

## 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 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 could abolish jury trials, thereby raising conviction rates and improving general deterrence. Additionally, bench trials would be far more efficient because the greater certainty of conviction would give defendants an incentive to plead guilty rather than taking their cases to trial. When trials do occur, they would be much faster because lawyers would 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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## I. INTRODUCTION

Over the last few decades, states have become much tougher<sup>1</sup> on defendants charged with driving while intoxicated (DWI).<sup>2</sup> Legislatures have increased penalties not only for recidivists but also for first-time offenders.<sup>3</sup> In most states, first-time DWI defendants now face up to six months in jail, and many jurisdictions authorize maximum sentences of one year or longer.<sup>4</sup> Although states should be commended for addressing the DWI problem,<sup>5</sup> a primary focus on punishment is insufficient and may actually be counterproductive.<sup>6</sup> 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 of the most common crimes in the United States.

For over four decades, social science evidence has demonstrated that, when presented with identical cases,<sup>7</sup> judges are more willing to

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1. See H. Laurence Ross et al., *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.

3. See, e.g., GERALD D. ROBIN, *WAGING THE BATTLE AGAINST DRUNK DRIVING: ISSUES, COUNTERMEASURES, AND EFFECTIVENESS* 10–11 (1991); Sandy Harrison, *Assortment of Laws Set to Debut – Good News and Bad News for Consumers as Regulations Kick in at Midnight*, DAILY NEWS L.A., Dec. 31, 1990, at N1 (noting increase in penalty for first-time California drunk drivers); Matt Nelson, *Drunk Drivers Slip Through Cracks, State Tightens Penalties for Offenders*, DULUTH NEWS TRIB., July 18, 1997, at A1 (noting that the Minnesota legislature voted to double the maximum penalty for defendants convicted of third or subsequent DWIs).

4. See *infra* notes 37–39 and accompanying text.

5. Drunk driving is an enormous problem that kills over 10,000 people every year and causes billions of dollars in property damage. *Statistics*, MOTHERS AGAINST DRUNK DRIVING, <http://www.madd.org/statistics/> (last visited Mar. 19, 2011).

6. There has been a modest reduction in the rate of DWI arrests in recent years. See LAURAN M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PUB. NO. NCJ 172212, SPECIAL REPORT: DWI OFFENDERS UNDER CORRECTIONAL SUPERVISION 1 (1999), <http://bjs.ojp.usdoj.gov/content/pub/pdf/dwiocs.pdf>. 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

convict than juries.<sup>8</sup> Jurors' 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 but for the grace of God go I."<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup> 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 rather 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,<sup>12</sup> 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.<sup>13</sup>

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 would not only increase the number of guilty defendants held accountable, but it would also further general deterrence goals. Researchers have long found that the certainty of

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than judges, innocent defendants will choose to be tried by judges rather than run the risk of jury mistake, while guilty defendants will choose to be tried by juries, hoping for a mistake. The acquittal rate should therefore be higher in bench trials—and it is." (emphasis omitted).

8. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 56–59 (1966).

9. See Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 *YALE L.J.* 1050, 1079 (2006) (offering reasons why jurors may be more lenient than judges).

10. See Andrew D. Leipold, *Why Are Federal Judges So Acquittal Prone?*, 83 *WASH. U. L.Q.* 151, 187 (2005) ("A few defense counsel . . . 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* Part IV.B.1 (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 generally Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 *VAND. L. REV.* 307 (2010) (discussing traditional disparities between state prosecutors and appointed defense attorneys).

13. See Leipold, *supra* note 10, at 181 ("The prosecutor assigned to the case is probably going to be less experienced than those assigned to felonies.").

punishment, not the severity of punishment, is the single best deterrent to future misconduct.<sup>14</sup> By moving to bench trials and increasing conviction rates, states would 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<sup>15</sup> 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.<sup>16</sup> 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 (MADD) and other organizations to toughen maximum sanctions, the vast majority of misdemeanor DWI defendants are actually sentenced to probation or very short jail sentences.<sup>17</sup>

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.<sup>18</sup> 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.<sup>19</sup> 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

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14. See *infra* notes 165–88 and accompanying text.

15. The time includes not just the questioning of jurors, but also 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, 138–40 (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 513,200 DWI offenders under supervision of the criminal justice system, more than 450,000 were on probation. See MARUSCHAK, *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* Parts VI.C.

19. See *infra* Part III.

trials so long as their state constitutions do not provide a more expansive jury trial protection than the U.S. Constitution. Legislatures would only have to amend their existing statutes to strike out the jury trial guarantee.

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.<sup>20</sup>

This Article offers a detailed explanation of why eliminating the right to a jury trial for misdemeanor DWI defendants is the right approach. Part II briefly surveys the development of DWI laws from around the country over the last few decades. Part II 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 III then reviews Supreme Court precedent holding that such defendants have no federal constitutional right to a jury trial. Part IV is the heart of the Article. It first reviews the social science literature demonstrating that judges are typically more likely to convict than juries. Part IV goes beyond the empirical literature to discuss reasons why juries in DWI cases may be more reluctant to convict than experienced judges. Part V sets forth the argument why eliminating the right to a jury trial would be a positive step forward. Part V reviews the literature demonstrating that increased conviction rates serve as a better deterrent than harsher punishments. Part V 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 VI discusses the particular steps that states should take to revise their statutes to eliminate the right to a jury trial for misdemeanor DWI prosecutions.

## II. 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.<sup>21</sup> Prior to this "modern era," DWI was treated as just another traffic violation.<sup>22</sup>

In 1978, the group Remove Intoxicated Drivers (RID) was founded in upstate New York, and in 1980 the more well-known MADD was

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20. See *infra* note 61 and accompanying text.

21. See JAMES B. JACOBS, *DRUNK DRIVING: AN AMERICAN DILEMMA*, at xv (1989).

22. See Andrew E. Taslitz, *A Feminist Fourth Amendment?: Consent, Care, Privacy, and Social Meaning in Ferguson v. City of Charleston*, 9 *DUKE J. GENDER L. & POL'Y* 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").

formed in California.<sup>23</sup> Shortly thereafter, chapters of both organizations, as well as Students Against Drunk Driving, began to spring up around the country.<sup>24</sup> In subsequent years, lobbying by these organizations led to a toughening of DWI laws around the country.<sup>25</sup>

In the early 1980s, Congress<sup>26</sup> passed legislation conditioning federal highway funding on states adopting a .10 blood alcohol level for intoxication and raising the drinking age to twenty-one.<sup>27</sup> 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.<sup>28</sup> As Professor James Jacobs explains, states “enacted mandatory jail terms, more-severe fines, and automatic and lengthier license suspensions and revocations.”<sup>29</sup>

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.<sup>30</sup> In Mississippi, the maximum sentence for first offenders is forty-eight hours’ incarceration.<sup>31</sup> First-time defendants in Hawaii face a maximum of only five days.<sup>32</sup> The maximum sentence in Kentucky, New Jersey, North Dakota, and South Carolina is thirty days in jail.<sup>33</sup> Indiana, Maryland, and Nebraska cap punishment for first offenders at two months.<sup>34</sup> Another three states impose maximum punishments of roughly three months.<sup>35</sup>

Most states are slightly tougher on first offenders. The most common statutory design, adopted by nearly twenty states, imposes a

23. JACOBS, *supra* note 21, at xv.

24. *Id.* at xvi.

25. ROBIN, *supra* note 3, at 8–14.

26. See H. LAURENCE ROSS, CONFRONTING DRUNK DRIVING: SOCIAL POLICY FOR SAVING LIVES 83 (1992) (“Between 1976 and 1980, eleven states raised their minimum drinking ages from eighteen to nineteen, twenty, or twenty-one.”).

27. See JACOBS, *supra* note 21, at xvi–xvii.

28. 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 (2006).

29. JACOBS, *supra* note 21, at xvii. States also stepped up police enforcement through roadblocks and patrols, leading to a fifty-percent increase in drunk driving arrests between the mid-1970s and mid-1980s. *Id.* at xvii–xviii.

30. See N.H. REV. STAT. ANN. § 265-A:18 (Supp. 2009); 75 PA. CONS. STAT. § 3804(a)(1), (c)(1) (2006) (setting a maximum punishment of probation and a \$300 fine if the offender took the blood test, but imposing at least seventy-two hours incarceration for offenders who refused the breath test).

31. See MISS. CODE ANN. § 63-11-30(2)(a) (2004).

32. See HAW. REV. STAT. § 291E-61(b)(1)(C)(ii) (2010).

33. See KY. REV. STAT. ANN. § 189A.010(5)(a) (West 2009); N.J. STAT. § 39:4-50(a)(1)(ii) (Supp. 2010); N.D. CENT. CODE § 12.1-32-01(6) (1997); S.C. CODE ANN. § 56-5-2940 (Supp. 2009).

