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

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

For over four decades, social science evidence has demonstrated that, when presented with identical cases,[7] judges are more willing to convict than juries.[8] Jurors' reluctance to convict cuts across a range of offenses, but it appears to be particularly troublesome for the crime of DWI. Unlike most offenses in the criminal code – think of murder, arson, or theft, for instance – many jurors in DWI cases can put themselves in the defendant's shoes and imagine "there for the grace of God go I."[9]

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.[10] 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.[11] These lawyers challenge the complicated sobriety tests that prove intoxication and are more likely to make headway with jurors who have never seen a DWI case before than a judge who has presided over numerous DWI trials and is aware of the reliability of the tests. Moreover, unlike most other areas of law in which appointed defense lawyers are often out-matched by experienced prosecutors,[12] 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.[13]

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

A higher conviction rate will not only increase the number of guilty defendants held accountable, but it will also further general deterrence goals. Researchers have long found that the certainty of punishment, not the severity of punishment, is the single best deterrent to future misconduct.[14] By moving to bench trials and increasing conviction rates, states will be more likely to maximize the chances of deterring future drunk driving.

At the same time that eliminating jury trials would increase conviction rates, states would also save considerable money and resources. Moving exclusively to bench trials would eliminate the time-consuming process of jury selection[15] 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.[16] In a world without jury trials for DWI cases, prosecutors would be in a position to devote more time to their other cases.

Finally, unlike more serious crimes, increasing DWI convictions would not clog already overcrowded jails. Despite lobbying efforts by Mothers Against Drunk Driving and other organizations to toughen maximum sanctions, the vast majority of misdemeanor DWI defendants are actually sentenced to probation or very short jail sentences.[17]

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.[18] 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.[19] Because many states impose a maximum sentence of only a few months in jail for first-time DWI offenders, states are free to try such defendants in bench trials so long as their state constitutions do not provide a more expansive jury trial protection than the United States Constitution. Legislatures would only have to amend their existing statutes to strike out the jury trial guarantee.

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.[20]

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

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

Despite the considerable toughening of DWI laws over the last thirty years, 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.[21] In Mississippi, the maximum sentence for first offenders is forty-eight hours incarceration.[22] First-time defendants in Hawaii face a maximum of five days.[23] The maximum sentence in Kentucky, New Jersey, North Dakota, and South Carolina is thirty days in jail.[24] Indiana, Maryland, and Nebraska cap punishment for first offenders at two months.[25] Another three states impose maximum punishments of roughly three months.[26]

Most states are slightly tougher on first offenders. The most common statutory design,

adopted by nearly twenty states, imposes a maximum sentence of six months for first-time offenders.[27] About a dozen states have regimes that carry a possible sentence of one year.[28] Only three states have adopted a scheme in which first-time offenders face a possible sentence in excess of a year.[29] In sum, in more than two-thirds of the states, defendants face a maximum sentence of six months incarceration, and often much less.[30]

Yet, even these low maximum sentences are deceiving because it is rare to see defendants sentenced anywhere close to the statutory maximum. Defendants facing months or even a year in jail often receive only probation. For instance, in Texas, a first-time DWI is a Class B misdemeanor punishable by a maximum sentence of 180 days in jail.[31] Although the statute provides for a minimum term of 72 hours imprisonment, first offenders with clean criminal records regularly receive probated sentences and serve no jail time.[32] 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.[33]

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

II. There Is No Federal Constitutional Right to a Jury Trial for Petty Offenses Carrying Six Months or Less Incarceration

Although popular culture portrays criminal defendants' right to a jury trial as sacrosanct, there are actually numerous restrictions on the jury trial right that conflict with public perception. Defendants are not entitled to the infamous jury of twelve,[34] nor to a verdict that is unanimous.[35] 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*.[36] 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 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.[37]

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.[38] Yet the Court left the "exact location" for another day.[39]

A few years later, in *Baldwin v. New York*,[40] the Court sought to clarify the parameters of

the petty offense doctrine. In a case where the defendant faced up to one year of imprisonment for a misdemeanor offense of pickpocketing, the Court concluded that states could not eliminate the right to a jury trial.[41] 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."[42] 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? The Court addressed this question in *Blanton v. City of North Las Vegas*, a DWI case where the defendant faced a maximum sentence of six months in jail as well as a $1,000 fine and forty-eight hours of community service while dressed in clothing identifying him as a DWI offender.[43] The Court accepted the proposition that collateral sanctions could guarantee a defendant facing six months or less in jail a right to a jury trial,[44] but it rejected the argument that Blanton's case rose to that level. The Court concluded that a DWI defendant facing six months' incarceration, a stiff fine, community service, and possible shaming from having to wear clothing identifying him as a DWI offender did not guarantee the right to a jury trial.[45]

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.[46]

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

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

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

Over forty years ago, researchers Hans Zeisel and Harry Kalven published a landmark study analyzing the extent to which trial judges agreed with juries' verdicts in more than 3,500 criminal jury trials.[47] After juries made the decision whether to convict or acquit, the trial judges completed questionnaires stating whether they disagreed with the verdict and the reasons for that disagreement.[48] The Kalven and Zeisel study remains the gold standard for jury analysis to this day.[49]

Kalven and Zeisel found that juries and judges agreed in approximately 78% of cases.[50] 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.[51] By contrast, in 19% of cases, juries acquitted a defendant who the judge would have convicted.[52] In sum, jurors were more lenient than judges in 16% of cases.[53] 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.[54]

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.[55] Interestingly, the most common crime in the study by a considerable margin was DWI.[56] Of the 3,576 cases Kalven and Zeisel studied, a total of 455, or nearly 13% of the sample, were DWI prosecutions.[57] Remarkably, the jury leniency rate in these cases jumped from 16% (the total for all crimes in the entire study) to 24% in DWI offenses.[58] Once again, judges would have acquitted in only 3% of cases where juries convicted.[59] By contrast, in a

staggering 27% of DWI cases, judges believed the evidence merited a conviction even though juries acquitted.[60]

