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Lonn Lanza-Kaduce

Donna M. Bishop

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# CRIMINOLOGY

## LEGAL FICTIONS AND CRIMINOLOGY: THE JURISPRUDENCE OF DRUNK DRIVING

Lonn Lanza-Kaduce\*

Donna M. Bishop\*\*

This paper is premised on a presupposition: legal thought influences legal behavior.<sup>1</sup> If this premise is valid, then the way we think about criminal law is important for understanding crime, and social scientists who emphasize social reactions to crime need to consider the theory of criminal law. Legal principles place significant constraints on the ways in which crimes are defined, the manner in which criminal statutes are applied, and the kinds of solutions we seek to prevent and control crime. Although social scientists long have addressed the impact of cultural and material forces on the development of criminal law,<sup>2</sup> they generally have failed to appreciate the role that jurisprudence plays in organizing both the content and the application of law.

The purpose of this paper is to analyze how jurisprudential theory incorporates social constructions about the world that often are accepted uncritically by others—including many in the social science community. This paper will focus on a particular device in jurisper-

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\* Associate Professor of Sociology and Criminology, Center for Studies in Criminology and Law, University of Florida. Ph.D. (1981); M.A. (1978); J.D. (1976); B.S. (1972), University of Iowa.

\*\* Associate, Center for Studies in Criminology and Law, University of Florida. Ph.D., State University of New York at Albany, 1982; M.A., College of William and Mary, 1974; B.A., Wheaton College, 1968.

<sup>1</sup> See Lanza-Kaduce, *Formality, Neutrality, and Goal-Rationality: The Legacy of Weber in Analyzing Legal Thought*, 73 CRIM. L. & CRIMINOLOGY 533 (1982).

<sup>2</sup> See, e.g., W. CHAMBLISS & R. SEIDMAN, *LAW, ORDER, AND POWER* (2d ed. 1982); J. GUSFIELD, *SYMBOLIC CRUSADE* (1964); H. ROSS, *LAW AND DEVIANCE* (1981); E. SCHUR, *THE POLITICS OF DEVIANCE: STIGMA CONTESTS AND THE USES OF POWER* (1980); Chambliss, *A Sociological Analysis of the Law of Vagrancy*, 12 SOC. PROBS. 66 (1964).

dential theory construction: the legal fiction. Although some view legal fictions to be primarily of historical significance,<sup>3</sup> we will demonstrate that legal fictions continue to be an important and, perhaps, inescapable feature of criminal law.

A legal fiction is defined as "an assumption or supposition of law that something which is or may be false is true."<sup>4</sup> Lon Fuller, who has focused considerable attention on the structure and inner logic of law,<sup>5</sup> also has carefully analyzed legal fictions.<sup>6</sup> Fuller acknowledged that disciplines other than law rely on fictions, and he illustrated the point by referring to such concepts as the "social compact" and "economic man."<sup>7</sup>

While few would grant either that the social compact is historically accurate or that human action is based purely on rational calculations of self-interest, most would agree that these fictions have nonetheless proven to be extremely useful theoretical devices. Fuller refers to such conceptual frameworks as "Big Fictions [which] . . . furnish a kind of general starting point, or original impetus, to thought."<sup>8</sup> Fuller contrasted Big Fictions with the numerous less grand fictions found in law (e.g., the corporation as "person"). He analyzed the nature of these latter devices and their general application to more mundane legal matters. Fuller suggested that examination of lesser fictions could provide "new insight into the problems involved in subjecting the recalcitrant realities of human life to the constraints of a legal order . . . ."<sup>9</sup>

Ironically, criminologists are likely to acknowledge Big Fictions in criminal law and, yet, to ignore the everyday, formal, lesser fictions and constructions that Fuller thought helped to rationalize and explain legal operations. For example, both the neo-Marxist Quinney<sup>10</sup> and the far more conservative Wilson<sup>11</sup> recognize the Big Fiction of individual responsibility<sup>12</sup> upon which our criminal law is premised. Wilson's remarks are perhaps most revealing. He writes (in the subjunctive) that we are "led to assume that the criminal acts

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<sup>3</sup> See, e.g., L. FRIEDMAN, *THE LEGAL SYSTEM* (1975).

<sup>4</sup> BLACK'S LAW DICTIONARY, 751 (4th ed. 1968).

<sup>5</sup> L. FULLER, *THE MORALITY OF LAW* (1964).

<sup>6</sup> L. FULLER, *LEGAL FICTIONS* (1967).

<sup>7</sup> *Id.* at ix.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at viii-ix.

<sup>10</sup> R. QUINNEY, *CLASS, STATE, AND CRIME: ON THE THEORY AND PRACTICE OF CRIMINAL JUSTICE* (1977); R. QUINNEY, *CRITIQUE OF LEGAL ORDER* (1974).

<sup>11</sup> J. WILSON, *THINKING ABOUT CRIME* (1975).

<sup>12</sup> At the core of the fiction of individual responsibility is the presumption that human action is voluntaristic, that individuals freely choose among alternative courses of action. Consequently, individuals may be held morally accountable for their behavior.

as if crime were the product of a free choice . . . . The radical individualism of Bentham and Beccaria may be scientifically questionable but prudently necessary."<sup>13</sup> Similarly, Packer observes: "the law treats man's conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were."<sup>14</sup>

To our knowledge, no criminologist has sought to analyze the relationship between the Big Fictions in criminal jurisprudence and the lesser fictions that more immediately constrain the operation of law. Given that Fuller advanced three arguments that ordinarily pique social science curiosity, this is somewhat surprising. First, Fuller contended that fictions represent "pathology" in law.<sup>15</sup> That is, although fictions often lead to conclusions that appeal to us as "right," they also may produce mistakes that create grave injustice.<sup>16</sup> Second, Fuller asserted that legal fictions serve ideological functions,<sup>17</sup> both by providing the intellectual superstructure to rationalize the actions of lawmakers<sup>18</sup> and by persuading through the appeal of metaphor.<sup>19</sup> Third, Fuller insisted that fictions generally are used to "escape the consequences of an existing, specific rule of law."<sup>20</sup>

We will raise a fourth function of lesser legal fictions in criminal law. There is, we believe, an inherent contradiction in the current theory of criminal law. On the one hand, criminal law reifies society; the criminal law recognizes emergent group processes for purposes of defining crime. Crime is an offense against the collectivity, whether it is phrased in terms of "the King's peace," the "public morality," or "social welfare." Crime, at least in the United States, is prosecuted by the collectivity which pays for the entire process: apprehension, prosecution, frequently the defense, trial, and punishment. On the other hand, criminal law theory performs reductionist operations for purposes of explaining criminal behavior. By that we mean, individual properties, especially those relevant to the *mens rea*, are emphasized. This permits the imputation of personal responsibility and blameworthiness which, in turn, justify punishment. The group is exonerated from complicity in crime causation by definition.

