidence was strong. Except in the most high-profile cases – which DWI cases surely are not – jurors who vote to acquit will return to their lives without any stigma or adverse career effects. There is little outside pressure imposed on jurors to encourage them to convict. By contrast, judges may face considerable outside pressure from interest groups to convict DWI defendants.

For this reason, social scientists have found that increases in the severity of drunk driving laws have sometimes had the unintended effect of reducing conviction rates because juries and judges are unwilling to impose penalties they view as unjustified. See H. LAURENCE ROSS, DETERRING THE DRINKING DRIVER: LEGAL POLICY AND SOCIAL CONTROL 95-97 (1982).

Critics might object that jurors’ lack of knowledge about punishment is true for most crimes, not just DWI offenses. While that is true, and while jurors might be afraid of over-punishment for a handful of other low-level offenses, for most crimes jurors will not be likely to acquit out of concern for over-punishment. Moreover, even if the nullification problem exists with respect to other crimes, singling out DWI trials to eliminate jury trials is still defensible because it is one of, if not the, most commonly tried crimes in the criminal code. See Kelsey P. Black, Note, Undue Protection Versus Undue Punishment: Examining the Drinking and Driving Problem Across the United States, 40 SUFFOLK U.L. REV. 463, 463 (2007) (“Drunk driving is the nation’s most commonly perpetrated violent crime.”).
In most jurisdictions, sitting judges must stand for re-election.\textsuperscript{148} This is not ordinarily a problem for judges because re-election rates are very high.\textsuperscript{149} The public is almost never aware of who particular trial judges are, and they are even less informed about what cases judges have presided over and what rulings they have issued. Thus, if a trial judge keeps her head down and doesn’t make any waves, she generally does not have to worry about how her rulings will affect her re-election prospects.

There is an exception to this general rule though when interest groups want to pressure judges not to rule too leniently in favor of defendants.\textsuperscript{150} The story plays out like this: If a judge makes rulings in DWI cases that are too pro-defendant – for instance, suppressing breathalyzer tests or imposing extremely light sentences – the prosecutors who work in that court might call the local MADD representative.\textsuperscript{151} MADD will then dispatch an observer to sit in the judge’s courtroom during DWI trials to observe how the judge is handling the cases. If the judge continues to behave in a way that seems to overly advantage the defendant, MADD may then decide to target the judge when she seeks re-election. And MADD is a powerful interest group with a large number of members. Given how low the turnout is for judicial elections, an opposition campaign by MADD could be extremely detrimental to a sitting judge. Of course, it may not come to that because when the judge sees the MADD representative in the courtroom, she may (perhaps subconsciously) adjust her behavior to be less favorable to DWI defendants.

While judges are supposed to be completely immune from political pressure, they are human. Judges typically enjoy their jobs and will likely be willing to adjust their behavior at the margins in order to eliminate threats to their reelection. In the DWI context, that may translate into judges being more likely to convict. Jurors, of course, face no such political pressure.\textsuperscript{152}

\textsuperscript{148} See Stephen F. Smith, \textit{The Supreme Court and the Politics of Death}, 94 VA. L. REV. 283, 328 (2008) ("[J]udges at all levels are popularly elected in the vast majority of states.").


\textsuperscript{150} See Leigh Goodmark, \textit{Telling Stories, Saving Lives: The Battered Mother’s Testimony Project, Women’s Narratives, and Court Reform}, 37 ARIZ. ST. L.J. 709, 752-53 (2005) (explaining how advocates against domestic violence and other problems can influence judges’ behavior by being present in court and noting “the influence that Mothers Against Drunk Driving has had in pressuring judges to sentence drunk drivers severely.”); Lynn Hecht Schafran, \textit{There’s No Accounting for Judges}, 58 ALB. L. REV. 1063, 1079 (1995) (describing “court watching” and “MADD’s critical role in forcing judges to sentence drunk drivers with the severity they deserve”).

\textsuperscript{151} MADD's website reveals not only contact information for the national office but also contacts at state and county levels. See MADD, GET LOCAL (available at http://www.madd.org/Local-Chapters.aspx)

\textsuperscript{152} Jurors could face psychological pressure to convict if they saw the MADD representative sitting in the courtroom and recognized why she was there. However, it would be difficult for jurors to know that a MADD representative was present because identifying information, such
In sum, both empirical and qualitative analysis indicates that judges are more likely to convict defendants in DWI cases. As the next section describes, a higher conviction rate in DWI cases will result in a greater certainty of punishment, which will in turn improve general deterrence.

IV. Eliminating Jury Trials for Certain DWI Cases Should Improve Deterrence and Save Resources

Criminologists have devoted considerable energy over the last few decades to studying what efforts actually reduce crime. Many experts would be quick to caution that we simply do not know enough to draw firm conclusions about what deters. Nevertheless, it is widely agreed that the severity of punishment – the variable that legislatures most often fixate on – is ineffective at enhancing deterrence. By

as buttons or posters, is typically forbidden during jury trials. See Sierra Elizabeth, Note, The Newest Spectator Sport: Why Extending Victims’ Rights to the Spectators’ Gallery Erodes the Presumption of Innocence, 58 DUKE L. J. 275 (2008) (cataloging cases and arguing against any retreat from the general prohibition in the face of the victims’ rights movement); State v. Franklin, 327 S.E.2d 449, 454 (W. Va. 1985) (overturning conviction after ten to thirty members of MADD sat in the courtroom directly in front of the jury wearing large MADD buttons). Judges need not see a button to know that the person in the front row is a MADD representative. Court staff, prosecutors, or defense lawyers could easily signal to the judge that MADD is watching.

154 See, e.g., William J. Stuntz, The Pathological Politics of Criminal Law, 100 MICH. L. REV. 505, 509 (2001) (“Voters demand harsh treatment of criminals; politicians respond with tougher sentences”); Jerome S. Legge, Jr. & Joonghoon Park, Policies to Reduce Alcohol-Impaired Driving: Evaluating Elements of Deterrence, 75 SOC. SCIENCE Q. 594, 603 (1994) (“Virtually all citizens are against the ‘drunk driver,’ and the greater the penalties against this individual, the better it should be for society. This helps explain the rush to the severity approach which many states took to deter alcohol-impaired driving early on.”).
155 See Anthony N. Doob & Cheryl Marie Webster, Sentence Severity and Crime: Accepting the Null Hypothesis, 30 CRIME & JUST. 143, 187 (2003) (reviewing the leading studies examining severity of punishment and deterrence and concluding that “[w]e could find no conclusive evidence that supports the hypothesis that harsher sentences reduce crime through the mechanism of general deterrence”); Legge & Park, supra note 154, at 596 (“The use of higher fines and especially jail terms has been disappointing on the whole [in deterring drunk driving.]”); Raymond Paternoster & Leeann Iovanni, The Deterrent Effect of Perceived Severity: A Reexamination, 64 SOC.
contrast, social scientists have long found that increasing the perceived certainty of punishment is effective at deterring misconduct. In addition to improving the certainty of punishment, moving to a bench trial regime will make the prosecution of DWI cases much shorter and more efficient. There is some evidence that enhancing the celerity or swiftness of punishment will also improve general deterrence. But even setting aside a celerity effect, eliminating jury trials in DWI cases will result in other efficiency gains that will improve the criminal justice process. Part IV.A therefore discusses the prospect of improved deterrence and Part IV.B reviews the efficiency gains to be had from eliminating jury trials in certain DWI cases.