In 2005, Theodore Eisenberg and his colleagues attempted to replicate Kalven and Zeisel's work.[61] Using data assembled by the National Center for State Courts, the Eisenberg study found a 75% agreement rate between judges and juries.[62] Eisenberg and his colleagues 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).[63]

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."[64] 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.[65] The primary explanation for judges and juries reaching different conclusions thus appears to be that juries have a more stringent view of the proof beyond a reasonable doubt standard.[66]

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 found that judges were more likely to convict, with a net jury leniency rate of 18.2%.[67] 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.[68] In a different study, Rebecca Snyder Bromley, a Colorado judge, studied sixty DWI trials in Colorado by using post-trial questionnaires of judges and jurors.[69] As in previous studies, Bromley found that judges would have convicted more often than juries.[70] In 26.7% of cases, judges would have convicted even though juries voted to

acquit.[71] Although judges would have acquitted in a surprising 15% of cases where juries convicted, overall the judges were still considerably more willing to convict. Bromley found that judges would have convicted in 73.4% of DWI cases they observed while juries only convicted in 61.7% of cases.[72] In sum, studies have consistently found that judges are willing to convict more often than juries when presented with identical cases.[73]

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

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

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

The first, and perhaps most important, reason why juries are less likely to convict 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.[74] These defendants receive the services of the local public defender or the lawyer appointed by the court. And the representation these indigent defendants receive is notoriously (though not universally) poor.[75] Public defenders, while highly committed to their jobs, are

tremendously overworked and under-resourced.[76]

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

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

Starting with the obvious, while there are only a few affluent defendants charged with robbery, murder and other violent crimes,[77] there are a considerable number who are charged with DWI.[78] Middle or upper-class individuals have a much greater incentive to fight the charges all the way to trial in the hopes of an outright acquittal. As explained in Part I, most first-time DWI offenses carry very modest maximum penalties of only a few months in jail. In practice, most defendants who plead guilty to these charges will not receive anywhere near the maximum sentence and will instead receive only a fine or perhaps a few days in jail. For poor defendants -- particularly those who are lingering in jail because they could not afford to post bail – pleading guilty would result in a sentence of time served and an immediate exit from jail.[79] Such a plea bargain is obviously very desirable.

Moreover, for indigent defendants who are either unemployed or work in low-skill jobs, the collateral consequences of being a convicted misdemeanant are not significant. It is very

unlikely that they will be fired from their jobs because they now have a misdemeanor conviction on their record. Indeed, pleading guilty (and thus getting out of jail) will help them to avoid being fired for being absent from work. And with respect to future employment, a misdemeanor conviction will not prevent indigent individuals from attaining the types of jobs – laboring jobs or low paying service jobs – that they would likely seek in the future. Thus, for indigent defendants there is little disincentive to plea bargain DWI cases and forego a trial.

Middle and upper-class DWI defendants face a much different calculus. First, for an affluent defendant, this will likely be his first run-in with the criminal justice system and the prospect of spending even a few days in jail may be scary enough to gamble on a trial in the hopes of an outright acquittal. Second, and more importantly, even if the affluent defendant were offered a plea bargain with only a fine or a very short jail sentence, the collateral consequences of a conviction might be too significant to allow him to accept an otherwise attractive plea bargain offer.[80] 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.[81] It might prevent the individual from being hired for a desirable job that has many other applicants. 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.

And affluent defendants typically do not gamble on trial with just any lawyer. Instead, they hire DWI specialists. Every major city has DWI defense specialists.[82] These lawyers devote almost their entire practice to DWI defense. They are often former prosecutors who handled DWI cases while in the district attorney's office. They know the ins and outs of how the breathalyzer machines work and every argument – some genuine and others facetious – that can

be raised to cast aspersion on such devices.

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.

This is not to say that jurors are naïve or gullible. The reality however is that trial judges who have seen hundreds of DWI cases will not be swayed by weak defense arguments. Unlike jurors who are likely hearing their first DWI case, trial judges 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.

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."[83] Many jurors have driven an automobile after consuming at least some alcohol.[84] A smaller number of jurors may be heavier drinkers who have actually driven while intoxicated once or twice, yet simply not been caught.[85] And another group of jurors – perhaps as high as ten percent of the population – are what can be termed "problem drinkers," many of whom will have driven while intoxicated multiple times.[86] While none of these jurors would applaud drunk driving, in the back of their minds they may be

willing to show leniency given that they have committed (or come close to committing) the same offense themselves.

Second, some jurors who have never driven after ingesting alcohol will nevertheless look at DWI charges through the lens of their own traffic stops. Many jurors have been ticketed for speeding or some other offense at one time in their lives.[87] 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.[88] 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.[89]

The remaining question, then, is whether judges have a better ability to put aside their sympathies and compassion for those they identify with so that they can convict guilty defendants? There are a number of reasons to think the answer is yes. First, almost all judges are trained lawyers who have been socialized to look at problems with a focus on logic and analysis. That is not to say that lawyers are always able to compartmentalize their biases and their compassion to sympathetic individuals. But their analytical legal training would seem to make them more likely to avoid such biases than jurors who have not received such training. Second, and more importantly, judges who have presided over many trials have often become

jaded. After one-hundred DWI trials, the judge is less likely to see the defendant as an individual from the same social and economic class and more likely to look at her as a cog in the machine. Once the judge fails to see the defendant as an individual who looks like him, the disincentive to convict diminishes.[90]

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.[91] In the DWI context, one important information deficit is punishment ranges and likely sentences. The average juror probably has no idea what the punishment range is for first-time offenders and, more importantly, what actual sentence is likely to be imposed within that range if the defendant is convicted. As explained below, this lack of information may lead jurors to acquit guilty defendants out of unjustified fears that the defendant would receive a long prison sentence.