Both the reification and the reductionism are distortions which

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<sup>13</sup> J. WILSON, *supra* note 11, at 56.

<sup>14</sup> H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 74-75 (1968).

<sup>15</sup> L. FULLER, *supra* note 6, at viii.

<sup>16</sup> *Id.* at 110.

<sup>17</sup> *See also* L. FRIEDMAN, *supra* note 3.

<sup>18</sup> L. FULLER, *supra* note 6, at 38.

<sup>19</sup> *Id.* at 24.

<sup>20</sup> *Id.* at 53.

give rise to the Big Fictions of societal harm and individual responsibility. Their opposite pulls, however, create problems in the everyday administration of criminal law. We will argue that an additional function of lesser legal fictions is their utility for resolving the paradoxes that result from a legal system which accepts social defense but rejects social causation.

To understand the social reaction to a kind of crime, we need to appreciate the configuration of fictions surrounding that crime. This paper applies some of Fuller's insights to the offense of drunk driving.<sup>21</sup> It examines three specific legal fictions central to drunk driving laws: (1) the highly suspect empirical assumption about risk which permits the attribution of culpability to drinking drivers; (2) the fictitious logic underlying the use of published blood alcohol concentration (BAC) as proof of drunk driving; and (3) the potential fiction of a rebuttable presumption that alcohol use is the cause of injury or death occurring in alcohol-related accidents. The jurisprudence of drunk driving illustrates two issues discussed by Fuller: (1) how express or implied legal relations or duties may rest on empirically inadequate assumptions,<sup>22</sup> and (2) how presumptions may distort empirical realities.<sup>23</sup>

It is important that the reader appreciate at the outset that we are not arguing either that drunk driving is unproblematic or that drunk driving is a moral act. We too would like to prevent the death, injury and property damage incurred in alcohol-related accidents. However, we are directly challenging the empirical and logical basis, and therefore, the justice, of much of our criminal law on drunk driving. There is heresy in our proposed purpose. To the extent that we successfully challenge the empirical and logical adequacy of drunk driving's legal fictions, the rationale for most of our laws on the subject will be undermined and the issue of justice joined. We will further argue that because legal countermeasures to drunk driving are premised on inaccuracies, there results the wasteful expenditure of resources on the prosecution, punishment and

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<sup>21</sup> Drunk driving laws generally fall into two categories. The first consists of "driving under the influence" statutes, which focus on the effects that alcohol consumption has had on the individual. Generally, the state has to prove that the individual's faculties, though not necessarily his driving ability, were impaired. The second group of laws consist of "driving while intoxicated" statutes, which make it illegal per se to drive with a blood alcohol level at or above a certain statutorily defined minimum. The focus here is upon the physiological status of the individual, quite without regard to whether the level of alcohol consumed has affected either the operation of his faculties, or his ability to drive safely. For an extended discussion, see R. ERWIN, DEFENSE OF DRUNK DRIVING CASES: CRIMINAL-CIVIL (3d ed. 1986).

<sup>22</sup> L. FULLER, *supra* note 6, at 106-16.

<sup>23</sup> *Id.* at 45.

treatment of many drinking-driving offenders who neither "deserve" nor profit by such responses. Popular opinion to the contrary notwithstanding, such responses serve neither valid retributive, deterrent, nor rehabilitative ends, and they arguably can be rationalized only by appeals to declaratory or moral educative aims that may be better served through mechanisms other than the criminal law.

Even more heretical are the implications of our arguments for criminal law generally. We will argue that the lesser fictions in drunk driving laws are natural outgrowths of criminal law's Big Fictions. If we are correct, it would be naive to think that other criminal laws are unaffected; undoubtedly, both their validity and utility are undercut by the pathology of legal fictions as well.

#### THE FICTION OF RISK

The Big Fiction of individual responsibility permits us to attribute culpability or blameworthiness to individuals for their behavior. To provide a theoretical framework for considering culpability, let us borrow from the authoritative Model Penal Code, where the kinds of culpability commonly expressed in American law are defined and ordered into (a) "purposely," (b) "knowingly," (c) "recklessly," and (d) "negligently."<sup>24</sup> For our purposes, the least demanding ground for culpability—negligence—is instructive.

The culpability of a person who acts negligently is defined thusly:

A person acts negligently with respect to a material element of an offense when he should be aware of a *substantial* and *unjustifiable risk* that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a *gross deviation* from the standard of care that a reasonable person would observe in the actor's situation.<sup>25</sup>

According to modern thinking on the theory of criminal law, the culpability of a drunk driver rests on whether his behavior presents a substantial and unjustifiable risk of which he should have been aware and which involves a gross deviation from the standard of care owed to others.<sup>26</sup> The definition implies a legal relationship of the drunk driver to the rest of us based on a standard of care or

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<sup>24</sup> MODEL PENAL CODE § 2.02(2) (1962).

<sup>25</sup> *Id.* (emphasis added).

<sup>26</sup> Throughout this discussion, we will utilize the masculine pronoun which, in this case, is justified on empirical grounds. Males are consistently overrepresented in the drinking-driving population. See, e.g., R. JONES & K. JOCELYN, ALCOHOL AND HIGHWAY SAFETY 1978: A REVIEW OF THE STATE OF KNOWLEDGE (1978).

“duty” which, as Fuller notes, is a concept of somewhat indefinite scope.<sup>27</sup> Fuller observes that the “existence of legal rights and duties depends upon how courts and their enforcement agencies act . . . . We have no other test of its ‘reality’.”<sup>28</sup> Consequently, pure legal relations cannot be fictitious.

What muddies the waters, according to Fuller, is the fact that many legal relations are thought to be linked to extra-legal facts. Extra-legal facts can be inaccurate. Hence, legal relations premised upon them may also be fictitious.

Such is the case with negligent culpability for drunk driving.<sup>29</sup> It requires us to discern what, as a matter of fact, constitutes a gross deviation from the duty or standard of care owed. Is there a substantial risk?

Consistent with criminal law’s Big Fiction of harm to the collectivity, one way to assess the risk is to examine the amount of social harm associated with drinking and driving each year. Experts refer to the annual aggregated statistics for alcohol-related traffic accidents which show approximately 25,000 deaths, 700,000 personal injuries, and \$20 billion in property damage,<sup>30</sup> and invite (demand?) us to make the moral attribution of culpability to the drunk driver. Unfortunately, these totals ignore the universe from which the statistics are derived. While the aggregate risk of being in an accident involving a drinking driver may be high (one in two during one’s lifetime according to extrapolations made by the National Highway Traffic Safety Administration),<sup>31</sup> the risk posed by the individual drinking driver may be low. Those who use group level statistics to attribute properties to individuals commit the ecological fallacy.<sup>32</sup> Rather than the average drinking driver posing a substantial risk,

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<sup>27</sup> L. FULLER, *supra* note 6, at 27.