A. Certainty of Punishment Is the Most Effective Deterrent

Over the last few decades, social scientists have demonstrated that the perceived certainty of punishment, that is the likelihood of being caught and held responsible for criminal behavior, is the single most important variable in deterring misconduct. Studies have demonstrated this to be true for crime generally157 and for DWI offenses in

F. 751, 769 (1986) (“Our data suggest only the more narrow conclusion that perceived severity has no direct and immediate effect on the commission of minor offenses.”); H. Laurence Ross, The Scandinavian Myth: The Effectiveness of Drinking-and-Driving Legislation in Sweden and Norway, 4 J. LEGAL STUD. 285 (1975) (utilizing interrupted time-series analysis but failing to find support for the conventional wisdom that more punitive DWI laws in Sweden, Norway, and Finland have been more effective at deterring drunk driving).

156 There are exceptions. See, e.g., Klepper & Nagin, supra note 117, at 741 (“[O]ur findings suggest that both the certainty and severity of punishment are deterrents, whereas prior findings generally suggest that only the former is an effective deterrent”). Although severity is typically discounted by social scientists, some scholars have argued that severity of punishment can be effective deterrent when there are sufficiently high levels of perceived certainty of punishment. See Harold G. Grasmick & George J. Bryjak, The Deterrent Effect of Perceived Severity of Punishment, 50 SOCIAL FORCES 471 (1980) (contending that many studies discounting the severity of punishment failed to consider the interaction between certainty and severity of punishment). Nevertheless, the bulk of the literature concludes that severity is not an effective deterrent.

157 See, e.g., ANDREW VON HIRSCH ET AL., CRIMINAL DETERRENCE AND SENTENCE SEVERITY: AN ANALYSIS OF RECENT RESEARCH 47 (1999) (reviewing the literature and concluding that “there are consistent and significant negative correlations between likelihood of conviction and crime rates); Robert Apel & Daniel S. Nagin, General Deterrence: A Review of Recent Evidence in HANDBOOK ON CRIME AND CRIMINAL JUSTICE (Michael Tonry ed., 2010), at 17 (“There is substantial evidence from a diverse literature that increases in the certainty of punishment substantially deters criminal behavior.”); Daniel S. Nagin & Greg Pogarsky, An Experimental Investigation of Deterrence: Cheating, Self-Serving Bias, and Impulsivity, 41 CRIMINOLOGY 167 (2003) (testing whether students would cheat on a trivia quiz in order to earn a cash bonus and finding that cheating decreased when the certainty of detection was higher but not when the perceived severity of punishment increased); Daniel S. Nagin, Criminal Deterrence Research at the Outset of
particular. While the deterrence literature is vast, a few studies merit special attention.

In 1967, Great Britain enacted the British Road Safety Act to tackle the DWI problem. The Act did not increase the severity of punishment for those convicted of DWI and in fact most defendants received no jail time if convicted under the new Act. The Act did however redefine the crime of drunk driving by making it a crime to drive with a blood alcohol level in excess of .08. The Act made it easier for police to conduct breath tests and imposed fines for refusing to comply with breath test requests. Importantly, the enactment of the law was accompanied by enormous publicity, and “[k]nowledge of the breath test was nearly universal among adults in

the Twenty-First Century, 23 CRIME & JUST. 1 (1998) (reviewing the literature and concluding, inter alia, that “cross-sectional and scenario based studies have consistently found that perceptions of the risk of detection and punishment have negative, deterrent-like associations with self-reporting offending or intentions to offend”); Jeffrey Grogger, Certainty v. Severity of Punishment, 24 ECON. INQUIRY 297, 304 (1991) (studying California arrestees and concluding that “increased certainty of punishment provides a much more effective deterrent than increased severity” and that a “six percentage point increase in average conviction rates would deter as many arrests as a 3.6 month increase in average prison sentences); Klepper & Nagin, supra note 117, at 741 (surveying graduate students about tax evasion scenarios and finding that certainty of punishment is an effective deterrent); Ann Dryden Witte, Estimating the Economic Model of Crime with Individual Data, 94 Q. J. ECON. 57, 79 (1980) (studying men released from the North Carolina prison system and demonstrating that “a percentage increase in the probability of being punished has a relatively larger effect on the number of arrests or convictions than does a percentage increase in the expected sentence”); Grasmick & Bryjak, supra note 156, at 472 (reviewing twelve deterrence studies and explaining that “nearly all of these researchers conclude that perceived certainty of legal sanctions is a deterrent, [while] only one (Kraut) concludes that perceptions of the severity of punishment are part of the social control process”); Alfred Blumstein & Daniel Nagin, The Deterrent Effect of Legal Sanctions on Draft Evasion, 29 STAN. L. REV. 241 (1977) (studying draft evasion and finding a significant negative association between the probability of conviction and the draft evasion rate, leading the authors to conclude that their “findings are consistent with the work of other investigators who have argued that the certainty of punishment has a stronger deterrent effect on crime than the severity of punishment.”); Isaac Ehrlich, Participation in Illegitimate Activities: A Theoretical and Empirical Investigation, 81 J. POL. ECON. 521, 544-47 (1973) (finding that the certainty of punishment was a more important indicator than severity in deterring murder, rape and robbery).

See ROSS, CONFRONTING DRUNK DRIVING, supra note 26, at 67-73 (reviewing international and domestic studies and concluding that “there is considerable evidence that increasing the actual certainty of punishment for drunk drivers in ways that also ensure adequate publicity can effect reductions in drunk driving”).


See id. at 67-68.

See id. at 19.

See id.
As a result of the Act, police charged drunk driving more frequently and “there was a great increase in the number of charges of drinking and driving offenses after 1967 that resulted in convictions.” In sum, the British Road Safety Act increased the certainty, though not the severity, of punishment for drunk driving.

The dramatic change in British law permitted sociologist Laurence Ross to conduct an interrupted time-series analysis of accident data to determine whether the Roadway Safety Act reduced drunk driving. Professor Ross found that the publicity of the Act and the increased likelihood of being convicted in fact led to a sharp decrease in highway casualties. In summarizing his findings, Ross explained that “the Road Safety Act of 1967 provides support for the hypothesis that subjective certainty of punishment can deter socially harmful behavior as exemplified by drinking and driving in Great Britain.”

In other research, Professor Ross found that the British experience was consistent with DWI deterrence studies from around the globe. Summarizing the literature in 1986, Professor Laurence Ross concluded that “at commonly prevailing levels of punitive severity, increments in threatened certainty of punishment are able to produce increments in marginal deterrence.” Ross went on to explain that “a chief source of difficulty for deterrence-based interventions in the past has been the very low level of actual and hence perceived certainty of punishment for offenders” and that “policymakers should be encouraged to increase certainty, within the limits of political feasibility, by devoting the maximum of law enforcement resources to the problem, in focused ways.” Similarly, in a study following the implementation of random breath testing in Australia, a researcher found that the increased certainty of punishment improved deterrence of drunk driving.

More recently, in a 2001 study, Daniel Nagin and Greg Pogarsky surveyed college students about drinking and driving in an effort to gauge the importance of certainty,

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163 Id. at 69.
164 Id. at 51.
165 See id. at 3.
166 See id.
167 Id.
169 Id. at 168. For an earlier review of the literature, see H. LAURENCE ROSS, DETERRING THE DRINKING DRIVER: LEGAL POLICY AND SOCIAL CONTROL (1982).
170 See ROSS HOMEL, POLICING AND PUNISHING THE DRUNK DRIVER: A STUDY OF GENERAL AND SPECIFIC DETERRENCE 236-37 (1988). Homel also found that those who believed the penalty for drunk driving had increased became less likely to drive while intoxicated. However, he attributed the effectiveness of increased severity of punishment to the possibility that “perceived severity of penalties only has predictive power when the perceived chances of arrest are high.” Id. at 237.
severity, and celerity of punishment in deterring offenders. After describing a scenario in which students were drinking on the main strip of a college town and believed themselves to be legally intoxicated, Nagin and Pogarsky asked the students to estimate the chances that they would be apprehended and convicted if they drove home. The researchers then randomly assigned the subjects different punishments ranging from a three-month license suspension to a fifteen-month license suspension. Having set out variables as to the certainty and severity of punishment, Nagin and Pogarsky asked students to estimate the likelihood that they would drive home while legally intoxicated. Once again, the researchers found that certainty of punishment had a greater effect on deterrence than severity.