Most first-time DWI defendants face relatively short maximum sentences of a few months in jail, or even less.[92] Outsiders who do not work in the criminal justice system – those most likely to end up as jurors – may mistakenly believe otherwise though.[93] Over the last few decades, advocates such as MADD have vigorously campaigned to stamp out drunk driving. Due to these legislative efforts and the accompanying public informational campaign, many jurors may wrongly assume that the statutory penalties for DWI are more severe than they actually are. In fact, social scientists have found that law-abiding citizens, such as those who would serve on juries, tend to overestimate the severity of penalties authorized for criminal defendants.[94] Worse yet, the law generally forbids lawyers from correcting such misperceptions by discussing possible sentences during the guilt phase of trials.[95]

More importantly, the maximum sentences are actually deceiving to criminal justice outsiders because most first-time offenders never receive anywhere close to the maximums. Despite statutory maximum sentences of six months or longer, most defendants convicted of first-time DWI receive no jail time whatsoever.[96] 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.[97]

As jurors sit through the guilt stage of a DWI trial they are either un-informed or misinformed about what punishment the defendant will likely receive. This, in turn, likely makes it harder for jurors to convict DWI defendants.[98]

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

Criminologists have devoted considerable energy over the last few decades to studying what efforts actually reduce crime. Many experts would be quick to caution that we simply do not know enough to draw firm conclusions about what deters.[99] Nevertheless, it is widely agreed that the severity of punishment – the variable that legislatures most often fixate on[100] – is ineffective[101] at enhancing deterrence.[102] By contrast, social scientists have long found that increasing the perceived certainty of punishment is effective at deterring misconduct. In addition to improving the certainty of punishment, moving to a bench trial regime will make the prosecution of DWI cases much shorter and more efficient. There is some evidence that enhancing the celerity or swiftness of punishment will also improve general deterrence. But even setting aside a celerity effect, eliminating jury trials in DWI cases will result in other efficiency gains that will improve the criminal justice process. Part IV.A therefore discusses the prospect of improved deterrence and Part IV.B reviews the efficiency gains to be had from

eliminating jury trials in certain DWI cases.

A. Certainty of Punishment Is the Most Effective Deterrent

Over the last few decades, social scientists have demonstrated that the perceived certainty of punishment, that is the likelihood of being caught and held responsible for criminal behavior, is the single most important variable in deterring misconduct. Studies have demonstrated this to be true for crime generally[103] and for DWI offenses in particular.[104] 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.[105] 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.[106] 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.[107] The Act made it easier for police to conduct breath tests and imposed fines for refusing to comply with breath test requests.[108] 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."[109] 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."[110] In sum, the British Road Safety Act increased the certainty, though not the severity, of punishment for drunk driving.

The dramatic change in British law permitted sociologist Laurence Ross to conduct an interrupted time-series analysis of accident data to determine whether the Roadway Safety Act reduced drunk driving.[111] 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.[112] In summarizing his findings, Ross explained that "the Road Safety Act of 1967 provides support for

the hypothesis that subjective certainty of punishment can deter socially harmful behavior as exemplified by drinking and driving in Great Britain."[113]

In other research, Professor Ross found that the British experience was consistent with DWI deterrence studies from around the globe. Summarizing the literature in 1986, Professor Laurence Ross concluded that "at commonly prevailing levels of punitive severity, increments in threatened certainty of punishment are able to produce increments in marginal deterrence."[114] 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."[115] 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.[116]

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.[117] 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.[118] The researchers then randomly assigned the subjects different punishments ranging from a three-month license suspension to a fifteen-month license suspension.[119] Having set out variables as to the certainty and severity of punishment, Nagin and Pogarsky asked students to estimate the likelihood that they would drive home while legally intoxicated.[120] Once again, the researchers found that certainty of punishment had a greater

effect on deterrence than severity.[121]

In these and other DWI studies,[122] 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.

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 limited at this time) that improving the swiftness of punishment also aids deterrence goals. Additionally, and irrespective of whether deterrence is improved through swifter punishment, moving to a bench trial regime will carry numerous efficiency gains for the criminal justice system.

1. Celerity of Punishment May Aid Deterrence

Punishment theorists have long posited that three factors – certainty, severity, and celerity of punishment – are important in maximizing deterrence.[123] As discussed in Part IV.A above, social scientists have invested enormous attention in the certainty and severity variables and have convincingly demonstrated that certainty of punishment is by far the more important component of deterrence. As a matter of logic, enhancing the celerity or swiftness of punishment would seem likely to improve deterrence for the same reason that certainty of punishment is important. When offenders are to be punished at some abstract time in the distant future they may discount the punishment rather than internalizing its full effect. By contrast, if punishment is swift, defendants have less ability to ignore or minimize its impact. Unfortunately, "empirical tests of

the celerity effect are scant."[124] And those few studies that have been conducted have failed to demonstrate convincingly that swiftness of punishment furthers deterrence goals in the way that the certainty of punishment studies have.[125]

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.[126] 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 alcohol levels over .05.[127] Studies in other states likewise found swift license revocations to be effective deterrents.[128]

Thus, while there is a dearth of research on the importance of the celerity of punishment, there is at least some evidence to suggest that carrying out swift justice in the DWI context serves to reduce drunk driving.[129]

2. Eliminating Jury Trials Improves the Efficiency of the System

Drunk driving is the most commonly prosecuted misdemeanor offense,[130] 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.[131] The amount of resources to conduct DWI prosecutions in these cases is enormous. For cases that proceed to jury trial, prosecutors must prepare witnesses and arguments, juries must be empanelled, judges must preside, and most other work in those courts will grind to a halt. Eliminating the right to a jury trial for first-offense DWI prosecutions will substantially reduce the needed resources by: (1) eliminating the need for jurors, voir dire, and peremptory challenges; (2) shortening the duration of trials because judges are in need of less background information than juries; and (3) reducing the number of trials altogether because defendants who face more conviction-prone judges have lower odds of an acquittal at trial and thus less incentive to risk the higher penalty that typically comes with a trial. All of these efficiencies will enable prosecutors, judges, and defense attorneys to devote more of their time and attention to other (likely more serious) criminal cases.