34. See IND. CODE. §§ 9-30-5-1(a), 35-50-3-4 (2004 & 2009) (sixty days); MD. CODE ANN., TRASP. § 27-101(q)(1) (West Supp. 2010) (limiting punishment to two months); NEB. REV. STAT. § 28-106(1) (2008) (sixty days).

35. See MICH. COMP. LAWS § 257.625(9)(a)(2) (2010) (ninety-three days); MINN. STAT. § 169A.27 (2006) (ninety days); N.M. STAT. ANN. § 66-8-102(E) (2004) (ninety days).

maximum sentence of six months for first-time offenders.<sup>36</sup> Fifteen states have regimes that carry a possible sentence of one year.<sup>37</sup> Only three states have adopted a scheme in which first-time offenders face a possible sentence in excess of one year.<sup>38</sup> In sum, in more than two-thirds of the states, defendants face a maximum sentence of six months' incarceration, and often much less.<sup>39</sup>

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 one 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.<sup>40</sup> Although the statute provides for a minimum term of seventy-two hours' imprisonment, first offenders with clean criminal records regularly receive probated sentences and serve no jail time.<sup>41</sup> 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.<sup>42</sup>

At bottom, the reality of DWI prosecutions in the United States is that most defendants are first offenders facing a maximum sentence of

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36. See ARIZ. REV. STAT. ANN. §§ 13-707(A)(1), 28-1381(C) (Supp. 2010); CAL. VEH. CODE § 23536 (West Supp. 2010); CONN. GEN. STAT. § 14-227a(g)(1) (2006); DEL. CODE ANN. tit.21 § 4177(d)(1) (2006); FLA. STAT. § 316.193(2)(a)(2)(a) (2010); IDAHO CODE ANN. § 18-8005(1)(a) (Supp. 2010); 625 ILL. COMP. STAT. 5/11-501(c)(3) (2008); KAN. STAT. ANN. § 8-1567(d) (Supp. 2008); LA. REV. STAT. 14:98(B)(1) (2004); MO. ANN. STAT. § 577.010 (West 2003); MONT. CODE § 61-8-714 (2009); NEV. REV. STAT. § 484C.400(1)(a)(2) (2010); OHIO REV. CODE ANN. § 4511.19(G)(1)(a) (West Supp. 2010); TEX. PENAL CODE ANN. §§ 12.22, 49.04(b) (West 2003); UTAH CODE ANN. § 41-6a-503 (West Supp. 2010); W. VA. CODE § 17C-5-2 (2011); WIS. STAT. § 346.63(1) (West 2010); WYO. STAT. ANN. § 31-5-233(e) (2009).

37. See ALA. CODE § 32-5A-191(e) (2009); ALASKA STAT. § 12.55.135(a) (2010); ARK. CODE ANN. § 5-65-111(a)(1)(A) (Supp. 2009); COLO. REV. STAT. § 42-4-1301(7) (Supp. 2009); GA. CODE ANN. § 40-6-391(c)(1)(B) (Supp. 2010); IOWA CODE §§ 321J.2, 903.1(1)(b) (Supp. 2010); ME. REV. STAT. ANN. tit. 17-A, § 1252(2)(D), tit. 29, § 2411(5) (2006 & 2010); N.Y. VEH. & TRAF. LAW § 1193(1)(b) (McKinney 1996); OKLA. STAT. tit. 47, § 11-902(c)(1) (2007); OR. REV. STAT. § 813.010(4) (2009); R.I. GEN. LAWS § 31-27-2(d)(1) (Supp. 2009); S.D. CODIFIED LAWS § 22-6-2(1) (2006); TENN. CODE ANN. § 55-10-403(s)(1) (Supp. 2009); VA. CODE § 18.2-270 (2009); WASH. REV. CODE § 46.61.5055(1)(a)(i) (Supp. 2010).

38. See MASS. GEN. LAWS ch. 90, § 24 (2005) (two-and-a-half years); N.C. GEN. STAT. § 20-179(g) (2009) (two years); VT. STAT. tit. 23, § 1210 (Supp. 2010) (two years).

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 JAMES H. HEDLUND & ANNE T. MCCARTT, AAA FOUND. FOR TRAFFIC SAFETY, DRUNK DRIVING: SEEKING ADDITIONAL SOLUTIONS, at vi (2002) ("About one-third of all drivers arrested or convicted of DWI are repeat offenders.").

40. See TEX. PENAL CODE ANN. § 49.04(b) (classifying the crime as a Class B misdemeanor); *id.* § 12.22(2) (providing that Class B misdemeanors shall be punished by "confinement in jail for a term not to exceed 180 days").

41. *Id.* § 49.04(b). Lawyers specializing in DWI defense are not reluctant to advertise that properly defended DWI prosecutions can result in no jail time. See, e.g., *Frequently Asked Questions*, TYLER FLOOD & ASSOC., P.L.L.C., <http://www.texaswidefenselawyer.com/drun-driving-faqs.html> (last visited Mar. 19, 2011) ("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 235–38 and accompanying text.

six months and in practice they have very low odds of being sentenced to jail at all, much 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 Part 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.

### III. 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,<sup>43</sup> nor to a verdict that is unanimous.<sup>44</sup> 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 *Duncan v. Louisiana*, the Court considered the case of a black defendant accused of assaulting a white victim in a racially tense environment.<sup>45</sup> Duncan, who faced up to two years' imprisonment under battery charges, had no statutory right to a jury trial under Louisiana law.<sup>46</sup> The Court found the Louisiana procedure to be unconstitutional on the ground that the Sixth Amendment right to a jury is fundamental and cannot be eliminated by the states.<sup>47</sup> 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:

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

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43. See *Williams v. Florida*, 399 U.S. 78, 86 (1970) (upholding a six-person jury).

44. See *Johnson v. Louisiana*, 406 U.S. 356, 362-63 (1972) (permitting a nine-to-three jury verdict).

45. 391 U.S. 145, 147 (1968).

46. *Id.* at 146.

47. *Id.* at 145-50.

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.<sup>48</sup>

Looking to English common law and the colonial period, the Court stated that petty offenses were regularly tried without juries.<sup>49</sup> Citing the benefits of efficiency and simplicity, the *Duncan* Court concluded that the benefits of eliminating jury trials outweighed any negative consequences to criminal defendants charged with petty offenses.<sup>50</sup> 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.<sup>51</sup>

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.<sup>52</sup> Yet, the Court left the "exact location" for another day.<sup>53</sup>

A few years later, in *Baldwin v. New York*,<sup>54</sup> the Court sought to clarify the parameters of the petty offense doctrine. In a case in which 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.<sup>55</sup> Drawing a brighter-line rule than in *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."<sup>56</sup> Thus, every criminal defendant facing more than six months in jail was guaranteed a jury trial.

The *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 shorter 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 *Blanton v. City of North Las Vegas*, a DWI case in which the defendant faced a maximum sentence of six months in jail as well as a \$1000 fine or forty-eight hours of community service while dressed in clothing identifying him as a DWI offender.<sup>57</sup> The Court accepted the proposition that collateral sanctions could

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48. *Id.* at 159 (citations omitted).

49. *Id.* at 160.

50. *Id.*

51. *Id.*

52. *See id.* at 161.

53. *Id.*

54. 399 U.S. 66 (1970).

55. *Id.* at 67–69.

56. *Id.* at 69.

57. 489 U.S. 538, 544 (1989).

guarantee a defendant facing six months or less in jail a right to a jury trial,<sup>58</sup> but it rejected the argument that defendant's case rose to that level.<sup>59</sup> 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.<sup>60</sup>

The *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 invoked the option to eliminate the right to a jury trial for low-level DWI offenses.<sup>61</sup>

#### IV. 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.<sup>62</sup> 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 Harry Kalven and Hans Zeisel published a landmark study that analyzed the extent to which trial judges agreed with juries' verdicts in more than 3500 criminal jury trials.<sup>63</sup> After juries made the decision whether to convict or acquit, the trial judges completed questionnaires stating whether they disagreed with the verdict

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58. *Id.* at 542.

59. *Id.* at 543–44.

60. *Id.* at 544–45.