Interestingly, Nagin and Pogarsky went beyond the certainty/severity question to examine the extralegal effects on deterrence. Students were told that if they were represented by the public defender that the chance of escaping conviction was fifty percent. They were also offered the option to hire an exceptional lawyer who would “virtually assure” them of not being convicted, or a “good” lawyer who could arrange a plea bargain whereby the student plead guilty to drunk driving but avoided any legal penalties. Students were asked to state the maximum amount they would pay to each lawyer. This data enabled Nagin and Pogarsky to determine that the students actually placed a greater monetary value on avoiding the stigma of a conviction (even if it did not carry any punishment) than on avoiding the actual legal consequences that typically accompanies a conviction. Put simply, Nagin and Pogarsky found that for college students accused of DWI, the stigma of conviction, even without accompanying punishment, amounted to an effective deterrent.

In these and other DWI studies, scholars have found that increasing the certainty

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172 See id. at 874-75.
173 See id. at 875.
174 See id.
175 See id. at 883-84. (“It is in this sense that the results support the prediction that certainty effects will be more pronounced than will be severity effects.”).
176 See id. at 875-76.
177 See id. at 875.
178 See id. at 879.
179 As I discuss below in Part V.C infra, such a finding provides support for legislators carving out the least serious DWI offenders (e.g. college students who are first-time offenders and have low blood alcohol contents), eliminating the right to a jury trial and punishing them with a maximum sentence of a fine. For the right group of offenders, the stigma of conviction, even without an accompanying threat of incarceration, can serve as an effective deterrent.
180 See Daniel S. Nagin & Raymond Paternoster, *Enduring Individual Differences and Rational Choice Theories of Crime*, 27 LAW & SOC. REV. 467, 477, 489 (1993) (using DWI scenarios (as well as theft and sexual assault scenarios) and finding that “perceptions of the certainty of formal and informal sanctions and self-imposed shame effectively controlled respondents’ intentions to offend”).
of punishment is effective at deterring drunk driving. Following the logic of these studies, it stands to reason that increasing the DWI conviction rate by moving from less conviction prone jury trials to bench trials should improve the certainty of punishment and hence the deterrent effect.

Of course, I do not want to overstate the case. Many DWI offenders are never caught, and the social science evidence presented to date primarily focuses on improving the certainty of apprehension rather than the certainty of convicting those who have been apprehended. Thus, an increase in the conviction rate of those who are arrested would not result in a drastic change in the number of DWI offenders who are punished. Moreover, any discussion of deterring DWI offenders must also recognize that, apart from the criminal consequences, DWI offenders risk physical harm to themselves and damage to their vehicles when they get behind the wheel. If these risks do not create an adequate deterrent, there is reason to question whether the criminal justice system can add much additional deterrence. Additionally, as Paul Robinson and John Darley have argued, changes in legal rules often fail to improve deterrence because offenders often do not know of the rule or are unable to rationally appreciate how the rule will impact them.

Because it is difficult to make credible deterrence predictions about DWI or any crime for that matter, it would be inappropriate to assert that eliminating jury trials would definitely lead to a marked decrease in DWI offenses. Nevertheless, the social science literature does suggest that judges will be more likely to convict DWI defendants and the deterrence literature in turn indicates that an increase in the perceived certainty of punishment should have favorable deterrence consequences. When the prospect of increased deterrence is considered along with the celerity and efficiency benefits considered in Part IV.B, the case for eliminating jury trials in misdemeanor DWI cases becomes stronger.

B. Eliminating Jury Trials Improves the Celerity of Punishment and Carries Other Efficiency Benefits

181 See Stephen J. Schulhofer, Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law, 122 U. PA. L. REV. 1497 (1974) (discussing DWI arrests and fatalities and noting that in considering deterrence arguments we must recognize that those figures “ignore[] all the instances of drunken driving that did not lead to an arrest.”); Ross et al., supra note 1, at 163 (“The actual chances of apprehension for a drunk driver in an American jurisdiction are estimated to range between 1 in 200 and 1 in 2000.’”).

182 See Schulhofer, supra note 181, at 1543-44.


184 See Ross et al., supra note 1, at 157 (“The empirical evidence for the deterrent effectiveness of severe [DWI] penalties such as jail is, however, inconsistent at best.”).
In addition to improving the certainty of punishment, legislation eliminating the right to a jury trial for certain DWI charges would also improve the celerity or swiftness of punishment. As discussed below, there is evidence (albeit very limited at this time) that improving the swiftness of punishment also aids deterrence goals. Additionally, and irrespective of whether deterrence is improved through swifter punishment, moving to a bench trial regime will carry numerous efficiency gains for the criminal justice system.

1. Celerity of Punishment May Aid Deterrence

Punishment theorists have long posited that three factors – certainty, severity, and celerity of punishment – are important in maximizing deterrence. As discussed in Part IV.A above, social scientists have invested enormous attention in the certainty and severity variables and have convincingly demonstrated that certainty of punishment is by far the more important component of deterrence. As a matter of logic, enhancing the celerity or swiftness of punishment would seem likely to improve deterrence for the same reason that certainty of punishment is important. When offenders are to be punished at some abstract time in the distant future they may discount the punishment rather than internalizing its full effect. By contrast, if punishment is swift, defendants have less ability to ignore or minimize its impact. Unfortunately, “empirical tests of the celerity effect are scant.”

Despite the dearth of research on celerity effects, there is some evidence in the DWI context to support the conventional wisdom that swift punishment can have a positive effect on deterrence. During the 1980s when breathalyzer tests became commonplace at traffic stops, a few states imposed immediate license suspensions on drivers who either failed or refused the breath tests. Because the license revocations were administrative in nature, they could be done very quickly and without the standard due process guarantees that apply in criminal proceedings. At the same time,

186 Nagin & Pogarsky, supra note 171, at 865.
187 See id. at 884 (“As for the celerity effect, further testing is necessary before it can be confidently concluded that the impact of celerity is immaterial.”); see also Edmond S. Howe & Thomas C. Loftus, Integration of Certainty, Severity, and Celerity Information in Judges Deterrence Value: Further Evidence and Methodological Equivalence, J. APPLIED SOC. PSYCH. 226, 227, 237 (1996) (noting that “celerity has been, with few exceptions, largely discounted and assumed irrelevant to the subject of punishment” and finding in a new study that “the relevance of celerity information to judgment of deterrence value is at best minor”).
188 See NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, STATE AND COMMUNITY PROGRAM AREA REPORT (1985) (reviewing efforts in eleven states).
even though the revocations were categorized as administrative, individual drivers who had been deprived of their licenses certainly felt as though they had been punished. The change in the law to allow immediate license revocation provided researchers with the opportunity to test whether the celerity of punishment had a deterrent effect on traffic fatalities. In a New Mexico study, Professor Laurence Ross found that a new law providing for immediate forfeiture of licenses for drivers who failed or refused blood alcohol tests, led to a drop in driving related fatalities involving drivers or pedestrians with blood alcohol levels over .05.\textsuperscript{189} Studies in other states likewise found swift license revocations to be effective deterrents.\textsuperscript{190}