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

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

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

Moving to bench trials would also eliminate the sometimes time-consuming and often peremptory challenge process. Even in misdemeanor cases, prosecutors and defense attorneys are typically afforded peremptory challenges to strike jurors who they view as unfavorable.[132] If nothing contentious occurs, the lawyers simply submit their peremptory challenges to the judge and the prospective jurors are struck very quickly. However, if either side believes their adversary has used peremptory strikes based on race or gender, a time-consuming hearing must be held to determine if a constitutional violation has occurred under the Supreme Court's *Batson v. Kentucky* decision.[133] If the judge finds a violation, some jurisdictions require that a new jury be impaneled and that jury selection be re-started from scratch.[134] And even if the trial judge rejects the *Batson* challenge, the defendant then has an appellate issue that he can raise on appeal if he is convicted. Eliminating the right to a jury trial eliminates the peremptory challenge problem altogether.

Finally, and most obviously, eliminating jury trials would save the time and expense of the jurors themselves. Each year there are likely well in excess of 10,000 DWI jury trials in the United States, most of which are for first offenders.[135] 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.[136] More importantly, some of these jurors could be shifted to other courtrooms to ensure that there

are a sufficient number of jurors for other cases. Presently, judges sometimes have to delay trials when a venire lacks a sufficient number of prospective jurors or when the lawyers "bust" the panel by striking such a large number of jurors for cause that there are not 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.

b. Shortening the Duration of Trials

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

The time savings will be even greater with the examination of witnesses. The typical DWI case involves testimony of officers who performed sobriety tests and chemists who explain breathalyzer tests. Judges have seen these types of witnesses dozens or even hundreds of times in the past. They are aware of the training the police and experts have received and how they perform their basic job responsibilities. Judges will require very little background testimony to assess the credibility and factual assertions of such witnesses. Jurors, by contrast, typically have no familiarity with police training and the mechanics of breathalyzers and other field sobriety tests. Prosecutors are therefore required to elicit lengthy background information through direct

examination. Prosecutors likewise spend considerable time reviewing how breathalyzers are calibrated and why other field sobriety tests are accurate. In a DWI jury trial it is therefore not surprising to see prosecutors spend time on where police officers were trained, the exact training received, their employment history at the police department, and other background information. Defense attorneys, in turn, then conduct detailed cross examination that could raise doubts about the training and scientific methodology of the witnesses. This lengthy testimony would not be completely eliminated in bench trials, but it would be substantially reduced.

c. Reducing Trials By Encouraging Plea Bargaining

If states eliminate the right to jury trials for first-offense DWI prosecutions it will almost surely reduce the number of DWI cases proceeding to trial because the outcome of bench trials is far more predictable. 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. Optimistic defendants – particularly successful individuals who are used to having things go their way – may choose to assume that the unknowns associated with a jury trial will break in their favor.

While bench trials also carry some uncertainty, there would be far fewer unknowns than in jury trials. 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 whether judges are prone to convict or acquit in run-of-the-mill DWI cases. And if the social science evidence described in Part III.A is correct, judges in general will be more willing to convict than juries.[137] Competent defense attorneys will of course relay this information to their clients and will also then explain the "trial penalty" whereby defendants who have pushed cases to trial are typically sentenced to tougher punishments.[138] Once defendants have solid information on judges' conviction rates and the

attendant trial penalty, the gamble on trial should look far less attractive.

VI. Conclusion

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

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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).

[4] *See infra* notes 27-29 and accompanying text.

[5] Drunk driving is an enormous problem that kills over ten thousand people every year and causes billions of dollars in property damage. *See* MOTHERS AGAINST DRUNK DRIVING, CAMPAIGN TO ELIMINATE DRUNK DRIVING: STATISTICS (available at http://www.madd.org/Drunk-Driving/Drunk-Driving/Statistics.aspx).

[6] There has been a modest reduction in the rate of DWI in recent years, *see* BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, DWI OFFENDERS UNDER CORRECTIONAL SUPERVISION 1 (June 1999). However, to the extent drunk driving has declined, that may be due less to legislation and more to the moral campaign waged by groups like MADD to make drunk driving stigmatic. *See* Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 634 (2000).

[7] On their face, trial statistics seem to show that judges acquit more than juries. Yet, this is misleading. The most commonly accepted explanation is that juries are less accurate at determining guilt so smart defendants waive their right to a jury when the evidence is weakest and stick with juries when the evidence of guilt is most compelling. *See* Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1501 (1999) ("If juries are less accurate guilt determiners than judges, innocent defendants will choose to be tried by judges 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.").

[8] *See* HARRY KALVEN & 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) (surveying lawyers about preference for jury trial or bench trial and explaining that "[a] few defense counsel also acknowledged that judges were less likely to be persuaded by creative defense techniques (as one lawyer put it, 'judges are more likely to see through our strategy'), perhaps a tacit admission that juries are more easily misdirected than judges are.").

[11] *See infra* note 118 and accompanying text discussing the quality of DWI defense lawyers.

[12] The classic example is death penalty cases where many defendants are represented by inexperienced or inadequate defense lawyers and prosecuted by experienced district attorneys. *See* Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 VAND. L. REV. 307 (2010).

[13] *See* Leipold, *supra* note 10, at 181 (explaining that in misdemeanor cases "[t]he prosecutor assigned to the case is probably going to be less experienced than those assigned to felonies").