<sup>28</sup> *Id.* at 29.

<sup>29</sup> Since the Model Penal Code defines “recklessly” and “negligently” very similarly, the arguments apply with equal force even if a more stringent level of culpability is employed. The major difference in definitions is that for reckless acts the individual has to “consciously disregard” the risk. Recklessness or culpable negligence are the two approaches that are usually used in attributing a *mens rea* to drunk drivers. See *Isensee, United States v. Fleming: When Drunk Drivers are Guilty of Murder*, 23 AM. CRIM. L. REV. 135 (1985).

<sup>30</sup> NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, *FACTS ON ALCOHOL AND HIGHWAY SAFETY* (1983) [hereinafter NHTSA]. Stated somewhat differently, alcohol is involved in approximately fifty to fifty-five percent of fatal accidents, eighteen to twenty-five percent of accidents resulting in injuries, and five to eight percent of property damage accidents. See J. FELL, *ALCOHOL INVOLVEMENT IN TRAFFIC ACCIDENTS: RECENT ESTIMATES FROM THE NATIONAL CENTER FOR STATISTICS AND ANALYSIS* (1982).

<sup>31</sup> NHTSA, *supra* note 30.

<sup>32</sup> Robinson, *Ecological Correlations and Behavior of Individuals*, 15 AM. SOC. REV. 351 (1950).

the problem may be either that there are a lot of drinking drivers on the road (who individually pose only slightly increased risks) or that a subgroup of drinking drivers is especially dangerous. In either event, however, the group-level social harm should not be used to establish the substantial risk created by the individual drinking driver that is demanded in criminal law's theory of culpability. Although the collectivity may establish the total damage done to it by drunk drivers, it has difficulty demonstrating how all drinking drivers share the responsibility personally.

The driving risk posed by the average drunk driver has been calculated empirically. It is, in both absolute and relative terms, "miniscule."<sup>33</sup> The chances of being involved in an accident when driving while intoxicated are only 4.5 for every 10,000 drunk driving trips,<sup>34</sup> while the risk of fatality associated with drunk driving is estimated at only 1 in 330,000 miles of impaired driving.<sup>35</sup>

The relative increment in the risk of accident posed by the aggregate of drinking drivers over non-drinking ones is estimated to be between three and sixfold.<sup>36</sup> Before attributing legal significance to this increment, however, it is necessary to consider the base of the comparison. The odds of a sober driving trip ending in an accident are .00016.<sup>37</sup> A percentage increase over such a miniscule base is misleading; attributing significance to it is to commit what is

<sup>33</sup> H. ROSS, *DETERRING THE DRINKING DRIVER*, 107 (rev. ed. 1984).

<sup>34</sup> L. SUMMERS & D. HARRIS, *THE GENERAL DETERRENCE OF DRIVING WHILE INTOXICATED: SYSTEM ANALYSIS AND COMPUTER-BASED SIMULATION* (1978).

<sup>35</sup> Voas, *Roadside Surveys, Demographics, and BAC's of Drivers*, in *ALCOHOL, DRUGS, AND TRAFFIC SAFETY* 21 (1975).

The bulk of the available evidence suggests that the low individual risk translates into considerable social harm because some drunk drivers are significantly more dangerous than others. Surveys report that up to eighty percent of American adults admit to drinking and driving. NHTSA, *supra* note 30. However, about seven percent of the drinking population accounts for over sixty-six percent of the alcohol-related fatal crashes. *Id.* Young drivers, especially males under twenty-five, are markedly over-involved in alcohol-related accidents and fatalities. J. HEADLUND, *AN ASSESSMENT OF THE 1982 TRAFFIC FATALITY DECREASE* (1983); NHTSA, *supra* note 30; A. WAGENAAR, *ALCOHOL, YOUNG DRIVERS, AND TRAFFIC ACCIDENTS: EFFECTS OF MINIMUM-AGE LAWS* (1983); Richman, *Human Risk Factors in Alcohol-Related Crashes*, J. *STUD. ON ALCOHOL* (Supplement 10) 21 (1985); Simpson, Mayhew & Warren, *Epidemiology of Road Accidents Involving Young Adults: Alcohol, Drugs, and Other Factors*, 10 *DRUG ALCOHOL DEPENDENCE* 35 (1982). The aggregated harm also increases because of the frequency of drunk driving trips. About two percent of all driver trips involve drunk drivers, L. SUMMERS & D. HARRIS, *supra* note 34, while as many as ten percent of drivers on weekend nights are thought to be drunk. NHTSA, *supra* note 30; Smith, Wolynetz, Davidson, & Poulton, *Estimated Blood-Alcohol Concentrations of Night-Time Canadian Drivers*, *PROCEEDINGS OF THE ANNUAL CONFERENCE OF THE TRAFFIC INJURY RESEARCH FOUNDATION OF CANADA* (1981).

<sup>36</sup> NHTSA, *supra* note 30; L. SUMMERS & D. HARRIS, *supra* note 34.

<sup>37</sup> L. SUMMERS & D. HARRIS, *supra* note 34.



known as the "fallacy of microscopic comparisons."<sup>38</sup> The actual risk remains very low. Because there is little objective risk, failure to perceive a substantial risk under many drinking and driving circumstances hardly constitutes a gross deviation from the standard of care owed.

But the criminal law does not merely accept the fiction of substantial personal risk. Many jurisdictions extend the pathology to further insulate the criminal law from the empirical problem. Several shortcuts to proof have been developed that are particularly illuminating.<sup>39</sup> First, most states accept proof of mental and/or physical impairment in lieu of evidence about driving safety. Second, the legal test in many jurisdictions is *any* degree of impairment.<sup>40</sup> So, although the theory of criminal responsibility requires the state to prove an objective substantial driving risk which constitutes a gross deviation from the standard of care owed to others, the everyday practice of criminal law permits culpability to rest on a demonstration of any impairment irrespective of whether a driving risk is posed.<sup>41</sup> The legal duty owed by the drinking driver is no longer at issue. Through the fiction, we are to assume that drinkers pose substantial driving risks so that we only need to show that a drinking driver is mentally or physically impaired. The legal fiction rationalizes the whole approach and enables the law to avoid having to prove something that may not exist: a substantial risk. The fiction conveniently allows the law to evade the consequence of its own logic, a logic which would make it difficult to obtain drunk driving convictions. Given the major societal harm associated with alcohol-related traffic accidents, there is considerable pressure on lawmakers to evade the logic of criminal law theory in this matter.