Thus, while there is a dearth of research on the importance of the celerity of punishment, there is at least some evidence to suggest that carrying out swift justice in the DWI context serves to reduce drunk driving.\textsuperscript{191} Of course, it would be folly to put too much importance on the administrative license suspension data when predicting the deterrence gains that would come from eliminating jury trials. As explained in Part IV.B.2 below, eliminating jury trials in DWI prosecutions would almost certainly abbreviate the time from arrest to conviction. In many instances, eliminating juries would lead some defendants to relinquish their trial rights and quickly plead guilty instead. Yet, even in those cases the time between arrest and conviction would still not be immediate because there would be pre-trial settings and other legal wrangling before a conviction. And for defendants who do insist on a bench trial, the new regime might provide that trial much faster but there would still be a considerable lag between the time of the offense and the time of conviction. As such, while celerity of punishment would be improved, it may still be too long of a time between offense and conviction to foster an improvement in the deterrent effect. Put simply, the case for an improved

\textsuperscript{189} See H. Laurence Ross, \textit{Administrative License Revocation in New Mexico}, 9 LAW & POLICY 5, 14 (1987) (“Inasmuch as administrative license revocation may be viewed as emphasizing swiftness of punishment, these results testify to the potential of this previously unexamined variable in the deterrence proposition.”).

\textsuperscript{190} See \textit{National Transportation Safety Board, Deterrence of Drunk Driving: The Role of Sobriety Checkpoints and Administrative License Revocation, Report No. NTSB/SS-84/01}, (Apr. 3, 1984) (finding a nearly 18% decrease in alcohol related traffic accidents in Delaware after the initiation of sobriety checkpoints and administrative license revocations despite an 8% increase in fuel consumption during the same time period); \textit{Forst Lowery, Minnesota’s Double-Barrelled Implied Consent Law: A 1983 Update of “Analytical Study of the Legal and Operational Aspects of the Minnesota Law Entitled ‘Chemical Test for Intoxication’”} 54-65 (1983) (discussing increased perception of certainty of punishment from immediate license revocation and the decline in traffic fatalities).

\textsuperscript{191} Outside the license revocation context, at least one study has found limited deterrent improvement in DWI cases from increased celerity of punishment. \textit{See Jiang Yu, Punishment Celerity and Severity: Testing a Specific Deterrence Model on Drunk Driving Recidivism}, 22 J. CRIM. JUST. 355, 359, 362 (1994) (finding that celerity of punishment did play a role in maximizing deterrence of first time drunk driving offenders, though finding fines to be a more important factor).
celerity effect on deterrence by eliminating jury trial rights is possible, though not necessarily likely. Nevertheless, as discussed below, the same efficiency gains that support the celerity argument stand on their own as systemic improvements to the criminal justice process.

2. Eliminating Jury Trials Improves the Efficiency of the System

Drunk driving is the most commonly prosecuted misdemeanor offense, and possibly the most commonly prosecuted of all criminal offenses in the United States. Each year, police arrest nearly 1.5 million people for DWI. The amount of resources to conduct DWI prosecutions in these cases is enormous. For cases that proceed to jury trial, prosecutors must prepare witnesses and arguments, juries must be empanelled, judges must preside, and most other work in those courts will grind to a halt. Eliminating the right to a jury trial for first-offense DWI prosecutions will substantially reduce the needed resources by: (1) eliminating the need for jurors, voir dire, and peremptory challenges; (2) shortening the duration of trials because judges are in need of less background information than juries; and (3) reducing the number of trials altogether because defendants who face more conviction-prone judges have lower odds of an acquittal at trial and thus less incentive to risk the higher penalty that typically comes with a trial. All of these efficiencies will enable prosecutors, judges, and defense attorneys to devote more of their time and attention to other (likely more serious) criminal cases.

a. Efficiencies From Eliminating Voir Dire, Peremptory Challenges, and Jurors

Eliminating the right to a jury trial would also eliminate some of the most time-consuming aspects of pre-trial procedure. With no jury trials, there obviously would be no voir dire questioning. This, of course, would save whatever time the court would have allotted for jury selection. More importantly, though, eliminating voir dire saves lawyers’ time outside of court. Attorneys, particularly junior prosecutors handling their first few trials, spend an enormous amount of time writing and practicing a voir dire script they will use to weed out unfavorable prospective jurors and win over favorable jurors before testimony begins. Because many prosecutors cut their teeth on first-offense DWI prosecutions, they likely spend large amounts of time preparing their voir dire examinations. And, unfortunately, because many courtrooms are over-burdened with cases, prosecutors often spend time preparing voir dire examinations that are

\[192\text{ See Jacobs, supra note 21, at xvii.} \]

never conducted because cases often plea bargain right before trial. Eliminating the right to a jury trial would thus save resources that are inefficiently spent on voir dire.

Moving to bench trials would also eliminate the sometimes time-consuming and often peremptory challenge process. Even in misdemeanor cases, prosecutors and defense attorneys are typically afforded peremptory challenges to strike jurors who they view as unfavorable.\(^{194}\) If nothing contentious occurs, the lawyers simply submit their peremptory challenges to the judge and the prospective jurors are struck very quickly. However, if either side believes their adversary has used peremptory strikes based on race or gender, a time-consuming hearing must be held to determine if a constitutional violation has occurred under the Supreme Court’s *Batson v. Kentucky* decision.\(^{195}\) If the judge finds a violation, some jurisdictions require that a new jury be impaneled and that jury selection be re-started from scratch.\(^{196}\) And even if the trial judge rejects the *Batson* challenge, the defendant then has an appellate issue that he can raise on appeal if he is convicted. Eliminating the right to a jury trial eliminates the peremptory challenge problem altogether.

Finally, and most obviously, eliminating jury trials would save the time and expense of the jurors themselves. Each year there are likely well in excess of ten thousand DWI jury trials in the United States, most of which are for first offenders.\(^{197}\) Moreover, in some cases a venire is brought to the courtroom only to have the case plea bargain after the jurors are forced to sit through voir dire and possibly even part of the trial itself. Assuming that 10,000 first-offense DWIs are prosecuted before juries in the United States each year and that a venire of twenty prospective jurors is used for each jury trial, that translates into 200,000 prospective jurors per year. Some of these jurors could be spared the financial hardship of jury service altogether.\(^{198}\) More importantly, some of these jurors could be shifted to other courtrooms to ensure that there are a sufficient number of jurors for other cases. Presently, judges sometimes have to delay trials when a venire lacks a sufficient number of prospective jurors or when the lawyers “bust” the panel by striking such a large number of jurors for cause that there are not


\(^{196}\) See *id.* at 99 n.24 (1986); Cheryl A.C. Brown, *Challenging the Challenge: Twelve Years After Batson, Courts Are Still Struggling to Fill in the Gaps Left by the Supreme Court*, 28 U. BALTIMORE L. REV. 379, 408-09 (1999) (noting that a “number of jurisdictions” provide for a new jury as the remedy for a *Batson* violation).

\(^{197}\) National statistics are unavailable because many states do not keep data. Nevertheless, when one considers that there were 1,852 DWI jury trials in Texas alone during the single year from mid-2007 until mid-2008, it is a fair estimate that there are in excess of ten thousands jury trials nationwide. See TEXAS ADMINISTRATIVE OFFICE OF COURTS, ACTIVITY LEVEL BY CASE TYPE: SEPTEMBER 1, 2007 TO AUGUST 31, 2008 (on file with the author).