61. The states that have taken this approach are: Florida, Hawaii, Louisiana, Mississippi, Nevada, New Hampshire, New Jersey, New Mexico, and Pennsylvania. See N.H. REV. STAT. ANN. § 265-A:2, 18 (LexisNexis Supp. 2009); *Blanton*, 489 U.S. at 539; *Johnson v. State*, 994 So. 2d 960, 962–63 (Fla. 2008); *State v. Sullivan*, 36 P.3d 803, 807 (Haw. Ct. App. 2001); *State v. Vu*, 846 So. 2d 67, 71 (La. Ct. App. 2003); *Case v. State*, 817 So. 2d 605, 606–07 (Miss. Ct. App. 2002); *State v. Graff*, 577 A.2d 1270 (N.J. 1990); *Meyer v. Jones*, 749 P.2d 93, 96 (N.M. 1988); *Commonwealth v. Kerry*, 906 A.2d 1237, 1239–40 (Pa. Super. Ct. 2006). Additionally, New York has eliminated the right to a jury trial for the “traffic infraction” of Driving While Ability Impaired, in which the defendant has a blood alcohol level below .08 but above .05. See *People v. Harris*, 828 N.Y.S.2d 832, 838–39 (N.Y. City Ct. 2006). This infraction carries a maximum penalty of fifteen days' incarceration, whereas the traditional charge of Driving While Intoxicated carries a maximum sentence of one year. See N.Y. VEH. & TRAF. LAW § 1193(1)(a)–(b) (West 1996).

62. See *infra* Part IV.A.

63. See KALVEN & ZEISEL, *supra* note 8, at 3–4, 9–10, 33.

and the reasons for that disagreement.<sup>64</sup> The Kalven and Zeisel study remains the gold standard for jury analysis to this day.<sup>65</sup>

Kalven and Zeisel found that juries and judges agreed in approximately 78% of cases.<sup>66</sup> 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.<sup>67</sup> By contrast, in 19% of cases, juries acquitted a defendant who the judge would have convicted.<sup>68</sup> In sum, jurors were more lenient than judges in 16% of cases.<sup>69</sup> 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.<sup>70</sup>

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.<sup>71</sup> Interestingly, the most common crime in the study by a considerable margin was DWI.<sup>72</sup> Of the 3576 cases Kalven and Zeisel studied, a total of 455, or nearly 13% of the sample, were DWI prosecutions.<sup>73</sup> Remarkably, the jury leniency rate jumped from 16% (the total for all crimes in the entire study) to 24% in DWI offenses.<sup>74</sup> Once again, judges would have acquitted in only 3% of cases where juries convicted.<sup>75</sup> By contrast, in a staggering 27% of DWI cases, judges believed the evidence merited a conviction even though juries acquitted.<sup>76</sup> In other words, judges would have convicted more than one in four defendants juries acquitted.

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

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64. *See id.* at 45–54.

65. *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 “[a]rguably one of the most important books in the field of law and social science”).

66. *See* KALVEN & ZEISEL, *supra* note 8, at 56. The authors distributed the 5.5% of hung juries evenly between convictions and acquittals. *Id.* at 57–58. Separating out the hung juries results in 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.

67. *Id.* at 59.

68. *Id.*

69. *See id.* This figure is derived by subtracting the 3% of cases where judges would have acquitted (but juries convicted) from the 19% of cases where judges convicted (but juries acquitted).

70. *See id.* at 106–11.

71. *Id.* at 66–67.

72. *Id.* at 67 tbl.17.

73. *Id.*

74. *Id.* at 468 tbl.130.

75. *Id.*

76. *Id.*

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.<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup>

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.<sup>80</sup> Second, many jurors believed the punishment for DWI was too severe.<sup>81</sup> Less commonly, jurors acquitted because, although 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.<sup>82</sup> Finally, Kalven and Zeisel found that some jurors voted to acquit because they, too, were drinkers and feared, “There but for the Grace of God go I.”<sup>83</sup>

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.<sup>84</sup> Despite calls for replication,<sup>85</sup> 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.<sup>86</sup> Using data assembled by the National Center for State Courts, researchers questioned judges, attorneys, and jurors who had participated in felony trials in four

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77. Kahan, *supra* note 6, at 634 (explaining that advocacy group campaigns were significant primarily because of their “effect[s] on public attitudes, which became suddenly more condemnatory in the late 1980s”).

78. KALVEN & ZEISEL, *supra* note 8, at 468–69.

79. *Id.* at 469.

80. *Id.* at 294 (“In many cases the issue seems to be entirely evidentiary, with the jury showing hostility to the use of drunkometers and alcometers, so frequently relied upon in these cases.”).

81. *Id.*

82. *Id.*

83. *Id.* at 296. As I explain below, there are additional reasons why juries may be more prone to acquit than judges. See *infra* Part IV.B.

84. See Wayne A. Logan, *Symposium: 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.”).

85. See Hans & Vidmar, *supra* note 65, at 347 (“Replication of the Kalven and Zeisel research is much overdue.”).

86. See Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel’s The American Jury*, 2 J. EMPIRICAL LEGAL. STUD. 171 (2005).

locations: Los Angeles County, Maricopa County (Phoenix), Bronx County (New York), and the District of Columbia.<sup>87</sup>

The 2005 study of judge-jury agreement largely replicated the results of Kalven and Zeisel's 1966 work.<sup>88</sup> Whereas Kalven and Zeisel found a 78% agreement rate between judges and juries, Eisenberg and his colleagues found a 75% agreement rate.<sup>89</sup> 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).<sup>90</sup>

Through the use of detailed questionnaires to judges and juries, Eisenberg and his colleagues concluded that the legal and factual complexities of the cases were "not a promising explanation of judge-jury disagreement."<sup>91</sup> 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.<sup>92</sup> As Professor Eisenberg and his colleagues explained, "Judges and juries seem to be reacting to the evidence in a similar manner, except that juries require stronger evidence to convict than judges do."<sup>93</sup> 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.<sup>94</sup>

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.<sup>95</sup> Although the primary purpose of the study was not to study the rate of judge-jury agreement, Heuer and Penrod did analyze seventy-seven criminal cases for rates of agreement.<sup>96</sup> As in the previously discussed studies, they found that judges were more likely to convict, with a net jury leniency

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87. *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 174–78.

88. *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.").

89. *Id.* at 180–81.

90. *Id.*

91. *Id.* at 191.

92. *Id.* at 185–89.

93. *Id.* at 189.

94. *Id.* at 185.

95. *See* Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 LAW & HUM. BEHAV. 29 (1994).

96. *Id.* at 48.

rate of 18.2%.<sup>97</sup> 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.<sup>98</sup>

One final study of judge-jury agreement specifically examined whether judges and juries reached the same conclusions in DWI cases.<sup>99</sup> Rebecca Snyder Bromley, a Colorado judge, studied sixty DWI trials in Colorado by using post-trial questionnaires of judges and jurors.<sup>100</sup> As in previous studies, Bromley found that judges would have convicted more often than juries.<sup>101</sup> In 26.7% of cases, judges would have convicted even though juries voted to acquit.<sup>102</sup> Although judges would have acquitted in a surprising 15% of cases where juries convicted, overall the judges were still considerably more willing to convict.<sup>103</sup> Bromley found that judges would have convicted in 73.4% of DWI cases they observed while juries only convicted in 61.7% of cases.<sup>104</sup>

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.<sup>105</sup> 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.<sup>106</sup> 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.<sup>107</sup> With these concerns in mind though, there appears to be a sound basis for

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97. *Id.*

98. *Id.*

99. See Rebecca Snyder Bromley, *Jury Leniency in Drinking and Driving Cases Has It Changed? 1958 Versus 1993*, 20 LAW & PSYCHOL. REV. 27 (1996).

100. *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).

101. See Bromley, *supra* note 99, at 42 ("[J]uries continue to be more lenient than judges overall.").

102. *Id.*

103. *Id.*

104. *Id.*

105. Of course, as Daniel Givelber and Amy Farrell 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 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.

106. See KALVEN & ZEISEL, *supra* note 8, at 36 (raising this concern with their own study).

107. See Robbennolt, *supra* note 100, at 473.

criminal defense lawyers' intuition that guilty defendants have a better chance of being acquitted if their cases are heard by juries rather than judges.<sup>108</sup>

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

As explained in Part IV.A, social science studies (including analyses 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 DWI 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.<sup>109</sup> These defendants receive the services of the local public defender or a lawyer appointed by the court. And the representation these indigent defendants receive is notoriously (though not universally) poor.<sup>110</sup> Public defenders, while highly committed to their jobs, are tremendously overworked and under-resourced.<sup>111</sup> They often have caseloads far in excess of what guidelines recommend,<sup>112</sup> and they work in offices that lack basic necessities such as investigative support, paralegals, and legal research databases. Appointed lawyers in many jurisdictions suffer from the same

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108. 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.”).

109. See CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PUB. NO. NCJ 179023, DEFENSE COUNSEL IN CRIMINAL CASES 5 (2000) (stating that 80% of felony defendants are indigent).