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<sup>38</sup> P. HORTON, G. LESLIE & R. LARSON, *THE SOCIOLOGY OF SOCIAL PROBLEMS* (8th ed. 1985).

<sup>39</sup> R. ERWIN, *supra* note 21.

<sup>40</sup> *Id.* at 1-89 - 1-94.

<sup>41</sup> Some courts have held that it is not even necessary for the state to establish a connection between mental and/or physical impairment and driving ability. *See, e.g.*, *Snyder v. City & County of Denver*, 123 Colo. 222, 227 P.2d 341 (1951); *State v. Slater*, 109 N.H. 279, 249 A.2d 692 (1969). Others hold that a link between mental or physical impairment and impaired driving must be established, although it need not be shown that the driver actually drove in an unsafe manner. *See, e.g.*, *Commonwealth v. Connolly*, 394 Mass. 169, 474 N.E.2d 1106 (1985). Thus, for example, the Supreme Court of New Jersey has stated: "It is clear that it is not essential to sustain the charge that the particular operator could not safely drive a car . . . proof that he could operate with safety will not, in and of itself, absolve him." *State v. Johnson*, 42 N.J. 146, 165, 199 A.2d 809, 819 (1964), *cited in* R. ERWIN, *supra* note 21, at 1-94.

## THE FICTION OF A PER SE BLOOD ALCOHOL CONCENTRATION

Another shortcut for evading problems of proof consists in defining the offense of drunk driving in terms of a specified blood alcohol concentration (BAC), usually .10 percent. Statutes which define the offense of drunk driving in terms of a minimum BAC are based on a legislative determination that a given BAC supports an inference of impairment and, by extension, of driving risk. In other words, the logic which supports these statutes operates as a conclusive presumption.

The conclusive presumption says, "the presence of Fact X [a minimum BAC] is conclusive proof of Fact A [impaired driving]." This statement is false, since we know that Fact X does not "conclusively prove" Fact A. And this statement . . . remains false, even though Fact A may by chance be present in a particular case.<sup>42</sup>

The flaw in this kind of fiction is that "it attaches to any given possibility a degree of certainty to which it normally has no right."<sup>43</sup> Fuller maintains that conclusive presumptions necessarily signify legal fictions.<sup>44</sup> Nevertheless, per se drunk driving laws in forty-three states currently rely on the logic of such a device.<sup>45</sup>

In jurisdictions having per se statutes, the state does not need to prove that the driver was drunk or that his faculties were impaired, much less that he was incapable of operating his vehicle safely. Instead it must demonstrate merely that the individual was driving and that he had a BAC at or above the requisite level. The only rebuttal permitted goes to the accuracy of the BAC test and its ability to accurately reflect the defendant's BAC at the time of his driving.<sup>46</sup>

While the constitutionality of per se statutes has been challenged on the ground that they rest on a conclusive presumption which relieves the state of its burden of proof,<sup>47</sup> courts have uniformly upheld them on the hypertechnical ground that no impermissible presumption is involved where blood alcohol content is itself defined as an element of the offense.<sup>48</sup> However, legislative

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<sup>42</sup> L. FULLER, *supra* note 6, at 41-42.

<sup>43</sup> *Id.* at 42.

<sup>44</sup> *Id.* at 40-42.

<sup>45</sup> Kentucky, Maryland, Massachusetts, South Carolina, Tennessee, West Virginia, and Wyoming do not have BAC statutes.

<sup>46</sup> See R. ERWIN, *supra* note 21, at 1-106 - 1-120.

<sup>47</sup> *Mullaney v. Wilber*, 421 U.S. 684 (1975). See also R. PERKINS & R. BOYCE, *CRIMINAL LAW* (3d ed. 1982).

<sup>48</sup> See, e.g., *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984); *People v. Lewis*, 148 Cal. App. 3d 614, 196 Cal. Rptr. 161 (1983); *State v. Woerner*, 16 Ohio App. 3d 59, 474 N.E.2d 354 (1984); *Commonwealth v. Hernandez*, 339 Pa. Super. 32, 488 A.2d 293 (1985); *Forte v. State*, 683 S.W.2d 145 (Tex. Ct. App. 1985). For another example of

determinations and judicial interpretations do not cure the logical and empirical problems of conclusive presumptions. Such legal contrivances illustrate the lengths to which criminal law theory is extended in order to manage the tension between social defense and individual responsibility.

Ironically, it is civil law (where standards of proof are supposed to be more relaxed) which provides the most dramatic exposé of the pathology created in the criminal law by per se BAC statutes. Despite the fact that criminal negligence is defined in terms of "substantial risk" and "gross deviation" from the standard of care owed to others, while tort law definitions of negligence ignore the degree of risk and refer to the "omission to use ordinary care,"<sup>49</sup> civil courts are reluctant to hold that BAC's under .20 percent constitute per se evidence of negligence.<sup>50</sup> Civil litigants must plead and prove how drinking and driving violated a standard of ordinary care in a way that caused injury, at least in cases of contributory negligence.<sup>51</sup> Nothing is presumed!

One of the reasons why BAC performs a fictitious transformation is that it indicates merely a physiological status. Impaired driving is a deviant behavior. Yet a BAC bears no necessary and consistent connection to actual driving behavior,<sup>52</sup> and not even a strong probabilistic one if we are to believe the epidemiological literature. We already have noted the low risk of accidents among drinking drivers. The risk of arrest is equally low, with best estimates ranging from one arrest in between 200 and 2000 occur-

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the way in which offense definitions can be manipulated to avoid problems of proof, consider the recent case of *Whitley v. Albers*, 106 S. Ct. 1078 (1986), where the Supreme Court upheld a state statute which made the display of a weapon during the commission of a robbery a sentencing consideration rather than an element of the offense. Through this strategy, the legislature relieved the prosecutor of having to meet the traditional beyond a reasonable doubt standard, see *In re Winship*, 397 U.S. 358 (1970), substituting instead the more relaxed requirement of preponderance of the evidence. Per se BAC statutes accomplish similar ends. They relieve the state of the difficult burden of proving a risk of harm, and substitute instead a requirement that the state prove only a physiological status.

<sup>49</sup> BLACK'S LAW DICTIONARY 1184 (4th ed. 1968).

<sup>50</sup> See R. ERWIN, *supra* note 21.