\(^{198}\) See Gloria Hillard, *Recession Hits the Jury Box*, NATIONAL PUBLIC RADIO, Oct. 19, 2009 (discussing how the recession has hindered jury service).
b. Shortening the Duration of Trials

Eliminating juries for first-offense DWI trials will also shorten the duration of trials by reducing the time spent on opening statements, closing arguments, and questioning of witnesses. Simply put, judges need far less background information than jurors to understand the big picture theme and particular facts of individual cases. Not only are judges familiar with the law that governs DWI cases, but ruling on pre-trial motions and perhaps overhearing plea bargaining discussions gives judges a good sense of the gist of the case before the trial even begins. This means that opening statements and closing arguments will not have to be as detailed and there will be no need for lawyers to spend time explaining to the fact-finder what the legal rules mean and how they apply to the facts of a particular case.

The time savings will be even greater with the examination of witnesses. The typical DWI case involves testimony of officers who performed sobriety tests and chemists who explain breathalyzer tests. Judges have seen these types of witnesses dozens or even hundreds of times in the past. They are aware of the training the police and experts have received and how they perform their basic job responsibilities. Judges will require very little background testimony to assess the credibility and factual assertions of such witnesses. Jurors, by contrast, typically have no familiarity with police training and the mechanics of breathalyzers and other field sobriety tests. Prosecutors are therefore required to elicit lengthy background information through direct examination. Prosecutors likewise spend considerable time reviewing how breathalyzers are calibrated and why other field sobriety tests are accurate. In a DWI jury trial it is therefore not surprising to see prosecutors spend time on where police officers were trained, the exact training received, their employment history at the police department, and other background information. Defense attorneys, in turn, then conduct detailed cross examination that could raise doubts about the training and scientific methodology of the witnesses. This lengthy testimony would not be completely eliminated in bench trials, but it would be substantially reduced.

c. Reducing Trials By Encouraging Plea Bargaining

If states eliminate the right to jury trials for first-offense DWI prosecutions it will almost surely reduce the number of DWI cases proceeding to trial. Trials, of course, are very time-consuming. Fewer trials will therefore mean a reduced workload for prosecutors, defense lawyers, and judges. The reduced workload will in turn provide prosecutors and defense lawyers with more time to spend investigating and preparing
their other cases.

The reason that abolishing the right to a jury trial will result in more plea bargaining is that bench trials are far more predictable than jury trials. When a defendant is deciding whether to gamble on a jury trial, she has no idea who will be on her jury and whether they might be favorable to her. Before the day of trial, a defendant might hope to have a jury that is demographically similar to her and that can identify with her. She might expect that her lawyer, who she may have paid a hefty sum, will have a good rapport with the jury. Or she might hope that the prosecutor will perform poorly. In short, there are many unknown variables about how a jury trial might break. Because many first-offense DWI defendants have no prior experience with the criminal justice system, they likely have little personal information to fill in the informational gaps.199 Optimistic defendants – particularly successful individuals who are used to having things go their way – may choose to assume that the unknowns will break in their favor. These defendants might therefore be more willing to take their case all the way to a jury trial and hope for the best.

While bench trials also carry some uncertainty, there would be far fewer unknowns than in jury trials. Recall that first-offense DWI is one of the most common crimes committed in the United States.200 In a regime where all first-offense DWIs are tried to the court, the same judges would be called on to resolve numerous cases. It therefore would quickly become clear to the repeat players in the criminal justice system – particularly highly paid DWI defense lawyers – whether judges are prone to convict or acquit in run-of-the-mill DWI cases. And if the social science evidence described in Part III.A is correct, judges in general will be more willing to convict than juries.201 Competent defense attorneys will of course relay this information to their clients. Instead of the defense attorney telling her client that he “might draw a really favorable jury,” the lawyer will inform the defendant that when a defendant has exceeded .08 on the breathalyzer Judge Smith has voted to convict in almost every case.

A competent defense attorney will also then explain the “trial penalty” whereby defendants who have pushed cases to trial are typically sentenced to tougher punishments.202 Once judges have established a pattern of regularly convicting individuals who have failed breathalyzer test, they may have little patience for new defendants who insist on going to trial. Therefore, there is reason to believe the “trial penalty” will be even more pronounced in DWI cases. Defense attorneys will of course convey to their clients the relevant information about the trial penalty and a judge’s conviction rate. Once defendants have solid information on judges’ conviction rates and the attendant trial penalty, the gamble on trial should look far less attractive. Put

199 See Bibas, supra note 138, at 920-29.
200 See supra note 147.
201 See supra notes 61-100 and accompanying text.
simply, a defendant faced with much greater certainty of conviction and the prospect of
an annoyed judge meting out a tougher sentence will be more likely to plea bargain.
And for defendants who were already leaning toward pleading guilty, the greater
certainty of the outcome will move them to do so more quickly. Not surprisingly, data
already demonstrates that the time between charging and verdict is almost five times
faster in bench trials than jury trials. Of course, the scenario described above is only a general pattern; specific cases will
differ. Some judges will not be more conviction prone than juries. Other judges will
not impose any type of trial penalty. These judges will likely be the exception, not the
rule. And they may very quickly discover that being the exception carries baggage.
The docket in their courtrooms will swell beyond that of other judges because fewer
cases will plea bargain and more court time will be spent handling DWI trials. Thus,
while some judges might continue to be less conviction prone than their colleagues in
DWI cases, others might slowly discover that they are the outliers and begin to change
their approach.

Even if a small percentage of judges are not tougher than juries, the overall effect
of eliminating jury trials will be substantial. Fewer and faster DWI trials will reduce the
workload of the lawyers handling the cases. This will be helpful to busy public
defenders (who handle some DWI cases) and very helpful to prosecutors (who handle
lots of DWI cases). While many observers are aware that public defenders and
appointed lawyers face excessive caseloads, it is also the case that prosecutors in
some jurisdictions are terribly overburdened. For instance, a recent analysis of the
McLennan County District Attorney’s Office in Texas found that the twenty-four
prosecutors in that office were responsible for 3,600 felonies and more than 8,000
misdemeanors in a single year. That works out to each attorney having between 300
and 500 open cases at any given time. If DWI cases were processed faster, these
lawyers would be able to devote more of their attention to violent crimes and other
complicated cases.

V. How States Can Revise Their Statutes To Eliminate the Right to a Jury Trial

203 See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE
STATISTICS--2003, at 447 tbl.5.43 (Ann L. Pastore & Kathleen Maguire eds., 2004) (finding in a
2003 review of federal cases that bench trials were resolved 2.6 months after charges were filed
compared with 12.3 months for cases that were tried to juries).
204 See, e.g., Backus & Marcus, supra note 106.
205 See, e.g., Cindy V. Culp, Data Offer Clues on McLennan County District Attorney’s Performance,
WACO TRIB. Dec. 13, 2009 (describing the “crushing” caseload).
206 See id.
207 See Erica J. Hashimoto, The Price of Misdemeanor Representation, 49 WM. & MARY L. REV. 461
(2007) (suggesting that states cease appointing free lawyers to indigent misdemeanor
defendants to reallocate attorney time to more serious cases).
As explained in Part II, the petty offense doctrine authorizes states to eliminate jury trials for first-offense DWI prosecutions so long as the maximum punishment does not exceed six months’ incarceration. States’ ability to implement this proposal depends on how their criminal code is drafted, the punishment ranges currently in place, and whether their state courts have embraced the petty offense doctrine under their state constitutions. In some states, eliminating the right to a jury trial would be as simple as adding a clause to the DWI statute. In other states, more in depth changes to the criminal code would be necessary, though not onerous. At present, only a handful of states have eliminated the right to a jury trial for low-level DWI offenses. While my proposal is foreclosed in about ten states that have rejected the petty offense doctrine, the proposal could be adopted in nearly thirty states. Below, I provide a roadmap for these nearly thirty states to eliminate the right to a jury trial for first-time DWI offenses.