[14] *See infra* notes 103-122 and accompanying text.

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

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

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

[18] The proposal is foreclosed in a small number of states that have interpreted their state constitutions to require a right to a jury trial in all criminal cases.

[19] *See infra* Part II.

[20] *See infra* note 46 and accompanying text.

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

[22] *See* Miss. Code § 63-11-30(2)(a).

[23] *See* Haw. Rev. Stat. 291E-61(b)(C)(ii).

[24] *See* Ky. Rev. Stat. § 189A.010(5)(a); N.J. Stat. § 39:4-50(a)(1); N.D. Cent. Code § 12.1-32-01; S.C. Code § 56-5-2930.

[25] *See* Ind. Code §§ 9-30-5-1(a) & 35-50-3-4 (sixty days); Md. Ann. Code § 27-101(c)(23) (limiting punishment to two months); Neb. Rev. Stat. 28-106 (sixty days).

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

[27] *See* Ariz. Rev. Stat. §§ 13-707(A)(1) & 28-1381(F); Cal. Vehicle Code § 23536; Conn. Gen. Stat. § 14-227a(g); 21 Del. Code § 4177; Fla. Stat. Ann. § 316.193(2)(a)(2)(a); Idaho Code § 18-8005(1)(a); 625 Ill. Comp. Stat. 5/11/501(c)(3); Kan. Stat. Ann. 8-1567(d); La. Rev. Stat. Ann. 14:98(B)(1); Mo. Rev. Stat. § 577.010; Mont. Code Ann. § 61-8-714; Nev. Rev. Stat. § 484.3792(1)(a)(2); Ohio Code § 4511.19(G); Tex. Pen. Code §§ 12.22 & 49.04(b); Utah Code Ann. § 41-6a-503; W. Va. Code § 20-7-18(b)(d); Wis. Stat. § 343.63(1); Wyo. Stat. Ann. § 31-5-233.

[28] *See* Ala. Code § 32-5A-191(e); Ark. Code § 5-65-111(a)(1)(A); Alaska Sess. Laws § 12.55.135(a); Colo. Rev. Stat. § 42-4-1301(7); Ga. Code Ann. § 40-6-391(C)(1); Iowa Code Ann. §§ 321J.2 & 903.1(b); Me. Rev. Stat Ann. tit. 29, § 2411(5) & tit 17, § 1252(2)(D); N.Y. McKinney's Veh. & Traff. Law § 1193(1)(b); Okla. Highway Safety Code 11-902; OR St. § 813.010(4); R.I. Gen. Laws 31-27-2(d); S.D. Codified Laws § 22-6-2; Tenn. Code. Ann. § 55-10-403(s)(1); Va. Code Ann. § 18.2-270; Wash. Rev. Code § 46.61.5055.

[29] *See* Mass. Gen. Laws Ch. 90 § 24 (two-and-one-half years); N.C. Gen. Stat. 20-179(g) (two years); Vt. Stat. Ann. tit. 23, § 1210 (two years).

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

[31] *See* Tex Pen. Code § 49.04(b) (classifying the crime as a Class B misdemeanor); Tex. Pen. Code § 12.22 (providing that Class B misdemeanors can be punished by "confinement in jail for a term not to exceed 180 days").
[32] Lawyers specializing in DWI defense are not reluctant to advertise that properly defended DWI prosecutions can result in no jail time. *See, e.g.*, TYLER FLOOD, FREQUENTLY ASKED QUESTIONS (available at http://www.texasdwidefenselawyer.com/drunk-driving-faqs.html) ("If you have a clean criminal record and there were no serious injuries resulting from your first misdemeanor DWI, you should not have to worry about doing any additional jail time. In Harris County, probation is an option as an alternative to jail time.").
[33] *See* JONES, MILLIGAN & GERAGHY, MASSACHUSETTS OUI LAW (available at http://www.dwilawoffice.com/massachusetts_oui_law.html).
[34] *See* Williams v. Florida, 399 U.S. 78 (1970) (upholding six person jury).
[35] *See* Johnson v. Louisiana, 406 U.S. 356 (1972) (permitting nine to three jury verdict).
[36] 391 U.S. 145 (1968).
[37] *Id.* at 159-60.
[38] *See id.* at 161.
[39] *Id.*
[40] 399 U.S. 66 (1970).
[41] *See id.* at 67, 69.
[42] *Id.* at 69.
[43] 489 U.S. 538, 544 (1989).
[44] *See id.* at 542.
[45] *See id.* at 545.
[46] The states that have taken this approach are: Florida, Hawaii, Louisiana, Mississippi, Nevada, New Hampshire, New Jersey, New Mexico, and Pennsylvania. *See* Johnson v. State, 994 So.2d 960, 962 (Fla. 2008); State v. Sullivan, 36 P.3d 803 (Hawaii 2001); State v. Vu, 846 So.2d 67, 71 (La. App. 5th Cir. 2003); Case v. State, 817 So.2d 605 (Miss. 2002); N.H. Rev. Stat. Ann. § 265-A:2; Blanton v. City of North Las Vegas, 489 U.S. 538 (1989); State v. Graff, 577 A.2d 1270 (N.J. 1990); Meyer v. Jones, 749 P.2d 93 (N.M. 1988); Commonwealth v. Kerry, 906 A.2d 1237 (Pa. Super. 2006). Additionally, New York has eliminated the right to a jury trial for the "traffic infraction" of Driving While Alcohol 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 of fifteen days incarceration, whereas the traditional charge of Driving While Intoxicated carries a maximum sentence of one year in New York. *See* N.Y. McKinney's Veh. & Traff. Law § 1193(1)(a) & (b).
[47] *See* KALVEN & ZEISEL, *supra* note 8, at 33.
[48] *See id.* at 44-54.
[49] *See* Valerie P. Hans & Neil Vidmar, *The American Jury at Twenty-Five Years*, 16 LAW & SOC. INQUIRY 323, 323 (1991) (describing *The American Jury* as "arguably one of the most important books in the field of law and social sciences").
[50] *See* Kalven and Zeisel, *supra* note 8, at 56. The authors distributed the 5.5% of hung juries evenly between convictions and acquittals. *See id.* at 57-58. Separating out the hung juries results a slightly lower percentage of agreement (75%) as well as slightly lower percentages of disagreement between judges and juries. *See id.* at 56 tbl. 11.
[51] *See id.* at 59.
[52] *See id.*