<sup>51</sup> Although it is true that a lesser standard of proof (preponderance of evidence) applies in the civil context, it is important to note that the interested party must take affirmative steps to offer evidence which persuades the trier of fact that the party alleged to have committed the injury acted negligently. He cannot merely rely on the BAC as proof. For discussion, see R. ERWIN, *supra* note 21.

<sup>52</sup> See, e.g., R. BROKENSTEIN, R. CROWTHER, R. SHUMATE, W. ZIEL, & R. ZYLMAN, *THE ROLE OF THE DRINKING DRIVER IN TRAFFIC ACCIDENTS (THE GRAND RAPIDS STUDY)* (1984); Cameron, *Alcohol and Traffic*, in *ALCOHOL, CASUALTIES AND CRIME* 120 (1977); Zylman, *Mass Arrests For Impaired Drivers May Not Prevent Traffic Deaths*, in *ALCOHOL, DRUGS AND SAFETY* 225 (S. Israelstam & S. Lambert eds. 1975).

rences of driving while intoxicated.<sup>53</sup> Moreover, the average BAC of arrested drivers is .20 percent—twice the level presumed for impairment in most states.<sup>54</sup> Either the police are not enforcing the law or visible signs of impairment (i.e., behavioral indicators) rarely occur at the .10 percent BAC level.<sup>55</sup>

Students of behavior should, however, expect slippage between a physiological indicator and actual behavior. As with any behavior, drunk driving shows remarkable variability. There already exists an entire literature showing that, to an important extent, drunken comportment is learned.<sup>56</sup> Some of the research findings are instructive. In the United States, people tend to drink more if they think that they are drinking alcohol. They feel more sexually aroused when they think that they are drinking alcohol. Men become less anxious and women more anxious when they think that they are drinking. Men become more aggressive when they think that they are drinking. And while there is well-documented evidence that alcohol consumption has certain pharmacological effects at the .10 percent BAC level—reducing sensorimotor coordination<sup>57</sup> and reaction time<sup>58</sup>—there is considerable evidence that the loss of inhibi-

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<sup>53</sup> L. SUMMERS & D. HARRIS, *supra* note 34; Beitel, Sharp & Glauz, *Probability of Arrest While Driving Under the Influence of Alcohol*, 36 J. STUD. ALCOHOL 109 (1975); Voas, *supra* note 35.

<sup>54</sup> NHTSA, *supra* note 30.

<sup>55</sup> There is even preliminary evidence that hung-over drivers (whose BAC's have returned to .00) do as poorly on road performance tests as do drunk drivers with BAC's at or beyond the presumptive level. H. LAURELL & J. TOERNOS, HUNG-OVER EFFECTS OF ALCOHOL ON DRIVER PERFORMANCE (1981); Laurell & Toernos, *Investigation of Alcoholic Hangover Effects on Driving Performance*, 20 BLUTALKOHOL 489 (1983).

<sup>56</sup> See, e.g., R. AKERS, *DEVIAN'T BEHAVIOR: A SOCIAL LEARNING APPROACH* (3d ed. 1985); C. MACANDREW & R. EDGERTON, *DRUNKEN COMPORTMENT: A SOCIAL EXPLANATION* (1969); Marlatt & Rohsenow, *The Think-Drink Effect*, *PSYCHOLOGY TODAY*, Dec. 1981, at 60.

<sup>57</sup> Linnoila, Erwin, Cleveland, Logue, & Gentry, *Effects of Alcohol on Psychomotor Performance of Men and Women*, 39 J. STUD. ALCOHOL 745 (1978); Linnoila, Erwin, Ramm & Cleveland, *Effects of Age and Alcohol on Psychomotor Performance of Men*, 41 J. STUD. ALCOHOL 488 (1980); Valeriotte, Tong, & Druding, *Ethanol, Tobacco, and Laterality Effects on Simple and Complex Motor Performance*, 40 J. STUD. ALCOHOL 823 (1979).

<sup>58</sup> H. WALLGREN & H. BARRY, *ACTIONS OF ALCOHOL* (1970); Burns & Moskowitz, *Effects of Diphenhydramine and Alcohol on Skills Performance*, 17 EUR. J. CLINICAL PHARMACOLOGY 259 (1980); Huntley, *Effects of Alcohol and Fixation-Task Difficulty on Choice Reaction Time to Extrafoveal Stimulation*, 34 Q.J. STUD. ALCOHOL 89 (1973); Huntley, *Influences of Alcohol and S-R Uncertainty Upon Spatial Localization Time*, 27 PSYCHOPHARMACOLOGIA 131 (1972); Moskowitz & Burns, *Effect of Alcohol on the Psychological Refractory Period*, 37 Q.J. STUD. ALCOHOL 782 (1971); Moskowitz & Murray, *Alcohol and Backward Masking of Visual Information*, 37 J. STUD. ALCOHOL 40 (1976); Moskowitz & Roth, *Effect of Alcohol on Response Latency in Object Naming*, 32 Q.J. STUD. ALCOHOL 969 (1971); but see Linnoila, Erwin, Cleveland, Logue & Gentry, *supra* note 57; Linnoila, Erwin, Ramm & Cleveland, *supra* note 57; Linnoila, Saario & Maki, *Effect of Treatment with Diazepam or Lithium and Alcohol on Psychomotor Skills Related to Driving*, 7 EUR. J. CLINICAL PHARMACOLOGY 337 (1974).

tions attributed to alcohol use is culturally learned. Important aspects of drunken behavior, such as risk-taking and aggressiveness, are not pharmacological at all, but are differentially learned. This helps to explain why young single males are disproportionately involved in alcohol-related accidents.<sup>59</sup>

Young males have learned to associate the cultural concomitants of drinking with driving, which translate into speed, nonchalance, risk-taking, and aggression. The more substantial risk posed by these drivers need not be due to the alcohol itself but to how they have learned—or failed to learn—to drink and drive.<sup>60</sup> Others of us may have learned to take extra precautions when we drink and drive: we slow down, we constantly check our rear view mirrors and double check for cars at intersections. We define the situation as requiring us to compensate for any physical effects of alcohol consumption. A physiological status like BAC cannot address such differential learning.

The problem with using a physiological status instead of behavioral indicators is compounded by the fact that even the pharmacological effects of alcohol on people are not uniform. People have varying tolerances or sensitivities to alcohol, as with most other drugs. Different dosages have different effects in different people. For alcohol, we know that tolerances vary by age (e.g., older people have less tolerance), metabolism rates, the presence of high protein foods in the digestive tract, and the extent of prior use.<sup>61</sup>

Several additional reservations should be noted with regard to per se drunk driving statutes. The problematic nature of the BAC is apparent in the disagreement across jurisdictions about what the presumptive BAC should be. It ranges from .08 percent in Utah and Oregon, to .10 percent in most states, with higher levels required in Georgia (.12 percent), Iowa (.13 percent), Virginia (.15 percent), and Colorado (.15 percent).<sup>62</sup> Evidently there is disagreement about when a given blood alcohol level impairs driving, even among policy makers.