A. Adding Simple Language to the Code to Eliminate the Right to a Jury Trial

208 See supra part II.
209 See supra note 60.
210 See infra note 235 and accompanying text.
In at least twelve states\textsuperscript{211} (and possibly three others),\textsuperscript{212} legislatures could eliminate the right to a jury trial for certain first-offense DWI prosecutions by simply adding a clause to the existing statute. In these states, the punishment for first-offense DWI does not exceed six months and therefore there is no federal constitutional right to a jury trial.\textsuperscript{213} Moreover, these states appear to have embraced the petty offense doctrine under their own state\textsuperscript{214} constitutions.\textsuperscript{215} Thus, the legislatures of these states

\textsuperscript{211} These states are Arizona, Colorado Connecticut, Delaware, Illinois, Indiana, Kansas, Kentucky, Maryland, Missouri, Nebraska, and South Carolina.

\textsuperscript{212} Three states – Minnesota, Wisconsin, and Utah -- appear not to have addressed whether the petty offense doctrine applies under their state constitutions. The Minnesota Supreme Court has noted that criminal defendants’ jury trial rights derive from the Minnesota Constitution, but it pointed to a state statute defining “crime” as the reason why all defendants facing incarceration are entitled to a jury trial. \textit{See} State v. Weltzin, 630 N.W.2d 406, 410 (Minn. 2001). The \textit{Weltzin} decision conducted no substantive analysis of whether the federal petty offense doctrine should apply under Minnesota constitutional law. If Minnesota were to embrace the petty offense doctrine, it would be free to eliminate jury trials for first-time DWI prosecutions, which carry a maximum sentence of only ninety days. \textit{See} Minn. Stat. §§ 169A.27 & 609.02. The Wisconsin Supreme Court appears not to have ruled on the merits of a petty offense challenge, although it has noted in dicta in a civil case that even in criminal proceedings, trial by jury is not invariably required. \textit{See} Layton School of Art and Design v. Wisconsin Employment Relations Commission, 262 N.W.2d 218, 235 & n.36 (Wis. 1978) (citing the federal petty offense cases). In Wisconsin, first-time DWI offenders are punishable by up to six months incarceration, see Wis. Stat. Ann. §§ 343.65 & 346.63(1), but are guaranteed a jury trial by statute, \textit{see} Wis. Stat. Ann. § 800.04(1)(d). Finally, in a Utah case, the state supreme court approvingly cited the federal petty offense doctrine but refused to assess the issue under the state constitution because it was not properly briefed. \textit{See} West Valley City v. McDonald, 948 P.2d 371 (Utah 1997). In Utah, first-time DWI offenders are punishable by up to six months incarceration, \textit{see} Utah Code Ann. § 41-6a-503, but are guaranteed a jury trial by statute, \textit{see} Utah Code Ann. § 77-1-6-2(e).


\textsuperscript{215} While a number of the cases adopting the petty offense doctrine have occurred in the context of criminal contempt charges – specifically the Connecticut, Illinois, Indiana, Kansas, and South Carolina cases cited in \textit{supra} note 214 -- rather than ordinary criminal cases, the reason for that is likely that these states have statutes (rather than state constitutional protections) that guarantee jury trial rights to ordinary criminal defendants. Although some litigation may be required in
would simply have to add a short clause to their DWI statute specifying that “for
prosecutions under this section of the code, the trial shall be by judge, not jury.”

Kentucky provides a good example of the simplicity and benefits of abolishing the
jury trial right in low-level DWI cases. Under Kentucky law, a first-time DWI is
punishable by up to thirty days in jail, and a second offense carries a maximum
sentence of only six months incarceration.216 Both offenses are thus petty and could be
tried in bench trials without violating the U.S. Constitution. And the Kentucky
Supreme Court has recognized that there is no state or federal constitutional right to a
jury trial for such misdemeanor DWI prosecutions.217 Nevertheless, the Kentucky
Supreme Court has recently concluded that DWI defendants have a statutory right to a
jury trial in all criminal prosecutions, including traffic violations.218

A simple legislative enactment could eliminate the statutory right to a jury trial in
first and second-offense DWI cases in Kentucky. The resources saved would be
substantial. In 2008, Kentucky prosecutors filed 843 first-time DWI charges and 274
second-time cases.219 Many of these 1,117 cases were either resolved by jury trials or
slowed down by defendants invoking their jury trial rights before eventually pleading
guilty. In addition to efficiency savings, Kentucky might benefit from any added
deterrence achieved from improving the certainty and celerity of punishment.
Kentucky ranks above the national average in alcohol-related fatalities in the United
States.220 In 2008, Kentucky had 826 traffic fatalities, of which 200 were alcohol

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217 See Commonwealth v. Green, 194 S.W.3d 277, 285 (Ky. 2006). Interestingly, in Green, it was
the prosecution, not the defendant, that demanded the jury trial. It is impossible to know the
reason for this unusual turn of events but it may be that the trial judge was seen as unlikely to
convict in DWI cases.
219 See KENTUCKY ADMINISTRATIVE OFFICE OF THE COURTS: CIRCUIT COURT- DUI REPORT BY
CIRCUIT AND OFFENSE: STATEWIDE (provided by Kentucky Department of Court Services and on
file with the author).
220 See Worst States for Drunk Drivers, FORBES, Dec. 18, 2009 (available at
http://www.forbes.com/2009/12/18/drunk-driving-states-lifestyle-vehicles-intoxicated-
madd-bac_chart.html?partner=relatedstoriesbox).
related. If even a few of these fatalities (not to mention other damaging accidents) could be reduced through improved deterrence, that benefit alone would be significant.

B. Lowering the Maximum Punishment to Six Months or Less

In seven states, transitioning to a bench trial regime would be slightly more difficult because, while the states embrace the petty offense doctrine, they impose a maximum punishment for first-time DWI that exceeds six months. Thus, under their present statutes, these states cannot constitutionally invoke the petty offense doctrine. But if they simply lowered the maximum incarceration period for first-time offenders, they would be free to abolish jury trials.

Massachusetts provides a good example. First-time DWI offenders in Massachusetts face the toughest maximum punishment in the nation: two-and-a-half years imprisonment. Yet, when first-time offenders are actually sentenced they typically receive no jail time whatsoever. The website of one Massachusetts DWI defense lawyer explains that although the authorized penalty for first offenders is “not more than 2 ½ years [in the] House of Correction,” “99.9 of the cases,” qualify for an “alternative disposition” which does not include jail time. Because Massachusetts has recognized the petty offense doctrine, the legislature would be free to abolish the right to a jury trial for first offenses if it lowered the maximum punishment to six months instead of the almost never enforced two-and-a-half-years.

221 See id.
222 The states are Alabama, Arkansas, Iowa, Massachusetts, North Carolina, Oregon, and Virginia.
225 Of course, states would have to also eliminate any statutory jury trial guarantee as well.
227 See MASSACHUSETTS DRUNK DRIVING ATTORNEY RUSSELL MATSON’S DRUNK DRIVING, DUI, DWI, AND OUI LAW DEFENSE INFORMATION (available at http://www.madrunkdrivingdefense.com/drunk-driving.htm) (explaining the “minimum penalty” that is available to first-time offenders who plead guilty and have a “smart attorney”).
228 See JONES, MILLIGAN & GERAGHY, MASSACHUSETTS OUI LAW (available at http://www.dwilawoffice.com/massachusetts_oui_law.html).
229 See In re DeSaulnier, 279 N.E.2d 287 (Mass. 1971) (recognizing the petty offense doctrine in the context of criminal contempt charges).
As a matter of legislative drafting, it is simple for states to bring themselves within the petty offense doctrine. The easiest approach would be for legislatures in these states to reduce the maximum sentence for all first-time DWI offenders to six months so that the crime would fall within the petty offense doctrine. Alternatively, legislatures could create a graded DWI statute in which less serious first-time offenders face a maximum sentence of six months or less, while more serious first-time defendants face longer sentences. Many states have already adopted such an approach. For example, New Hampshire differentiates between “ordinary” offenders with blood alcohol levels up to .16 and “aggravated” offenders who have levels in excess of .16. Given that judges are more likely to impose tougher sentences on offenders with higher blood alcohol levels, it makes logical sense to have the “ordinary” offenders face no more than six months incarceration (and therefore have no jury trial) while authorizing a longer sentence (and therefore a right to a jury trial) for the “aggravated” offenders.