110. See Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1035 (2006).

111. See Adam M. Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 CONN. L. REV. 85, 93–94, 96–97 (2007).

112. Kyung M. Lee, *Reinventing Gideon v. Wainwright: Holistic Defenders, Indigent Defendants, and the Right to Counsel*, 31 AM. J. CRIM. L. 367, 377–78 (2004).

problems:<sup>113</sup> too much work, too little assistance, and far too little pay to incentivize them to devote the necessary time to each case.<sup>114</sup>

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<sup>115</sup>) 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 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 is not—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,<sup>116</sup> a considerable number are charged with DWI.<sup>117</sup> Each year, there are nearly 1.5 million DWI arrests,<sup>118</sup> 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.”<sup>119</sup>

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113. See Gershowitz, *supra* note 111, at 91–99.

114. 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).

115. Other possible explanations are that (1) 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) 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.

116. See William J. Stuntz, *Race, Class, and Drugs*, 98 *COLUM. L. REV.* 1795, 1802 (1998).

117. See JACOBS, *supra* note 21, at xxi (“[D]runk driving is not a crime associated with the poor and dispossessed.”).

118. See MARUSCHAK, *supra* note 6, at 1.

119. *Id.*

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 II, 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.<sup>120</sup> 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 misdemeanor are not significant. It is very unlikely that they will be fired from their jobs because they now have a misdemeanor conviction on their records. 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 individuals from attaining the types of jobs—laboring jobs or low-paying service jobs—that they likely would 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.<sup>121</sup> 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.<sup>122</sup> It might prevent the individual from being hired for a

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120. 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, 11:53 AM), <http://www.chron.com/disp/story.mpl/metropolitan/6583478.html> (finding that 200 inmates currently incarcerated in the Harris County jail already had served the minimum jail sentence for the crimes they were charged with).

121. 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.”).

122. 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

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 going to trial with just any lawyer. Instead, they hire DWI specialists. Every major city has DWI defense specialists.<sup>123</sup> These lawyers devote almost their entire practices 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 aspersion 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) trial after joining the district attorney's office. Anecdotally, these junior prosecutors report being out-matched 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

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related to applicants' prior educational history"). Additionally, the prospect of a DWI conviction could cause an individual to worry about being admitted to the bar following law school.

123. A Google search of "DWI" and the name of any medium or large city brings up dozens of webpages for attorneys specializing in DWI.

the other field sobriety tests? In these cases, a top 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.<sup>124</sup>

Of course, in some cases these arguments might be genuine. Police occasionally do fail to perform sobriety tests properly.<sup>125</sup> 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.<sup>126</sup> DWI defense specialists will often also present testimony from their own expert witnesses to attack the prosecution's case.<sup>127</sup>

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 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.<sup>128</sup> Put differently, trial judges with considerable background knowledge (unlike jurors who are likely

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124. See, e.g., *People v. Schaefer*, 516 N.Y.S.2d 391, 392 (Yonkers City Ct. 1987) (noting cases in which doubts concerning the effectiveness of the breathalyzer were raised and giving the defendant the benefit of the doubt).

125. See, e.g., *id.* at 394 (noting that the breathalyzer had not been calibrated in six months).

126. See, e.g., MARCELLINE BURNS & HERBERT MOSKOWITZ, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., PUB. NO. DOT HS-802 424, PSYCHOPHYSICAL TESTS FOR DWI ARREST 1 (1977) (finding a 76% accuracy rate with a "high rate of false-arrest decisions").

127. See Gil Sapir & Mark Giangrande, *Right to Inspect and Test Breath Alcohol Machines: Suspicion Ain't Proof*, 33 J. MARSHALL L. REV. 1, 26 (1999) ("Expert witness testimony is essential to establishing an effective defense against the per se drunk driving charge.").

128. See, e.g., MARCELLINE BURNS & TERESA DIOQUINO, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., A FLORIDA VALIDATION STUDY OF THE STANDARDIZED FIELD SOBRIETY TEST (S.F.S.T.) BATTERY 31 (1997) (concluding that officers' decisions to arrest based on field sobriety tests were accurate in 95% of cases).

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.<sup>129</sup> 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.”<sup>130</sup>

To be selected for jury duty in most jurisdictions, prospective jurors must have clean records and no felony convictions.<sup>131</sup> 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.<sup>132</sup> Put simply, when presented with a defendant charged with murder, rape, theft, or 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 themselves in the defendant’s shoes. Many jurors have driven an automobile after consuming at least some alcohol.<sup>133</sup> A smaller number of jurors may be heavier drinkers who have actually driven while intoxicated once or twice, yet simply have not been

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129. 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.”).

130. See ROBIN, *supra* note 3, at 7.

131. See Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 67 (2003).

132. 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 68–71 (2009).

133. See JACOBS, *supra* note 21, at 44 (discussing a study in which 37% of 1491 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.

caught.<sup>134</sup> And another group of jurors—perhaps as high as ten percent of the population—can be termed “problem drinkers,” many of whom will have driven while intoxicated multiple times.<sup>135</sup> 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 have 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.<sup>136</sup> 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.<sup>137</sup> 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.<sup>138</sup>

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.<sup>139</sup> Yet, it is often difficult for law enforcement to detect this wrongdoing among the middle class and bring criminal charges against them. As Professor Bill

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134. *Id.* at 43 (“A second category, perhaps amounting to 15 percent of all drivers, comprises heavy social drinkers who sometimes may be on the road at illegal BACs.”).

135. *Id.* (“Ten percent of all drivers are problem drinkers, whose drinking patterns are likely to bring them frequently into conflict with the DWI laws.”).

136. Each year there are nearly thirty million traffic stops in the United States. *See, e.g.,* ERICA LEAH SCHMITT ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PUB. NO. NCJ 191548, CHARACTERISTICS OF DRIVERS STOPPED BY POLICE, 1999, at 1, 4 (2002), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cdsp99.pdf> (noting that in 1999 more than 10% of all licensed drivers were stopped by police).

137. *See* John Clark, *The Social Psychology of Jury Nullification*, 24 LAW & PSYCHOL. REV. 39, 48–49 (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”).

138. *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.”).

139. Sana Loue, *The Criminalization of the Addictions*, 24 J. LEGAL MED. 281, 307 (2003) (“It has been estimated that approximately 32% to 46% of the United States population over the age of 12 has used marijuana at least once; approximately 5% are regular users.”).

Stuntz has explained, constitutional privacy protection is often unequally distributed in favor of the wealthy.<sup>140</sup> Affluent individuals can commit drug offenses from the privacy of their heavily Fourth Amendment-protected homes and are unlikely to face arrest and prosecution.<sup>141</sup> 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 offenses, 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.<sup>142</sup>

And once arrested, wealthy DWI defendants—unlike poor defendants—have the incentive and financial ability to go to trial. As explained in Part IV.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 going to 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 typically are willing to give the benefit of the doubt to those with whom they identify. Social scientists have found that trust correlates with race, ethnicity, and income level.<sup>143</sup>

The second question is harder to answer. Do judges have a better ability to put aside their sympathies and compassion for those whom 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. This 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

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140. See Stuntz, *supra* note 116, at 1821–24.

141. See *id.* at 1824.

142. 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) (“No one disputes the proposition that full compliance with all traffic regulations is impossible for any significant distance.”).

143. See Frank B. Cross, *Law and Trust*, 93 GEO. L.J. 1457, 1534 (2005) (discussing literature).

make them more likely to avoid such biases than jurors who have not necessarily received such training. Second, and more importantly, judges who have presided over many trials often become desensitized. After one hundred DWI trials, a 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 machine. Once the judge fails to see the defendant as an individual who looks like him, the disincentive to convict diminishes.<sup>144</sup>

In sum, there are a number of reasons—including 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 likely are better 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.<sup>145</sup> 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 a guilty defendant out of unjustified fear 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.<sup>146</sup> Yet, outsiders who do not work in the criminal justice system—those most likely to end up as jurors—may mistakenly believe otherwise.<sup>147</sup> Over the last few decades, advocates such as MADD have vigorously campaigned to stamp out

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144. Cf. 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.*

145. See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 920–29 (2006) (discussing the informational “gulf” between criminal justice insiders and outsiders).

146. See *supra* notes 30–37 and accompanying text.

147. See Bibas, *supra* note 145, at 913 (“Public information about criminal justice is notoriously inaccurate and outdated . . .”).

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 law-abiding citizens, such as those who would serve on juries, tend to overestimate the severity of penalties authorized for criminal defendants.<sup>148</sup> Worse yet, the law generally forbids lawyers from correcting such misperceptions by discussing possible sentences during the guilt phase of trials.<sup>149</sup>

More importantly, the maximum sentences are actually deceiving to criminal justice outsiders because most first-time offenders do not receive anywhere close to the maximums.<sup>150</sup> Despite statutory maximum sentences of six months or longer, most defendants convicted of first-time DWI receive no jail time whatsoever.<sup>151</sup> 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.<sup>152</sup>

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 likely will 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.<sup>153</sup> 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

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

149. 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.”); Jeffrey Bellin, *Is Punishment Relevant After All? A Prescription for Informing Juries About the Consequences of Conviction*, B.U. L. REV. (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1548654](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1548654).