Our faith in a per se BAC (misguided as it may be) also must extend to instrumentation and administration. Both may prove un-

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<sup>59</sup> SNOW & CUNNINGHAM, *Age, Machismo, and The Drinking Locations of Drunken Drivers: A Research Note*, 6 *DEVIANANT BEHAV.* 57 (1985).

<sup>60</sup> See, e.g., R. JONES & K. JOCELYN, *supra* note 26; CARLSON, *Age, Exposure and Alcohol Involvement in Night Crashes*, 5 *J. SAFETY RES.* 247 (1973); ZYLMAN, *Youth, Alcohol, and Collision Involvement*, 5 *J. SAFETY RES.* 58 (1973).

<sup>61</sup> See generally R. AKERS, *supra* note 56; J. GUSFIELD, *THE CULTURE OF PUBLIC PROBLEMS: DRINKING-DRIVING AND THE SYMBOLIC ORDER* (1981).

<sup>62</sup> See R. ERWIN, *supra* note 21.

reliable.<sup>63</sup> For example, Dumbowski, perhaps the leading expert on the subject, reports that "alcohol analysis results even under highly controlled conditions can and do rapidly oscillate in short time periods above or below any given concentration."<sup>64</sup> He further argues that "it is impossible or unfeasible to convert the alcohol concentration of breath or urine to the simultaneous blood alcohol concentration with forensically acceptable certainty."<sup>65</sup>

The law assumes that people can accurately monitor their blood alcohol levels in order to conform. Whether they can is an open empirical question, but we must admit to some skepticism.<sup>66</sup> If self-monitoring is not easily within the power of individuals, the "inner morality" of the BAC standard must also be questioned.<sup>67</sup>

We must conclude that the fiction of the BAC reflects a pathology consistent with Fuller's argument. It mirrors one of criminal law's Big Fictions in that it tries to locate an individual property (the BAC) as the key to understanding a complex physiological and cultural phenomenon—alcohol-impaired driving. In erecting per se standards, however, the criminal law drifts from its behavioral grounding. The pathology is overlooked because of the overriding concern for social defense. The unfortunate irony is that per se BAC legislation has done remarkably little to protect the general welfare.<sup>68</sup> The ultimate utility of the per se fiction lies in the somewhat less remarkable fact that the fiction avoids problems of proof associated with alcohol-related driving behavior—problems of proof that have been documented historically by the rate of jury acquittals

<sup>63</sup> See generally R. ERWIN, *supra* note 21; J. GUSFIELD, *supra* note 61.

<sup>64</sup> Dumbowski, *Absorption, Distribution and Elimination of Alcohol: Highway Safety Aspects*, J. STUD. ALCOHOL (Supplement 10) 98, 105, (1985).

<sup>65</sup> *Id.* Interestingly, Dumbowski has suggested that jurisdictions using per se definitions might circumvent this problem by defining the per se element in terms of breath alcohol concentrations rather than blood alcohol concentrations. Some state legislatures have already revised their criminal codes in this regard, making it easier to obtain convictions using breathalyzer tests. See, e.g., ALASKA STAT. § 28.35.030(a) (1984); OHIO REV. CODE ANN. § 4511.19(a) (1983). Thus, the fiction is extended!

<sup>66</sup> That people cannot accurately monitor their own blood alcohol levels is suggested by the fact that research is currently underway to develop techniques that individuals can use to estimate impairment in themselves and others. Thus far, such efforts have been largely unsuccessful. See, e.g., J. STUD. ALCOHOL (Supplement 10) (1985). Nevertheless, per se BAC statutes have been regularly upheld in the face of challenges on vagueness grounds. See R. ERWIN, *supra* note 21, at 1-125 - 1-131. Under these circumstances, certainly "it behooves the government to provide a means for people to determine whether or not they are breaking the law." Jonah, *Panel Discussion, Legal Countermeasures*, J. STUD. ALCOHOL (Supplement 10) 170 (1985).

<sup>67</sup> See L. FULLER, *supra* note 6, at 33-41.

<sup>68</sup> See, e.g., H. ROSS, *supra* note 33; P. WHITEHEAD, *DETERRENCE OF DRINKING-DRIVING: PRIORITIES IN PUBLIC POLICY* (1977); Votey, *Recent Evidence From Scandinavia on Detering Alcohol Impaired Driving*, 16 ACCIDENT ANALYSIS & PREVENTION 123 (1983).

in drunk driving cases prior to the enactment of per se laws.<sup>69</sup> Rather than requiring proof of drunk driving behavior, the criminal law, much as Fuller surmised, accepts the persuasion of metaphor (i.e., alcohol impaired driving is a published BAC).

#### FICTITIOUS IMPUTATION OF CAUSE

Combining fictions of risk and BAC provides new ways to extend the construction of the drunk driver as criminal. If a driver having a BAC of .10 percent is presumed to be driving drunk, and if drunk driving is presumed to create substantial risk, then injuries or deaths associated with alcohol-related traffic accidents are not "accidents" at all. They are construed to be foreseeable outcomes, the cause of which can be attributed to alcohol use. Acceptance of the first two fictions permits a probabilistic statement about cause that may be logically derivative but that is empirically inaccurate. In effect, when legal fictions build upon each other, the accuracy of the derivative fiction is a function of its components.

The whole matter of cause in legal theory is highly stylized—perhaps even "mystifying."<sup>70</sup> Legal theories depart radically from philosophical and social science perspectives:

As a matter of *fact* there are many causes of every result, but whenever a problem of this nature requires judicial determination, the point of the approach is to see "which antecedent shall . . . be selected from an infinite series of antecedents as big with the event." In other words, the effort is to determine which cause "ought to be treated as the dominant one with reference not merely to the event itself, but to the jural consequence that ought to attach to the event."<sup>71</sup>

In law, legal significance is attached to some causes but not others for policy reasons.

Both of criminal law's Big Fictions offer grounds for identifying alcohol use as a legally-recognized cause. Social defense requires that the collectivity adopt some countermeasures to reduce alcohol-related accidents. In fact, in some jurisdictions the state not only selects drunk driving as a preferred cause, but considers it to be an aggravating circumstance. So, for example, the California traffic code automatically makes the drunk driver who injures another guilty of a felony.<sup>72</sup>

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<sup>69</sup> See H. KALVEN AND H. ZEISEL, *THE AMERICAN JURY* (1966).