[53] *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).
[54] *See id.* at 106-11.
[55] *See id.* at 67.
[56] *See id.*
[57] *See id.*
[58] *See id.* at 468.
[59] *See id.*
[60] *See id.*
[61] *See* Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's The American Jury*, 2 J. EMPIR. L. STUD. 171 (2005).
[62] *See id.* at 180-81.
[63] *See id.*
[64] *See id.* at 191.
[65] *See id.* at 189.
[66] *See id.* at 185.
[67] *See* Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 LAW & HUM. BEHAV. 29 (1994).
[68] *See id.*
[69] *See* Rebecca Snyder Bromley, *Jury Leniency in Drinking and Driving Cases: Has It Changes?*, 20 LAW & PSYCHO. REV. 27 (1996). 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).
[70] *See* Bromley, *supra* note 69, at 42 ("[J]uries continue to be more lenient than judges overall.").
[71] *See id.*
[72] *See id.*
[73] Of course, as Daniel Givelber and Amy Farrell have recently explained, just because judges would convict more often than juries does not tell us that judges are more accurate at determining guilt. *See* Daniel Givelber & Amy Farrell, *Judges and Juries: The Defense Case and the Differences in Acquittal Rates*, 33 LAW & SOC. INQUIRY 31, 33 (2008). It could be argued that moving to bench trials will raise the conviction rate for DWI cases at the expense of convicting the innocent. While this concern cannot be dismissed, I do not see it as likely. Prosecutors rarely bring DWI cases to trial when the defendant is very close to the legal limit. Moreover, even in weak cases where the defendant can allege that the breathalyzer is incorrectly calibrated, there is still evidence that the defendant had alcohol in his system and was driving an automobile, thus lowering (though not eliminating) the odds of a wrongful conviction.
[74] *See* CAROLINE WOLF HARLOW, DEFENSE COUNSEL IN CRIMINAL CASES, BUREAU OF JUSTICE STATISTICS 5 (2000), available at www.ojp.usdoj.gov/bjs/abstract/dccc.htm (stating that 80% of felony defendants are indigent).
[75] *See* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: A National Crisis*, 57 HASTINGS L. REV. 1031 (2006).
[76] *See* Adam M. Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 CONN. L. REV. 85, 93-94, 96-97 (2007).

[77] *See* William J. Stuntz, *Race Class, and Drugs*, 98 COLUM. L. REV. 1795, 1802 (1998).
[78] *See* JAMES B. JACOBS, DRUNK DRIVING: AN AMERICAN DILEMMA XXI (1989) ("[D]runk driving is not a crime associated with the poor.").
[79] *See, e.g.*, Lise Olsen, *Thousands Languish in Crowded Jail: Inmates Can Stay Locked Up for More Than a Year Waiting for Trial in Low-Level Crimes*, HOUS. CHRON., Aug. 23, 2009 (finding that 200 currently incarcerated inmates in the Harris County jail had already served the minimum jail sentence for the crimes they were charged with).
[80] *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.").
[81] *See* John S. Dzienkowski, *Character and Fitness Inquiries in Law School Admissions*, 45 S. TEX. L. REV. 921, 923 (2004) (explaining that a majority of law schools ask applicants character and fitness questions and that "most of the questions relate primarily to criminal offenses as well as those related to applicants' prior educational history.").
[82] A Google search of "DWI" and the name of any medium or large city brings up dozens of webpages for attorneys specializing in DWI.
[83] *See* ROBIN, *supra* note 3, at 7.
[84] *See* JACOBS, *supra* note 78, at 44 (discussing a study in which 37% of 1,491 adults over eighteen admitted to driving after consuming alcohol). The percentage is likely higher because respondents are often unwilling to admit stigmatic behavior in surveys.
[85] *See id.* at 43 ("A second category, perhaps amounting to 15% of all drivers, comprises heavy social drinkers who sometimes may be on the road at illegal BACs.").
[86] *See id.* ("Ten percent of all drivers are problem drinkers, whose drinking patterns are likely to bring them frequently into conflict with the DWI laws.").
[87] Each year there are nearly 30 million traffic stops in the United States. *See* BUREAU OF JUSTICE STATISTICS, CHARACTERISTICS OF DRIVERS STOPPED BY POLICE, 1999 at 1,4 (2002) (noting that in 1999 more than ten percent of all licensed drivers were stopped by police).
[88] *See* John Clark, *The Social Psychology of Jury Nullification*, 24 LAW & PSYCH. REV. 39, 49 (2000) (explaining how jurors who acquitted Lyle and Eric Menendez could not believe that they killed their parents because they "looked like nice young men").
[89] *See* JACOBS, *supra* note 78, 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.").
[90] *See* Janet A. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1124 (1991) ("Judges try hundreds, even thousands of cases every year, while jurors hear only a few during their service. Over and over again, the juvenile court judge hears testimony from the same police and probation officers, inevitably forming a settled opinion on their credibility. Worse yet, the judge may well have heard earlier charges against the accused, and thus may come to hold a fixed view on the juvenile's credibility and character."). While Professor Ainsworth identifies the same data-point as me, she reaches the opposite conclusion. She maintains that, in the juvenile context, judges' familiarity with the types of cases makes them worse fact-finders because they become less meticulous. *See id.*

[91] *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).