150. Although this evidence largely is anecdotal, based on conversations with prosecutors and defense attorneys around the country, its validity can be seen in some published opinions, as well. See, e.g., *Garcia v. State*, 296 S.W.3d 180, 182 (Tex. Crim. App. 2009) (upholding conviction where defendant was sentenced to three days in jail for DWI, which is a class B misdemeanor in Texas carrying a maximum sentence of up to 180 days' incarceration).

151. See Cafaro, *supra* note 28, 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.”).

152. See, e.g., *Thompson v. State*, 89 S.W.3d 843, 850 (Tex. Crim. App. 2002) (reversing a sentence in part when the 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).

153. Although many DWI offenders are older, college-age men are common DWI defendants, as well. See LAWRENCE A. GREENFELD, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUB. NO. ED295017, DRUNK DRIVING 1 (1988) (finding that “[a]rrest rates for DUI were highest among 21-year-olds”).

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 meted out.<sup>154</sup> 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.<sup>155</sup>

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 Interest 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

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154. 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).

155. Critics might object that jurors' lack of knowledge about punishment is true for most crimes, not just DWI offenses. Although that is true, and jurors might be afraid of overpunishment for a handful of other low-level offenses, for most crimes jurors will not be likely to acquit out of concern for overpunishment. For example, it is difficult to imagine a juror refusing to convict of murder, rape, or even theft, because of fear that the defendant might be sentenced to prison as a result. 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 the, if not the, most commonly tried crime(s) in the criminal code. See Kelsey P. Black, *Undue Protection Versus Undue Punishment: Examining the Drinking and Driving Problem Across the United States*, 40 *SUFFOLK U. L. REV.* 463, 463 (2006) ("Drunk driving is the nation's most commonly perpetrated violent crime.").

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 highest-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.

In most jurisdictions, sitting judges must stand for re-election.<sup>156</sup> This is not ordinarily a problem for judges because re-election rates are very high.<sup>157</sup> The public is almost never aware of who particular trial judges are, and they are even less informed about which cases judges have presided over and what rulings they have issued. Thus, if a trial judge keeps her head down and does not 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.<sup>158</sup> 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.<sup>159</sup> 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.

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156. See Stephen F. Smith, *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.”).

157. See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 741 (1995) (noting that incumbent judges are usually re-elected).

158. See Leigh Goodmark, *Telling Stories, Saving Lives: The Battered Mothers' 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, *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”).

159. MADD's website reveals not only contact information for the national office but also contacts at state and county levels. See *Local Offices*, MADD, <http://www.madd.org/local-offices/> (last visited Mar. 19, 2011).

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 re-election. In the DWI context, that may translate into judges being more likely to convict. Jurors, of course, face no such political pressure.<sup>160</sup>

In sum, both empirical and qualitative analyses indicate that judges are more likely to convict defendants in DWI cases. As the next Part describes, a higher conviction rate in DWI cases will result in a greater certainty of punishment, which will in turn improve general deterrence.

#### V. 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 which 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.<sup>161</sup> Nevertheless, it is widely agreed that the severity of punishment—the variable on which legislatures most often fixate<sup>162</sup>—is ineffective<sup>163</sup> at enhancing deterrence.<sup>164</sup> By contrast,

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160. Jurors could face psychological pressure to convict if they saw the MADD representative sitting in the courtroom and recognized why she was there. It would be difficult for jurors to know that a MADD representative was present, however, because identifying information, such as buttons or posters, is typically forbidden during jury trials. See Sierra Elizabeth, *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); see also *State v. Franklin*, 327 S.E.2d 449, 454–55 (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.

161. See, e.g., Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 181–82 (2008) (“Empirical evidence on the deterrent effects of punishment remains speculative and inconclusive, and the ability of formal punishment alone to deter crime appears to be quite limited.”).

162. See, e.g., Jerome S. Legge, Jr. & Joonghoon Park, *Policies to Reduce Alcohol-Impaired Driving: Evaluating Elements of Deterrence*, 75 SOC. SCI. 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.”); 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 . . .”).

163. 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 162, 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. FORCES 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,

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. Section A therefore discusses the prospect of improved deterrence, and Section 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 generally<sup>165</sup> and for DWI offenses in particular.<sup>166</sup>

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286 (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).

164. There are exceptions. See, e.g., Klepper & Nagin, *supra* note 121, 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 an 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*, 59 SOC. FORCES 471, 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.

165. 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.) (forthcoming 2011) (manuscript at 2) (on file with author) (“There is substantial evidence from a diverse literature that increases in the certainty of punishment substantially deters criminal behavior.”); Alfred Blumstein & Daniel Nagin, *The Deterrent Effect of Legal Sanctions on Draft Evasion*, 29 STAN. L. REV. 241, 269 (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); Grasmick & Bryjak, *supra* note 164, at 472 (reviewing twelve deterrence studies and explaining that “nearly all 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”); Jeffrey Grogger, *Certainty v. Severity of Punishment*, 29 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

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.<sup>167</sup> 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.<sup>168</sup> 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.<sup>169</sup> The Act made it easier for police to conduct breath tests and impose fines for refusing to comply with breath test requests.<sup>170</sup> Importantly, the enactment of the law was accompanied by enormous publicity, and “[k]nowledge of the breath test was nearly universal among adults in Britain.”<sup>171</sup> 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.”<sup>172</sup> 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 Road Safety Act reduced drunk driving.<sup>173</sup> 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.<sup>174</sup> In summarizing his findings, Ross explained that “the Road Safety Act of 1967 provides support for the hypothesis that subjective

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sentences”); Klepper & Nagin, *supra* note 121, at 741 (surveying graduate students about tax evasion scenarios and finding that certainty of punishment is an effective deterrent); Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1, 13 (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-reported offending or intentions to offend”); 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); 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”).

166. See ROSS, *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”).

167. See H. Laurence Ross, *Law, Science, and Accidents: The British Road Safety Act of 1967*, 2 J. LEGAL STUD. 1 (1973).

168. *Id.* at 67–68.

169. *Id.* at 19.

170. *Id.*

171. *Id.* at 69.

172. *Id.* at 51.

173. *Id.* at 3.

174. *Id.*

certainty of punishment can deter socially harmful behavior as exemplified by drinking and driving in Great Britain.”<sup>175</sup>

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 Ross concluded that, “at commonly prevailing levels of punitive severity, increments in threatened certainty of punishment are able to produce increments in marginal deterrence.”<sup>176</sup> 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.”<sup>177</sup> 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.<sup>178</sup>

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, severity, and celerity of punishment in deterring offenders.<sup>179</sup> 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.<sup>180</sup> The researchers then randomly assigned the subjects different punishments ranging from a three-month license suspension to a fifteen-month license suspension.<sup>181</sup> Having set out variables as to the certainty and severity of punishment, Nagin and Pogarsky asked the students to estimate the likelihood that they would drive home while legally

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175. *Id.*

176. H. Laurence Ross, *Implications of Drinking-and-Driving Law Studies for Deterrence Theory*, in *CRITIQUE AND EXPLANATION: ESSAYS IN HONOR OF GWYNNE NETTLER* 159, 166 (Timothy F. Hartnagel & Robert A. Silverman eds., 1986) (emphasis omitted).

177. *Id.* at 168. For an earlier review of the literature, see ROSS, *supra* note 154.

178. See ROSS HOMEL, *POLICING AND PUNISHING THE DRINKING 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. *Id.* at 237. 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.*

179. See Daniel S. Nagin & Greg Pogarsky, *Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence*, 39 *CRIMINOLOGY* 865, 874–75 (2001).

180. *Id.*

181. *Id.* at 875.

intoxicated.<sup>182</sup> Once again, the researchers found that certainty of punishment had a greater effect on deterrence than severity.<sup>183</sup>

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 their chance of escaping conviction was fifty percent. They were also offered the option to hire an exceptional lawyer who would “virtually assur[e]” them of not being convicted, or a “not as good” lawyer who could arrange a plea bargain whereby the student plead guilty to drunk driving but avoided any legal penalties.<sup>184</sup> Students were asked to state the maximum amount they would pay to each lawyer.<sup>185</sup> 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.<sup>186</sup> 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.<sup>187</sup>

In these and other DWI studies,<sup>188</sup> scholars have found that increasing the certainty 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,<sup>189</sup> 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

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182. *Id.*

183. *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.”).