While the actual drafting and logic of such a regime is quite simple, the more difficult problem is that legislatures are typically reluctant to reduce criminal punishments because of the risk of being seen as soft on crime. Given the influence of MADD and other interest groups, legislators have an incentive to raise punishment ranges, not reduce them. Yet, this political problem would likely be averted if MADD and other advocacy groups supported the legislation to reduce the maximum punishment. And MADD would be wise to support a reduction.

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As noted above, the reality is that almost no first-time DWI defendants ever receive anywhere close to a year or longer in jail. And while states may want to punish first-time DWI offenders with long sentences if they have lengthy criminal histories, that can be accomplished with a separate statutory scheme for recidivists that would not affect the bulk of first-time DWI offenders.

The only real benefit provided by having punishments in excess of six months for first-time DWI offenders is that it amounts to a symbolic statement the state takes DWI very seriously. Yet, the expressive value of a tough maximum sentence may actually be counterproductive if drivers are aware that the outer punishment range of the statute is never enforced. Put more simply, it does little good to have a lengthy punishment range if no one ever receives that punishment and ordinary citizens know that no one receives that punishment. Moreover, social scientists have found that when jurors are aware that DWI defendants face tough penalties, the jurors actually become less likely to convict.

By contrast, recall that social science data indicates that judges are more likely to convict than juries and that certainty of punishment is the most important factor in

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232 See supra note 226-29 and accompanying text.
233 See supra note 146.
achieving deterrence. Interest groups such as MADD might be willing to trade an unenforced lengthy punishment range for a shorter sentencing range that holds more defendants accountable and has a better chance of deterring DWI. If MADD and other interest groups were to make this strategic calculation, political opposition to reducing the sentencing range might be neutralized. In turn, legislators might be willing to vote for such a bill.

C. Carving Out a Small Category of Cases Where No Jail Time Can Be Imposed

The biggest obstacle to eliminating the right to a jury trial for first-offense DWI trials is that some states have rejected the petty offense doctrine under their state constitutions. These states break down into two categories. In ten jurisdictions, the state constitution has been interpreted to require jury trials for all criminal offenses, even those that carry only a fine and no jail time. In order to implement my proposal in these states, legislators would have to pass a statute they know to be unconstitutional and then ask their state supreme court to overrule its prior precedent and accept the petty offense doctrine. Obviously, such a scenario is very unlikely.

In at least seven states, however, state courts have only forbidden the abolition of jury trial rights when defendants face incarceration. In other words, these states

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234 See supra Parts III.A and IV.A.


236 These states include California, Idaho, Ohio, Oklahoma, South Dakota, West Virginia, and Wyoming, all of which carry a maximum sentence for first-offenders of six months or less. See Cal. Vehicle Code § 23152 & 23536; Idaho Code §§ 18-8004(1)(a) & 8005(1)(a); Ohio Rev. Code Ann. §§ 4511.19 & 2929.24; Okla. Highway Safety Code 11-902; S.D. Codified Laws §§ 22-6-2 & 32-23-2; W. Va. Code § 20-7-18b(d); Wyo. Stat. Ann. § 31-5-233. Additionally, the issue is unresolved in Rhode Island, where the Rhode Island Supreme Court has not determined whether violations carrying a maximum fine of $500 are entitled to a jury trial. See State v. Vinagro, 433 A.2d 945, 949 n.6 (R.I. 1981). At present, Rhode Island punishes first-offenders with up to a year in jail, see R.I. Stat. § 31-27-2(d), thus making a $500 maximum fine a very unlikely change.

237 See Mitchell v. Superior Court, 783 P.2d 731, 738 (Cal. 1989) ("Under the California Constitution, only infractions not punishable by imprisonment are not within the jury trial guaranty."); State v. Benjamin, 730 P.2d 952, 964 (Idaho 1986) (concluding that the state constitution "guarantees a jury trial whenever the possible sanction includes imprisonment"); State v. Tate, 391 N.E.2d 738 (Ohio 1979) (quoting state constitution which guarantees a jury trial "except . . . in cases involving offenses for which the penalty provided is less than imprisonment...\)
have not rejected the petty offense doctrine for crimes where the maximum punishment is only a fine. Thus, if states were to carve out a separate and very narrow DWI offense that does not carry any jail time then they would be free to abolish the right to a jury trial.\textsuperscript{238}

For example, a state could re-grade its DWI statute to carve out a separate offense for first-time offenders who had blood alcohol levels of .08 to .14. Defendants with these unlawful (though not egregiously high) blood alcohol levels could face a stiff fine, loss of their driver’s license, and community service, but no actual jail sentence. Eliminating the prospect of a jail sentence would in turn eliminate the right to a jury trial. A few states have already embraced this idea. For instance, in New Hampshire, a typical first-time DWI offender faces a $500 fine, license revocation, and a driver intervention program, but has no right to a jury trial.\textsuperscript{239} If, however, the offender commits an aggravated first offense – by driving more than thirty miles over the speed limit, causing a collision resulting in serious bodily injury, carrying a passenger under sixteen years of age, or having a blood alcohol level in excess of .16 – the defendant faces jail time and has the right to a jury trial.\textsuperscript{240}

Of course, the idea of taking a category of DWI offenders who face jail time and downgrading the maximum punishment to a fine would likely not be popular with

\begin{itemize}
  \item \textsuperscript{238} Professor Laurence Ross has suggested that legislatures decriminalize first-time DWI offenses so that they can be handled as administrative proceedings which carry few procedural protections and consequently result in a greater certainty and celerity of punishment and hence improved deterrence. See ROSS, DETERRING THE DRUNK DRIVER, supra note 146, at 110. One commentator is skeptical of such an approach because it would send “a symbolic message to the public that alcohol impaired driving is nothing more than a minor traffic offense or routine violation. Cafaro, supra note 27, at 26. As explained below, my proposal would not be vulnerable to this criticism because defendants would still be charged with a criminal offense and conviction for first-time offenders could still be used to enhance penalties for recidivists.
  \item \textsuperscript{240} See N.H. Rev. Stat. Ann. § 265-A:3 (increasing the maximum fine to $750 as well as the prospect of up to ten days in jail). Pennsylvania has a similarly graded approach, although it recognizes the petty offense doctrine and declines to provide a jury trial to defendants facing six months or less incarceration. Ordinary first offenders in Pennsylvania face no jail time. However, if the defendant’s blood alcohol level is in excess of .16 or if they refused to take the breathalyzer test, defendants face at least 72 hours of incarceration. See 75 Pa. Cons. Stat. §§ 3802(c) & 3804(c)(3).
\end{itemize}
interest groups such as MADD and legislators who are usually inclined to increase rather than decrease punishments. However, as a matter of public policy, such an approach may make sense.