[92] *See supra* notes 21-30 and accompanying text.

[93] *See* Bibas, *Transparency and Participation, supra* note 91, at 913 (explaining that "[p]ublic information about criminal justice is notoriously inaccurate and outdated").

[94] *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 legal penalties to be more severe than they actually are and, compared with offending populations, nonoffenders generally overestimate the presumptive severity of legal penalties.").

[95] *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*, (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1548654).

[96] *See* Tina Wescott Cafaro, *You Drink, You Drive, You Lose: Or Do You?*, 42 GONZ. L. REV. 1, 9 (2009) ("A first time [drunk driving] offender generally receives probation, a fine, some form of alcohol counseling and some form of driver's education schooling.").

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

[98] Critics might object that jurors' lack of knowledge about punishment is true for most crimes, not just DWI offenses. While that is true, and while jurors might be afraid of over-punishment for a handful of other low-level offenses, for most crimes jurors will not be likely to acquit out of concern for over-punishment. Moreover, even if the nullification problem exists with respect to other crimes, singling out DWI trials to eliminate jury trials is still defendable because it is one of, if not the, most commonly tried crimes in the criminal code. *See* Kelsey P. Black, Note, *Undue Protection Versus Undue Punishment: Examining the Drinking and Driving Problem Across the United States*, 40 SUFFOLK U.L. REV. 463, 463 (2007) ("Drunk driving is the nation's most commonly perpetrated violent crime.").

[99] *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 (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.").

[100] *See, e.g.*, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001) ("Voters demand harsh treatment of criminals; politicians respond with tougher sentences"); Jerome S. Legge, Jr. & Joonghoon Park, *Policies to Reduce Alcohol-Impaired Driving: Evaluating Elements of Deterrence*, 75 SOC. SCIENCE Q. 594, 603 (1994) ("Virtually all citizens are against the 'drunk driver,' and the greater the penalties against this individual, the better it should be for society. This helps explain the rush to the severity approach which many states took to deter alcohol-impaired driving early on.").

[101] *See* Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143, 187 (2003) (reviewing the leading studies examining severity of punishment and deterrence and concluding that "[w]e could find no conclusive evidence that

supports the hypothesis that harsher sentences reduce crime through the mechanism of general deterrence"); Legge & Park, *supra* note 154, at 596 ("The use of higher fines and especially jail terms has been disappointing on the whole [in deterring drunk driving.]"); Raymond Paternoster & Leeann Iovanni, *The Deterrent Effect of Perceived Severity: A Reexamination*, 64 SOC. F. 751, 769 (1986) ("Our data suggest only the more narrow conclusion that perceived severity has no direct and immediate effect on the commission of minor offenses."); H. Laurence Ross, *The Scandinavian Myth: The Effectiveness of Drinking-and-Driving Legislation in Sweden and Norway*, 4 J. LEGAL STUD. 285 (1975) (utilizing interrupted time-series analysis but failing to find support for the conventional wisdom that more punitive DWI laws in Sweden, Norway, and Finland have been more effective at deterring drunk driving).

[102] There are exceptions. *See, e.g.*, Steven Klepper & Daniel Nagin, *The Deterrent Effect of Perceived Certainty and Severity of Punishment Revisited*, 27 CRIMINOLOGY 721, 741 (1989) ("[O]ur findings suggest that both the certainty and severity of punishment are deterrents, whereas prior findings generally suggest that only the former is an effective deterrent"). Although severity is typically discounted by social scientists, some scholars have argued that severity of punishment can be effective deterrent when there are sufficiently high levels of perceived certainty of punishment. *See* Harold G. Grasmick & George J. Bryjak, *The Deterrent Effect of Perceived Severity of Punishment*, 50 SOCIAL FORCES 471 (1980) (contending that many studies discounting the severity of punishment failed to consider the interaction between certainty and severity of punishment). Nevertheless, the bulk of the literature concludes that severity is not an effective deterrent.

[103] *See, e.g.*, ANDREW VON HIRSCH ET AL., CRIMINAL DETERRENCE AND SENTENCE SEVERITY: AN ANALYSIS OF RECENT RESEARCH 47 (1999) (reviewing the literature and concluding that "there are consistent and significant negative correlations between likelihood of conviction and crime rates); Robert Apel & Daniel S. Nagin, *General Deterrence: A Review of Recent Evidence* in HANDBOOK ON CRIME AND CRIMINAL JUSTICE (Michael Tonry ed., 2010), at 17 ("There is substantial evidence from a diverse literature that increases in the certainty of punishment substantially deters criminal behavior."); Daniel S. Nagin & Greg Pogarsky, *An Experimental Investigation of Deterrence: Cheating, Self-Serving Bias, and Impulsivity*, 41 CRIMINOLOGY 167 (2003) (testing whether students would cheat on a trivia quiz in order to earn a cash bonus and finding that cheating decreased when the certainty of detection was higher but not when the perceived severity of punishment increased); Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1 (1998) (reviewing the literature and concluding, *inter alia*, that "cross-sectional and scenario based studies have consistently found that perceptions of the risk of detection and punishment have negative, deterrent-like associations with self-reporting offending or intentions to offend"); Jeffrey Grogger, *Certainty v. Severity of Punishment*, 24 ECON. INQUIRY 297, 304 (1991) (studying California arrestees and concluding that "increased certainty of punishment provides a much more effective deterrent than increased severity" and that a "six percentage point increase in average conviction rates would deter as many arrests as a 3.6 month increase in average prison sentences); Klepper & Nagin, *supra* note 116, at 741 (surveying graduate students about tax evasion scenarios and finding that certainty of punishment is an effective deterrent); Ann Dryden Witte, *Estimating the Economic Model of Crime with Individual Data*, 94 Q. J. ECON. 57, 79 (1980) (studying men released from the North Carolina prison system and demonstrating that "a percentage increase in the probability of being punished has a relatively larger effect on the number of arrests or convictions than does a percentage increase in the expected sentence"); Grasmick & Bryjak, *supra* note 156, at 472