184. *Id.* at 875–76.

185. *Id.*

186. *Id.* at 879.

187. As I discuss *infra* in Part VI.C, 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.

188. See Daniel S. Nagin & Raymond Paternoster, *Enduring Individual Differences and Rational Choice Theories of Crime*, 27 *LAW & SOC’Y 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”).

189. See 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.”); 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, 1543 (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”).

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.<sup>190</sup> 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 rules or are unable to rationally appreciate how the rules will impact them.<sup>191</sup>

Because it is difficult to make credible deterrence predictions about DWI<sup>192</sup>—or any crime, for that matter—it would be inappropriate to assert that eliminating jury trials definitely would 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 next in Section 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*

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 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.

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190. See Schulhofer, *supra* note 189, at 1543–44.

191. See Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 951 (2003) (expressing “skepticism about the ability to deter crime through the manipulation of criminal law rules and penalties”).

192. 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.”).

### 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.<sup>193</sup> As discussed in Section 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.”<sup>194</sup> And those few studies that have been conducted fail to demonstrate convincingly that swiftness of punishment furthers deterrence goals in the way that the certainty of punishment studies do.<sup>195</sup>

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.<sup>196</sup> 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, 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

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193. See CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 55–57 (Henry Paolucci trans., The Bobbs-Merrill Co., Inc. 1963) (1764).

194. Nagin & Pogarsky, *supra* note 179, at 865.

195. 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 Edmund S. Howe & Thomas C. Loftus, *Integration of Certainty, Severity, and Celerity Information in Judged Deterrence Value: Further Evidence and Methodological Equivalence*, 26 J. APPLIED SOC. PSYCH. 226, 227, 237 (1996) (noting that “celerity has been, with few exceptions . . . largely discounted and assumed irrelevant to the subjective representation of punishment” and finding in a new study that “the relevance of celerity information to judgment of deterrence value is at best minor”).

196. See NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP’T OF TRANSP., HIGHWAY SAFETY 14 (1985) (reviewing efforts in eleven states).

alcohol levels over .05.<sup>197</sup> Studies in other states likewise found swift license revocations to be effective deterrents.<sup>198</sup>

Thus, although 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.<sup>199</sup> 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 Section 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 pretrial 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 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.

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197. See H. Laurence Ross, *Administrative License Revocation in New Mexico: An Evaluation*, 9 LAW & POL'Y 5, 13-14 (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.").

198. See NAT'L TRANSP. SAFETY BD., PUB. NO. SS-84/01, DETERRENCE OF DRUNK DRIVING: THE ROLE OF SOBRIETY CHECKPOINTS AND ADMINISTRATIVE LICENSE REVOCATIONS 20 (1984) (finding a nearly 18% decrease in fatal 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); FORST LOWERY, MINNESOTA'S DOUBLE-BARRELED 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), <http://ntl.bts.gov/lib/25000/25600/25668/DOT-HS-806-549.pdf> (discussing increased perception of certainty of punishment from immediate license revocation and the decline in traffic fatalities).

199. Outside the license revocation context, at least one study has found limited deterrent improvement in DWI cases from increased celerity of punishment. 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 also finding fines to be a more important factor).

## 2. *Eliminating Jury Trials Improves the Efficiency of the System*

Drunk driving is the most commonly prosecuted misdemeanor offense,<sup>200</sup> 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.<sup>201</sup> The amount of resources required 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 bench 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 pretrial 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 overburdened with cases, prosecutors often spend time preparing voir dire examinations that are 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 also would eliminate the sometimes time-consuming and often contentious peremptory challenge process. Even in

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200. See JACOBS, *supra* note 21, at xviii.

201. See *Crime in the United States 2009*, FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, [http://www2.fbi.gov/ucr/cius2009/data/table\\_29.html](http://www2.fbi.gov/ucr/cius2009/data/table_29.html) (last visited Mar. 19, 2011).

misdemeanor cases, prosecutors and defense attorneys are typically afforded peremptory challenges to strike jurors who they view as unfavorable.<sup>202</sup> If nothing contentious occurs, the lawyers simply submit their peremptory challenges to the judge and the prospective jurors are stricken very quickly. If either side, however, believes its 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.<sup>203</sup> If the judge finds a violation, some jurisdictions require that a new jury be impaneled and that jury selection be restarted from scratch.<sup>204</sup> And even if the trial judge rejects the *Batson* challenge, the defendant then has an 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 10,000 DWI jury trials in the United States, most of which are for first offenders.<sup>205</sup> 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.<sup>206</sup> More importantly, some of these jurors could be shifted to other courtrooms to ensure that there is 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 enough remaining bodies to fill the jury box. Moving DWI jurors to other cases would thus ensure that jury trials of more serious offenses are not delayed because of a lack of eligible jurors.

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202. See Roger Allan Ford, *Modeling the Effects of Peremptory Challenges on Jury Selection and Jury Verdicts*, 17 GEO. MASON L. REV. 377, 381 (2010) ("[N]early all states give each side two to six challenges in misdemeanor trials.").

203. 476 U.S. 79, 188–89 (1986) (forbidding peremptory strikes based on race).

204. See *id.* at 99 n.24; 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. BALT. L. REV. 379, 408–09 (1999) (noting that a "number of jurisdictions" provide for a new jury as the remedy for a *Batson* violation).

205. National statistics are unavailable because many states do not keep data. Nevertheless, when one considers that there were 1825 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 10,000 jury trials nationwide. See TEX. ADMIN. OFF. OF COURTS, ACTIVITY SUMMARY BY CASE TYPE: SEPT. 1, 2007 TO AUG. 31, 2008 (on file with the author).

206. See Gloria Hillard, *Recession Hits the Jury Box*, NAT'L PUB. RADIO (Oct. 19, 2009), <http://www.npr.org/templates/story/story.php?storyId=113800461> (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 pretrial 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. Defense attorneys still will try to impeach experts, but the time they take to do so 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, whom 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.<sup>207</sup> 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 cases all the way to a jury trial and hope for the best.

Although 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.<sup>208</sup> 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 IV.A is correct, judges in general will be more willing to convict than juries.<sup>209</sup> 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 typically are sentenced to tougher punishments.<sup>210</sup> Once judges have established a pattern of regularly convicting individuals who have failed breathalyzer tests, 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

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207. See Bibas, *supra* note 145, at 924–29.

208. See Black, *supra* note 155, at 463.

209. See *supra* Part IV.A.

210. See Donald A. Dripps, *On Cases, Casebooks, and the Real World of Criminal Justice: A Brief Response to Anders Walker*, 7 OHIO ST. J. CRIM. L. 257, 259 (2009) (describing the trial penalty as “the single most important institutional fact a criminal lawyer can know”).

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 going to trial should look far less attractive. Put 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.<sup>211</sup>

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,<sup>212</sup> 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 3600 felonies and more than 8000 misdemeanors in a single year.<sup>213</sup> That works out to each attorney having between 300 and 500 open cases at any given time.<sup>214</sup> If DWI cases were processed

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211. 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., 31st ed. 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).

212. See, e.g., Backus & Marcus, *supra* note 110, at 118.

213. See, e.g., Cindy V. Culp, *Data Offer Clues on McLennan Country District Attorney's Performance*, WACO TRIB., Dec. 13, 2009, available at NEWSBANK, Record No.: 12132009-wac-DADData.

214. *Id.*

quicker, these lawyers would be able to devote more of their attention to violent crimes and other complicated cases.<sup>215</sup>

## VI. HOW STATES CAN REVISE THEIR STATUTES TO ELIMINATE THE RIGHT TO A JURY TRIAL

As explained in Part III, 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.<sup>216</sup> 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.<sup>217</sup> While my proposal is foreclosed in about ten states that have rejected the petty offense doctrine,<sup>218</sup> 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*

In at least twelve states<sup>219</sup>—and possibly three others<sup>220</sup>—legislatures could eliminate the right to a jury trial for certain first-offense DWI

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215. See Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 461 (2007) (suggesting that states cease appointing free lawyers to indigent misdemeanor defendants to reallocate attorney time to more serious cases).

216. See *supra* Part III.

217. See *supra* note 61.

218. See *infra* note 245 and accompanying text.

219. These states are Arizona, Colorado, Connecticut, Delaware, Illinois, Indiana, Kansas, Kentucky, Maryland, Missouri, Nebraska, and South Carolina.