First, creating a category of “fine only” DWI offenses would be in line with the actual (as opposed to the authorized) punishment that many first-time offenders with comparatively low blood alcohol levels currently receive. In a way, creating a category of “fine only” DWI offenses would amount to a truth-in-charging statute in which prosecutors seek convictions and sentences specified under the statute, rather than charging someone with an offense carrying up to six months in jail and plea bargaining the case for a fine instead of jail time.

Second, as noted above, eliminating the right to a jury trial would level the playing field for prosecutors thus making it easier to convict defendants and reducing the resources that must be spent on each case. Anecdotally, prosecutors report that it is very difficult to convince juries to convict first-offense DWI defendants with comparatively low blood alcohol levels. Eliminating jail time and thus the right to a jury trial would probably increase the conviction rate.

Third, and related, studies suggest that for low-level offenses such as DWI, the stigma of conviction may serve as a more important deterrent than the accompanying punishment. For instance, in a study of college students, researchers found that subjects put a greater monetary value on avoiding the stigma of a DWI conviction than on avoiding the punitive consequences (such as license suspension) that accompanied a conviction. Similarly, in a study following the Vietnam war, researchers found that for middle-class defendants charged with draft evasion the stigma of being convicted was the dominant factor in achieving deterrence.

Fourth, there is actually little evidence that sentencing DWI defendants to jail is a successful deterrent. In reviewing deterrence studies of DWI jurisdictions that imposed mandatory jail time on offenders, Laurence Ross and his colleagues concluded that most studies “failed to find evidence of effectiveness for jail.” In a study of Arizona’s mandatory one-day in jail law, Ross concluded that jail time “very likely had no important deterrent effect.” Indeed, according to defense attorneys who were surveyed, “the punishment most threatening to their clients was not jail, but license suspension.” The ineffectiveness of possible jail sentences is consistent with the certainty and severity literature discussed in Part IV. Studies have consistently found

241 See supra notes 192-207 and accompanying text.
242 Nagin & Pogarsky, supra note 171, at 879.
243 See Blumstein & Nagin, supra note 157, at 269.
244 See Ross et al., supra note 1, at 158.
245 Id. at 163.
246 Id. at 164; see also Ross, Law, Science and Accidents, supra note 159, at 68 (explaining that the penalty most feared in the British Road Safety Act was “disqualification or loss of the driver’s license for a year”).
that when the certainty of punishment for DWI remains low, increasing the severity of punishment, even to include jail time, does not improve deterrence.\textsuperscript{247}

Fifth, even if more severe sanctions did enhance deterrence, eliminating jail time would not be counterproductive because inexperienced criminals often believe punishments to be harsher than they actually are. Studies of offender characteristics have found that individuals who have rarely committed criminal infractions tend to fear punishment more than experienced criminals,\textsuperscript{248} and they tend to believe that punishments are more severe than those actually proscribed by law.\textsuperscript{249} Because first-time DWI offenders are often otherwise law-abiding individuals, they are likely to overestimate the punishment they would face if convicted. Thus, they may fear jail time even when it is not an authorized sanction.

Finally, criminologists have demonstrated that more severe punishments are more fiercely resisted\textsuperscript{250} and can result in court backlogs.\textsuperscript{251} For instance, when Arizona revised its DWI laws to impose a mandatory twenty-four hours in jail for anyone convicted, the justice system slowed down dramatically in counties that abided by the law.\textsuperscript{252} The Arizona law led more defendants to retain private lawyers and demand jury trials.\textsuperscript{253} In Phoenix, the mandatory jail law resulted in a significant increase in trials and extra courtrooms had to be added.\textsuperscript{254} The average time from arrest to conviction more than doubled.\textsuperscript{255} Increasing the severity of punishment thus undermined the celerity of punishment and -- if the high priced lawyers were worth their fees -- the certainty of punishment. Given the consensus that certainty of punishment is a far better deterrent than severity of punishment,\textsuperscript{256} the imposition of jail time in some jurisdictions may actually hinder effective DWI deterrence.

Of course, there are good reasons why legislatures would want their DWI statutes to continue to carry jail time. First, each criminal case is unique and some culpable offenders will deserve jail time. Statutes that authorize such jail time will afford judges the discretion to see that justice is done. While this argument is initially

\textsuperscript{247} See Ross, Implications of Drinking-and-Driving Law, supra note 168, at 167.
\textsuperscript{249} See Paternoster et al., supra note 141, at 418 (“[P]rior research has suggested that most people perceive legal penalties to be more severe than they actually are and, compared with offending populations, nonoffenders generally overestimate the presumptive severity of legal penalties.”).
\textsuperscript{250} See MARK A. R. KLEINMAN, WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS PUNISHMENT 93 (2009).
\textsuperscript{251} See Legge & Park, supra note 154, at 596 (“Severe sanctions in general have resulted in accelerated plea bargaining and court backlogs and opposition by judges who prefer discretion.”).
\textsuperscript{252} See Ross et al., supra note 1, at 164-66.
\textsuperscript{253} See id. at 165.
\textsuperscript{254} See id.
\textsuperscript{255} See id.
\textsuperscript{256} See supra Part IV.
appealing, the reality is that the category of defendants at issue here – first-time offenders with lower blood-alcohol levels – rarely receive jail time. By setting up a fine-only class of DWI offenders, legislatures could allow the elimination of jury trials, which would likely result in holding more guilty defendants accountable and hopefully increasing deterrence. The benefits of such a regime would seemingly outweigh the costs of allowing a small number of culpable offenders to avoid a handful of days in jail.

A second reason why legislatures might shy away from eliminating jail time for the lowest-level DWI offenses is that a sentencing regime that authorizes jail time carries the expressive value of saying that all DWI offenses are serious and that all offenders – even those who barely run afoul of the law -- run the risk of incarceration. While this expressive value cannot be denied, it of course is far less influential if offenders know that jail time is almost never imposed. Moreover, the expressive value may be outweighed by (1) the increased number of guilty defendants who would be held responsible; (2) the increased deterrent effect that would accompany a greater certainty of punishment; and (3) the prosecution resources that would be saved.

In sum, a narrow, fine-only offense for defendants with low blood alcohol levels might create a disincentive for some offenders to spend time and money fighting a conviction. A fine-only framework would thus increase the celerity and certainty of conviction, which is the best approach for increasing deterrence.257

VI. Conclusion

In an effort to get tough on crime, legislatures’ first instinct is often to increase punishments. Over the last few decades, this has certainly been the case for DWI. A large number of states now punish first-time DWI offenders with sentences of up to six months and some states impose even tougher maximum punishments. But if legislatures’ goal is to hold guilty offenders accountable, they should leave the maximum punishments where they are or even lower them in some states. Rather than increasing punishments, states should instead take advantage of the petty offense doctrine and abolish the statutory right to jury trials for DWI offenders facing up to six months’ incarceration. Eliminating jury trials would put defendants’ fate in the hands of judges who are more likely to convict. In turn, higher conviction rates would enhance the certainty of punishment, a factor much more important than the severity of punishment in achieving general deterrence. Additionally, bench trials would be far more efficient because the greater certainty of conviction would give defendants less reason to gamble on trial. When trials did occur they would be much faster because

257 See KLEIMAN, supra note 250, at 95 ("Since uncertainty, delay, and inaccurate prediction all limit the effectiveness of deterrent threats, designers of criminal-justice policies should look for ways of increasing the probability of some nontrivial punishment for each offense, to reduce the time-gap between offense and punishment and make the risks of crime to criminals easier for them to perceive.").
there would be no need to select juries, and lawyers would have to present far less background information to already knowledgeable judges. At present, only a handful of states have opted to eliminate jury trials for first-offense DWI defendants. If other states are interested in increasing conviction rates and maximizing general deterrence they should take the steps outlined in this article in order to eliminate the right to jury trials for first-time DWI offenders.