<sup>70</sup> See B. CARDOZO, *PARADOXES OF LEGAL SCIENCE* (1928).

<sup>71</sup> R. PERKINS & R. BOYCE, *supra* note 47, at 781 (citing B. CARDOZO, *supra* note 70, at 82, 83).

<sup>72</sup> CAL. VEH. CODE, § 23101 (West 1985). This provision of California's penal code calls to mind Gusfield's observation that:

For many in American culture, people who drink and then drive take chances with

Criminal law's fascination with contrasting involuntary and voluntary intoxication signifies the influence of the Big Ficion of individual responsibility.

Voluntary intoxication is not limited to those instances in which drunkenness was definitely desired or intended but includes all instances of culpable intoxication. It may be voluntary although the drinking was induced by the example or persuasion of another, and the mere fact that the liquor or drug was supplied by someone else does not tend in any way to show that intoxication was involuntary. Drunkenness will be presumed to be voluntary unless some special circumstance is established to remove it from that category.<sup>73</sup>

Not only is voluntary intoxication presumed, but courts are increasingly willing to find implied malice on the part of drunk drivers who have been in fatal accidents, thereby increasing the level of culpability and punishment.<sup>74</sup>

The imputation of cause in drunk driving law frequently operates like a rebuttable presumption. The drinking is presumed to be the cause of injuries or death arising from an alcohol-related accident where the drunk driver is at fault. Drunk driving is imputed to be a legal cause if it was (a) an antecedent, (b) a substantial factor (not *de minimus* or trivial), and (c) not remote (i.e., not isolated by an independent intervening cause (like faulty brakes) or an abnormal response by another entity (as a deer darting into the auto's path). Even if drunk driving were otherwise remote, it may still be deemed a legal cause if the consequences were foreseeable (as when the evasive action to avoid the deer was affected by slowed reaction time).<sup>75</sup>

Although the imputation of cause to drunk driving in alcohol-related accidents is technically rebuttable, Fuller argues that there are three requirements if such a device is to escape the charge of fiction: it must (1) be based on an inference justified by common experience, (2) be freely rebuttable, and (3) order not an inference, but a disposition of the case.<sup>76</sup> We shall apply these requirements to the imputation of cause in drunk driving cases.

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other people's lives in a manner more criminal than do others who, while sober, manufacture dangerously designed autos, who drive when too young or too old, who drive too fast for the conditions of the road, who drive defective autos, who drive when fatigued or who drive without using seat belts. While the contribution of any of these conditions to the aggregate of auto accidents may be greater or lesser than the use of alcohol, they do not create the same moral drama; they do not elicit the same concern for moral justice.

J. GUSFIELD, *supra* note 61, at 75.

<sup>73</sup> R. PERKINS & R. BOYCE, *supra* note 47, at 1001.

<sup>74</sup> Isensee, *supra* note 29.

<sup>75</sup> For a general discussion of legal causations, see R. PERKINS & R. BOYCE, *supra* note 47, at 769-825.

<sup>76</sup> L. FULLER, *supra* note 6, at 45.



We must confess to some consternation regarding Fuller's first condition. Justifying an inference by common experience does not render it accurate—indeed, it may prolong the fiction. Such a consensus view of “truth” can do much mischief, as is graphically illustrated by historical, popularly supported inferences about witchcraft.<sup>77</sup>

Instead of common experience, let us use the available research literature as the basis for judgment. The drunk driving literature counsels us to be cautious in imputing cause. We already have discussed the problem of separating the pharmacological effects of alcohol from the differential learning effects and have suggested that the latter are important for explaining drunken comportment. Indeed, the dominant scientific point of view would not permit the law's facile imputation of cause to alcohol:

Although research has clearly indicated that alcohol plays a substantial role in traffic problems, both at the time of the accident and in the personal histories of accident-involved persons, any general, single-cause model of traffic accidents cannot account for the intricate relationships of personality, situational, and demographic factors in the chain of events which lead to traffic crashes.<sup>78</sup>

The ability to rebut the imputation of legal cause to alcohol use in traffic accidents is practically constrained in the everyday operation of the criminal law. The fiction of the BAC coupled with the fiction of risk effectively stack the deck against rebuttal, revealing the ideological function of fictions as discussed by Fuller.<sup>79</sup> The scientific metaphor of the BAC and the moral metaphor of high risk (and therefore culpability) are extremely persuasive even though neither may be empirically grounded. The negligent driver who kills someone in a traffic accident may be only civilly liable, unless he has a BAC of .10 percent. Through the metaphor of legal fictions, the identical driving behavior (e.g., running a red light) can be seductively transformed into criminal homicide without any additional showing of whether or how alcohol affected the driving behavior. The public as well as members of the scientific community are persuaded:

The carnage *produced* on the highways by drunk drivers and the personal tragedy of the victims and the victim's families coupled with the common practice in court of meting out very lenient sentences and penalties even in cases where deaths have been *caused* by drunken driv-

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<sup>77</sup> Currie, *The Control of Witchcraft in Renaissance Europe*, in *THE SOCIAL ORGANIZATION OF LAW* 344 (1973).

<sup>78</sup> Cameron, *supra* note 52, at 258.

<sup>79</sup> Others may interpret this as the “mystification function” of law. See, e.g., W. CHAMBLISS & R. SEIDMAN, *supra* note 2.

ers has produced outrage and moral crusades to get such drivers off the roads.<sup>80</sup>

As Simpson has observed, we have mythologized the "killer drunk."<sup>81</sup> A complex, multi-causal reality has been simplified to attribute cognizable cause to alcohol use and to attribute social pathology and moral reprehensibility to the drinking driver.

Fuller's final requirement for nonfictitious, rebuttable presumptions was that they articulate contingencies that order the disposition of cases rather than dictate particular inferences. But he recognized the difficulty of achieving this in practice: "our professional linguistic habits tend to keep us in the paradoxical position of insisting that a rebuttable presumption *does not change anything* and at the same time of asserting that it is *necessary*—that without it a different result might be reached."<sup>82</sup> For the purpose of social defense, we may very well insist that the special causal significance assigned to alcohol use is necessary, but we do not want to admit that the preference distorts why we hold individuals personally responsible. The tension between social defense and individual responsibility is manifest in the imputation of legal cause to drinking drivers.

#### SUMMARY AND IMPLICATIONS

Criminal law theory on drunk driving utilizes a variety of fictions that permit us to study how legal thought influences legal behavior. Although the law on drunk driving can rely on epidemiological studies to establish a social threat against which the collectivity must defend, there is empirical difficulty in translating the aggregate damage into a substantial risk posed by individuals. Such a transformation is nonetheless a requirement of criminal law theory on culpability. To resolve the tension between the Big Fictions of social defense and individual responsibility, a few convenient lesser fictions have been created.