220. 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. See *State v. Weltzin*, 630 N.W.2d 406, 410–11 (Minn. 2001). The *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. See MINN. STAT. §§ 169A.27, 609.02 (2009). 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. See *Layton Sch. of Art and Design v. Wis. Emp't Relations Comm'n*, 262 N.W.2d 218, 235 & 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) (West 2010), but are guaranteed a jury trial by statute, see WIS. STAT. ANN. § 800.04(1)(d). Finally, in a Utah case, the Utah Supreme Court

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.<sup>221</sup> Moreover, these states appear to have embraced the petty offense doctrine under their own state<sup>222</sup> constitutions.<sup>223</sup> Thus, the legislatures of these states would simply have to add a short clause to their DWI statutes 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.<sup>224</sup> Both offenses are thus petty and could be tried in bench trials without violating the U.S. Constitution. And the Supreme Court of Kentucky has recognized that there is no state or federal constitutional right to a jury trial for such misdemeanor DWI prosecutions.<sup>225</sup>

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approvingly cited the federal petty offense doctrine, but refused to assess the issue under the state constitution because it was not properly briefed. *See West Valley City v. McDonald*, 948 P.2d 371, 374–75 (Utah 1997). In Utah, first-time DWI offenses are punishable by up to six months’ incarceration, *see UTAH CODE ANN.* § 41-6a-503 (LexisNexis 2010), but are guaranteed a jury trial by state statute, *see UTAH CODE ANN.* § 77-1-6-2(e) (LexisNexis 2008).

221. *See* ARIZ. REV. STAT. ANN. §§ 13-707(A)(1), 28-1381(F) (2010); COLO. REV. STAT. § 42-4-1301(7)(b)(i) (2004); CONN. GEN. STAT. § 14-227(a)(g) (2006); DEL. CODE ANN. tit. 21, § 4177(d)(1) (2001); 625 ILL. COMP. STAT. 5/11-501(c)(3) (2006); IND. CODE § 9-30-5-1(a) (2004); KAN. STAT. ANN. § 8-1567(d) (2001); KY. REV. STAT. ANN. § 189A.010(5)(b) (West 2009); MD. CODE ANN., TRANSP. § 27-101(c)(23)–(24) (West 2008); MO. REV. STAT. §§ 558.011(1)(6), 577.010 (2010); NEB. REV. STAT. § 28-106(1) (2008); S.C. CODE ANN. § 56-5-2930(A)(1) (2006).

222. *See* *Benitez v. Dunevant*, 7 P.3d 99, 102 (Ariz. 2000); *Austin v. City and Cnty. of Denver*, 462 P.2d 600, 602 (Colo. 1969); *Wilson v. Cohen*, 610 A.2d 1177, 1182 (Conn. 1992); *Thomas v. State*, 331 A.2d 147, 150 (Del. 1975); *People v. Dorris*, 373 N.E.2d 77, 79 (Ill. App. Ct. 1978); *Holly v. State*, 681 N.E.2d 1176, 1177 (Ind. Ct. App. 1997); *State v. Shannon*, 905 P.2d 649, 656 (Kan. 1995); *Commonwealth v. Green*, 194 S.W.3d 277, 282 (Ky. 2006); *Fisher v. State*, 504 A.2d 626, 627 (Md. 1986); *Ryan v. Moreland*, 653 S.W.2d 244, 248 (Mo. Ct. App. 1983); *State v. Bishop*, 399 N.W.2d 271, 276 (Neb. 1987); *State v. Passmore*, 611 S.E.2d 273, 275 (S.C. Ct. App. 2005).

223. 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 *supra* note 222—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 these states to clarify that the petty offense doctrine applies to all criminal cases, not just criminal contempt cases, there would appear to be a strong case for embracing the doctrine in all low-level misdemeanors. Indeed, the Supreme Court recognized over forty years ago that “criminal contempt is a crime in every fundamental respect” and that “there is no substantial difference between serious contempts and other serious crimes.” *Bloom v. Illinois*, 391 U.S. 194, 201–02 (1968). Furthermore, the Court’s decision in *Bloom* was issued the same day as *Duncan v. Louisiana*, and it explained that by “deciding to treat criminal contempt like other crimes insofar as the right to jury trial is concerned, we similarly place it under the rule that petty crimes need not be tried to a jury.” *Id.* at 210. Nevertheless, at least one court has tried to distinguish criminal contempt cases in rejecting the petty offense doctrine. *See* *People v. Antkoviak*, 619 N.W.2d 18, 40 (Mich. App. 2000) (contending that “contempt cases are not precisely criminal cases”).

224. *See* KY. REV. STAT. ANN. § 189A.010(5)(a)–(b).

225. *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

Nevertheless, the Supreme Court of Kentucky recently concluded that DWI defendants have a *statutory* right to a jury trial in all criminal prosecutions, including traffic violations.<sup>226</sup>

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 nearly 35,000 first-time DWI cases and over 9000 second-time cases.<sup>227</sup> Some of these roughly 44,000 cases were tried to juries, and in a much larger number of cases, defendants almost certainly invoked their jury trial rights (thus leading to scheduling delays and additional court settings) before eventually pleading guilty.<sup>228</sup> In addition to efficiency savings, Kentucky might benefit from an 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.<sup>229</sup> In 2008, Kentucky had 826 traffic fatalities, of which 200 were alcohol-related.<sup>230</sup> 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 eight states,<sup>231</sup> transitioning to a bench trial regime would be slightly more difficult because, while the states embrace the petty offense doctrine,<sup>232</sup> they impose a maximum punishment for first-time DWI that exceeds six months.<sup>233</sup> Thus, under their present statutes, these states

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for this unusual turn of events, but it may be that the trial judge was seen as unlikely to convict in DWI cases.

226. *Id.* at 284–85 (citing KY. REV. STAT. ANN. § 29A.270(1)).

227. See KENTUCKY ADMINISTRATIVE OFFICE OF THE COURTS: CIRCUIT AND DISTRICT COURT DUI REPORT BY OFFENSE: STATEWIDE (provided by Kentucky Department of Court Services and on file with the author) (listing over 34,000 first-time and nearly 9000 second-time DWI cases filed in Kentucky district courts, and over 650 first-time and nearly 300 second-time cases filed in circuit courts).

228. Although the Kentucky Administrative Office of the Courts did not have statistics available for jury trials and eventual plea agreements, intuition and experience suggest that many of these defendants must have demanded jury trials, and some of those who demanded jury trials must have reached a plea agreement prior to trial.

229. See *Full List: Worst States for Drunk Drivers*, FORBES (Dec. 18, 2009), [http://www.forbes.com/2009/12/18/drunken-driving-states-lifestyle-vehicles-intoxicated-madd-bac\\_chart.html](http://www.forbes.com/2009/12/18/drunken-driving-states-lifestyle-vehicles-intoxicated-madd-bac_chart.html).

230. *Id.*

231. The states are Alabama, Arkansas, Iowa, Massachusetts, New York, North Carolina, Oregon, and Virginia.

232. See *Clemmons v. City of Muscle Shoals*, 565 So. 2d 683 (Ala. Crim. App. 1990); *Perroni v. State*, 186 S.W.3d 206 (Ark. 2004); *Marzen v. Klousia*, 316 N.W.2d 688, 690 (Iowa 1982) (limiting petty offense doctrine to cases with maximum sentences of thirty days); *In re DeSaulnier*, 279 N.E.2d 287 (Mass. 1971); *People v. Harris*, 828 N.Y.S.2d 832 (N.Y. City Ct. 2006); *State v. Morris*, 165 S.E.2d 245 (N.C. 1969); *In re Stevenson*, 458 P.2d 414 (Or. 1969) (en banc); *Ragsdale v. City of Danville*, 82 S.E. 77 (Va. 1914).

233. See ALA. CODE § 32-5A-191(e) (2009); ARK. CODE ANN. § 5-65-111(a)(1)(A) (Supp. 2009); IOWA CODE ANN. §§ 321J.2, 903.1(b) (Supp. 2010); MASS. GEN. LAWS ch. 90, § 24 (2005); N.Y. VEH. &

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.<sup>234</sup>

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.<sup>235</sup> Yet, when first-time offenders are actually sentenced they typically receive no jail time whatsoever.<sup>236</sup> 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.<sup>237</sup> Because Massachusetts has recognized the petty offense doctrine,<sup>238</sup> 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.

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.<sup>239</sup> 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.<sup>240</sup> 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

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TRAF. LAW ANN. § 1193(1)(b) (McKinney 1996); N.C. GEN. STAT. § 20-179(g) (2009); OR. REV. STAT. §§ 161.615(1), 813.010(4) (2009); VA. CODE ANN. §§ 18.2-11, 18.2-270 (2009).

234. Of course, states also would have to eliminate any statutory jury trial guarantee as well.

235. See MASS. ANN. LAWS ch. 90, § 24.

236. See *Massachusetts Drunk Driving/DUI/DWI/OUI Laws & Penalties*, MASS. DRUNK DRIVING DEFENSE, <http://www.madrunkdrivingdefense.com/drunken-driving.htm> (last visited Mar. 19, 2011) (explaining the "minimum penalty" that is available to first-time offenders who plead guilty and have a "smart attorney").