(reviewing twelve deterrence studies and explaining that "nearly all of these researchers conclude that perceived certainty of legal sanctions is a deterrent, [while] only one (Kraut) concludes that perceptions of the severity of punishment are part of the social control process"); Alfred Blumstein & Daniel Nagin, *The Deterrent Effect of Legal Sanctions on Draft Evasion*, 29 STAN. L. REV. 241 (1977) (studying draft evasion and finding a significant negative association between the probability of conviction and the draft evasion rate, leading the authors to conclude that their "findings are consistent with the work of other investigators who have argued that the certainty of punishment has a stronger deterrent effect on crime than the severity of punishment."); Isaac Ehrlich, *Participation in Illegitimate Activities: A Theoretical and Empirical Investigation*, 81 J. POL. ECON. 521, 544-47 (1973) (finding that the certainty of punishment was a more important indicator than severity in deterring murder, rape and robbery).

[104] *See* H. LAURENCE ROSS, CONFRONTING DRUNK DRIVING: SOCIAL POLICY FOR SAVING LIVES 67-73 (1992) (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").

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

[106] *See id.* at 67-68.

[107] *See id.* at 19.

[108] *See id.*

[109] *Id.* at 69.

[110] *Id.* at 51.

[111] *See id.* at 3.

[112] *See id.*

[113] *Id.*

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

[115] *Id.* at 168. For an earlier review of the literature, see H. LAURENCE ROSS, DETERRING THE DRINKING DRIVER: LEGAL POLICY AND SOCIAL CONTROL (1982).

[116] *See* ROSS HOMEL, POLICING AND PUNISHING THE DRUNK DRIVER: A STUDY OF GENERAL AND SPECIFIC DETERRENCE 236-37 (1988). Homel also found that those who believed the penalty for drunk driving had increased became less likely to drive while intoxicated. However, he attributed the effectiveness of increased severity of punishment to the possibility that "perceived severity of penalties only has predictive power when the perceived chances of arrest are high." *Id.* at 237.

[117] *See* Daniel Nagin & Greg Pogarsky, *Integrating Celerity, Impulsivity and Extralegal Sanction Threats Into a Model of General Deterrence: Theory and Evidence*, 39 CRIMINOLOGY 865 (2001).

[118] *See id.* at 874-75.

[119] *See id.* at 875.

[120] *See id.*

[121] *See id.* at 883-84. ("It is in this sense that the results support the prediction that certainty effects will be more pronounced than will be severity effects.").

[122] *See* Daniel S. Nagin & Raymond Paternoster, *Enduring Individual Differences and Rational Choice Theories of Crime*, 27 LAW & SOC. REV. 467, 477, 489 (1993) (using DWI scenarios (as well as

theft and sexual assault scenarios) and finding that "perceptions of the certainty of formal and informal sanctions and self-imposed shame effectively controlled respondents' intentions to offend").

[123] *See* CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 55 (Henry Paolucci trans., The Bobbs-Merrill Company, Inc. 1963) (1764).

[124] Nagin & Pogarsky, *supra* note 117, at 865.

[125] *See id.* at 884 ("As for the celerity effect, further testing is necessary before it can be confidently concluded that the impact of celerity is immaterial."); *see also* Edmond S. Howe & Thomas C. Loftus, *Integration of Certainty, Severity, and Celerity Information in Judges Deterrence Value: Further Evidence and Methodological Equivalence*, J. APPLIED SOC. PSYCH. 226, 227, 237 (1996) (noting that "celerity has been, with few exceptions, largely discounted and assumed irrelevant to the subject of punishment" and finding in a new study that "the relevance of celerity information to judgment of deterrence value is at best minor").

[126] *See* NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, STATE AND COMMUNITY PROGRAM AREA REPORT (1985) (reviewing efforts in eleven states).

[127] *See* H. Laurence Ross, *Administrative License Revocation in New Mexico*, 9 LAW & POLICY 5, 14 (1987) ("Inasmuch as administrative license revocation may be viewed as emphasizing swiftness of punishment, these results testify to the potential of this previously unexamined variable in the deterrence proposition.").

[128] *See* NATIONAL TRANSPORTATION SAFETY BOARD, DETERRENCE OF DRUNK DRIVING: THE ROLE OF SOBRIETY CHECKPOINTS AND ADMINISTRATIVE LICENSE REVOCATION, REPORT NO. NTSB/SS-84/01, (Apr. 3, 1984) (finding a nearly 18% decrease in alcohol related traffic accidents in Delaware after the initiation of sobriety checkpoints and administrative license revocations despite an 8% increase in fuel consumption during the same time period); FORST LOWERY, MINNESOTA'S DOUBLE-BARRELLED IMPLIED CONSENT LAW: A 1983 UPDATE OF "ANALYTICAL STUDY OF THE LEGAL AND OPERATIONAL ASPECTS OF THE MINNESOTA LAW ENTITLED 'CHEMICAL TEST FOR INTOXICATION'" 54-65 (1983) (discussing increased perception of certainty of punishment from immediate license revocation and the decline in traffic fatalities).

[129] 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 finding fines to be a more important factor).

[130] *See* JACOBS, *supra* note 78, at xviii.

[131] *See* NATIONAL HIGHWAY TRANSPORTATION SAFETY ADMINISTRATION, TRAFFIC SAFETY FACTS: 2006 DATA 5 (2008).

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

[133] 476 U.S. 79 (1986) (forbidding peremptory strikes based on race).

[134] *See id.* at 99 n.24 (1986); Cheryl A.C. Brown, *Challenging the Challenge: Twelve Years After Batson, Courts Are Still Struggling to Fill in the Gaps Left by the Supreme Court*, 28 U. 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).