237. See *Massachusetts OUI Law*, LAW OFFICE OF STEPHEN L. JONES, [http://www.dwilawoffice.com/massachusetts\\_oui\\_law.html](http://www.dwilawoffice.com/massachusetts_oui_law.html) (last visited Mar. 19, 2011).

238. See *In re DeSaulnier*, 279 N.E.2d 287, 290 (Mass. 1971) (recognizing the petty offense doctrine in the context of criminal contempt charges).

239. New York, which punishes DWI with a maximum sentence of one year, has taken this approach with the lesser infraction of Driving While Ability Impaired, which involves a blood alcohol level of .05 to .07 and carries a maximum sentence of fifteen days. See *supra* note 61 and accompanying text. New York easily could create a similarly graded system for the crime of DWI and punish offenders with blood alcohol levels of .08 to (for example) .14 with only up to six months' incarceration, rather than imposing a maximum sentence of one year for all DWI offenders.

240. See N.H. REV. STAT. ANN. § 265-A:3, 18 (2004).

have no jury trial) while authorizing a longer sentence (and therefore a right to a jury trial) for the “aggravated” offenders.

Although 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.<sup>241</sup> 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.

As noted above, the reality is that almost no first-time DWI defendants ever receive anywhere close to a year or longer in jail.<sup>242</sup> And although 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.<sup>243</sup>

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 achieving deterrence.<sup>244</sup> 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.

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241. See Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 966 (2009) (explaining that legislatures increase sentences and “broaden prosecutorial power to burnish their tough-on-crime credentials”).

242. See *supra* notes 235–38 and accompanying text.

243. See *supra* note 154.

244. See *supra* Parts IV.A and V.A.

*C. Carving Out a Small Category of Cases in Which 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.<sup>245</sup> 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,<sup>246</sup> however, state courts have only forbidden the abolition of jury trial rights when defendants face incarceration.<sup>247</sup> In other words, these states 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, they would be free to abolish the right to a jury trial.<sup>248</sup>

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245. See *Baker v. City of Fairbanks*, 471 P.2d 386 (Alaska 1970); *Geng v. State*, 578 S.E.2d 115 (Ga. 2003); *State v. Sklar*, 317 A.2d 160 (Me. 1974); *People v. Antkoviak*, 619 N.W.2d 18, 41 (Mich. Ct. App. 2000); *State v. Rensvold*, 139 P.3d 154 (Mont. 2006); *City of Bismark v. Fetting*, 601 N.W.2d 247, 251 (N.D. 1999); *State v. Dusina*, 764 S.W.2d 766 (Tenn. 1989); *Franklin v. State*, 576 S.W.2d 621 (Tex. Crim. App. 1978) (en banc); *State v. Becker*, 287 A.2d 580 (Vt. 1972); *City of Pasco v. Mace*, 653 P.2d 618 (Wash. 1983) (en banc).

246. 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. VEH. CODE §§ 23152, 23536 (West Supp. 2010); IDAHO CODE ANN. §§ 18-8004(1)(a), 18-8005(1)(a) (Supp. 2010); OHIO REV. CODE ANN. §§ 4511.19, 2929.24 (West 2010 & 2008); OKLA. STAT. tit. 47, § 11-902 (2007); S.D. CODIFIED LAWS §§ 22-6-2, 32-23-2 (2006); W. VA. CODE ANN. § 20-7-18b(d) (2004); WYO. STAT. ANN. § 31-5-233 (2009). 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 one year in jail, see R.I. GEN. LAWS § 31-27-2(d) (Supp. 2009), thus making a \$500 maximum fine a very unlikely change.

247. See OKLA. CONST., art. II, § 19 (stating that the right to jury trial does not apply to cases where the maximum sentence is a fine of \$1500 or less); *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.” (citations omitted)); *State v. Bennion*, 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, 739 n.2 (Ohio 1979) (quoting state constitution which guarantees a jury trial “except . . . in cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary”); *State v. Bowers*, 498 N.W.2d 202 (S.D. 1993) (holding that there is no state constitutional right to a jury trial, even for offense carrying a possibility of up to six months incarceration, if no jail sentence is actually imposed); *Gapp v. Friddle*, 382 S.E.2d 568, 569 (W. Va. 1989) (“Under art. 3, § 14 of the West Virginia Constitution, the right to a jury trial is accorded in both felonies and misdemeanors when the penalty imposed involves any period of incarceration.”); *Brenner v. City of Casper*, 723 P.2d 558, 561 (Wyo. 1986) (“[W]e hold that a crime punishable by any jail term, regardless of length, is a serious crime subject to the constitutional right to a jury trial.”).

248. Professor H. Laurence Ross has suggested that legislatures decriminalize first-time DWI offenses so that they can be handled as administrative proceedings which carry few procedural

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 drivers' licenses, and community service, but no actual jail sentences. 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.<sup>249</sup> 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, attempting to elude a police officer, 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.<sup>250</sup>

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 interest groups such as MADD and legislators who are usually inclined to increase rather than decrease punishments. As a matter of public policy, however, 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.<sup>251</sup>

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protections and consequently result in a greater certainty and celerity of punishment and hence improved deterrence. See ROSS, *supra* note 154, 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 28, 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.

249. See N.H. REV. STAT. ANN. § 265-A:18 (Supp. 2009).

250. See *id.* (increasing the minimum fine to \$750 as well as the prospect of at least ten days in jail). Pennsylvania similarly has a 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. If defendants' blood alcohol levels are in excess of .16, however, or if they refused to take the breathalyzer test, defendants face at least seventy-two hours of incarceration. See 75 PA. CONS. STAT. §§ 3802(c), 3804(c)(3) (2006).

251. See *supra* notes 200–15 and accompanying text.

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, probably would 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.<sup>252</sup> 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.<sup>253</sup>

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, Professor Ross and his colleagues concluded that most studies “failed to find evidence for effectiveness of jail.”<sup>254</sup> In a study of Arizona’s mandatory one-day-in-jail law, Ross concluded that jail time “very likely had no important deterrent effect.”<sup>255</sup> Indeed, according to defense attorneys who were surveyed, “the punishment most threatening to their clients was not jail, but license suspension.”<sup>256</sup> The ineffectiveness of possible jail sentences is consistent with the certainty and severity literature discussed in Part V. Studies have consistently found that when the certainty of punishment for DWI remains low, increasing the severity of punishment, even to include jail time, does not improve deterrence.<sup>257</sup>

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,<sup>258</sup> and they tend to believe that punishments are more severe than those actually prescribed by

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252. Nagin & Pogarsky, *supra* note 179, at 879.

253. Blumstein & Nagin, *supra* note 165, at 269.

254. Ross et al., *supra* note 1, at 158.

255. *Id.* at 163.

256. *Id.* at 164; *see also* Ross, *supra* note 167, 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”).

257. Ross, *supra* note 176, at 167.

258. *See, e.g.*, Greg Pogarsky et al., *Modeling Change in Perceptions About Sanction Threats: The Neglected Linkage in Deterrence Theory*, 20 J. QUANTITATIVE CRIMINOLOGY 343, 349 (2004).

law.<sup>259</sup> 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”<sup>260</sup> and can result in court backlogs.<sup>261</sup> 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.<sup>262</sup> The Arizona law led more defendants to retain private lawyers and demand jury trials.<sup>263</sup> In Phoenix, the mandatory jail law resulted in a significant increase in trials and extra courtrooms had to be added.<sup>264</sup> The average time from arrest to conviction more than doubled.<sup>265</sup> 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,<sup>266</sup> 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 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

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259. See Paternoster et al., *supra* note 148, at 418 (“[P]rior research has suggested that most people perceive potential legal penalties to be more severe than they actually are and, compared with offending populations, nonoffenders generally overestimate the presumptive severity of legal penalties.” (citations omitted)).

260. See MARK A.R. KLEIMAN, WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS PUNISHMENT 93 (2009).

261. See Legge & Park, *supra* note 162, at 596 (“Severe sanctions in general have resulted in accelerated plea bargaining and court backlogs and opposition by judges who prefer discretion.”).

262. Ross et al., *supra* note 1, at 164–66.

263. See *id.* at 164.

264. *Id.* at 165.

265. *Id.*

266. See *supra* Part V.

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 thus would increase the celerity and certainty of conviction, which is the best approach for increasing deterrence.<sup>267</sup>

## VII. 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 going to trial. When trials did occur they would be much faster because 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 and eliminate the right to jury trials for first-time DWI offenders.

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267. See KLEIMAN, *supra* note 260, at 95 (“Since uncertainty, delay, and inaccurate perception 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.”).