First, several logical fallacies are tolerated to permit the construction of an exaggerated estimate of individual risk. The social harm associated with alcohol-related accidents at the aggregate level is attributed to a condition shared by all individual drinking drivers. That there is substantial harm to the group, however, does not logically require the inference that individual drinking drivers pose a substantial risk. To infer individual properties from group-level statistics is to commit the ecological fallacy. The logical flaw is ex-

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<sup>80</sup> R. AKERS, *supra* note 56, at 166 (emphasis added).

<sup>81</sup> SIMPSON, *Human-Related Risk Factors in Traffic Crashes: Research Needs and Opportunities*, J. STUD. ALCOHOL (Supplement 10) 32, 37 (1985).

<sup>82</sup> L. FULLER, *supra* note 6, at 45.

posed by examining the empirical record: the actual risk posed by individual drinking drivers is miniscule.

A common way to accentuate the perception of risk is to compare it to that posed by non-drinking drivers. Doing so, however, involves the fallacy of microscopic comparisons and does not alter the fact that the risk remains unsubstantial. At the individual level of analysis, automobile accidents occur so infrequently (even as a proportion of all drinking and driving occasions) that the criminal justice system's ability to react effectively is doubtful.<sup>83</sup>

The legal fiction of risk is compounded in practice because of the difficulty in proving something that, at least empirically, is illusory. To solve the problem, not only does the criminal law sever alcohol-induced impairment of mental or physical faculties from driving ability, but it also accepts any degree of impairment as proof of drunk driving. To further promote certainty where little exists, the law frequently adopts the fiction of a published blood alcohol concentration as proof of impaired driving ability. Through this fiction, a physiological status is substituted for behavioral indicators. Although convenient for the apprehension and successful prosecution of individuals, such subtle legal machinations do little to affect the aggregate social harm.

There are several reasons for the failure associated with BAC statutes. First, a BAC is only imperfectly related to behavior because individuals have different physiological tolerances for alcohol (which may vary with situational factors) and because drunken behavior is, to some extent, differentially learned. Consequently, the risk posed by drivers having the same BAC may be very different. Second, there are problems of reliability associated with the instrumentation and administration of breath, blood, and urine alcohol tests. Third, we are not at all sure that individuals can accurately monitor their BAC's. Finally—and this criticism applies to both BAC statutes and those that take the more traditional approach of defining drunk driving in terms of indicators of impairment—the failure of these statutes to limit the social harm in alcohol-related accidents derives from intervening at the individual level to try to deter alcohol-related accidents.

There is little evidence that deterrence-based policies are effective, not only with respect to drunk driving,<sup>84</sup> but with respect to

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<sup>83</sup> Attempts to deter drunk driving have proven notably unsuccessful. While beneficial effects are often noted in the short run, they are usually of very short duration. For an extended discussion, see H. Ross, *supra* note 33.

<sup>84</sup> See H. Ross, *supra* note 33.

criminal behavior generally.<sup>85</sup> The criminological literature is replete with studies demonstrating the failure of deterrence-based social policies. The threat of punishment is ineffective as a social control device, especially where there is little likelihood that punishment will actually be imposed. (Recall that the risk of arrest is only 1 in every 200 to 2000 occurrences of driving while intoxicated).<sup>86</sup>

The most notably successful legal countermeasure to stem the harm from alcohol-related accidents has been to raise the minimum drinking age.<sup>87</sup> This strategy employs a group-level approach, in that it targets the subgroup of young, inexperienced drivers known to have a higher risk of being in alcohol-related accidents. This solution is effective because, in addition to focusing on a high-risk population, it seeks to reduce consumption and, hence, opportunity, rather than attempting to deter by reducing the motivation to drive while drunk. Finally, the strategy of raising the minimum drinking age does not have to rely on the identification and apprehension of individual offenders in order to work. It is a preventive rather than a reactive approach. Raising the minimum drinking age—along with such other preventive measures as improving road design, controlling media portrayals of drinking, and raising the minimum driving age—are policies which recognize that drinking and driving occur in a larger social context the modification of which may lead to a reduction in alcohol-related accidents.<sup>88</sup>

The third legal fiction about drinking and driving reflects what

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<sup>85</sup> See, e.g., DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES (A. Blumstein, J. Cohen & D. Nagin eds. 1978); J. GIBBS, CRIME, PUNISHMENT, AND DETERRENCE (1975); C. TITTLE, SANCTIONS AND SOCIAL DEVIANCE (1977); F. ZIMRING & G. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL (1973); Erickson & Gibbs, *Objective and Perceptual Properties of Legal Punishment and the Deterrence Doctrine*, 25 SOC. PROBS. 253 (1978); Geerken & Gove, *Deterrence, Overload, and Incapacitation: An Empirical Evaluation*, 56 SOC. FORCES 424 (1977); Paternoster, Saltzman, Waldo & Chiricos, *Perceived Risk and Social Control: Do Sanctions Really Deter?* 17 LAW & SOC. REV. 457 (1983); Piliavin, Gartner, Thornton & Matsueda, *Crime, Deterrence, and Rational Choice*, 51 AM. SOC. REV. 101 (1986); Thomas & Bishop, *The Effect of Formal and Informal Sanctions on Delinquency: A Longitudinal Comparison of Labeling and Deterrence Theories*, 75 J. CRIM. L. & CRIMINOLOGY 1222 (1984).

<sup>86</sup> See L. SUMMERS & D. HARRIS, *supra* note 34; Bietal, Sharp & Glauz, *supra* note 53; Voas, *supra* note 35.

<sup>87</sup> See NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, EVALUATION OF MINIMUM DRINKING AGE LAWS USING THE ELECTRONIC INJURY SURVEILLANCE SYSTEM (1982); A. WAGENAAR, *supra* note 35; Cook & Tauchen, *The Effect of Minimum Drinking Age Legislation on Youthful Auto Fatalities, 1970-1977*, 13 J. LEGAL STUD. 169; Williams, Zador, Harris & Karpf, *The Effect of Raising The Legal Minimum Drinking Age on Fatal Crash Involvement*, 12 J. LEGAL STUD. 169 (1983).

<sup>88</sup> See, e.g., Bonnie, *Regulating Conditions of Alcohol Availability*, J. STUD. ALCOHOL (Supplement 10) 129 (1985); Waller, *Licensing and Other Controls of the Drinking Driver*, J. STUD. ALCOHOL (Supplement 10) 150 (1985).

amounts to a rebuttable presumption regarding causation. Although the criminal law acknowledges the likelihood of multiple causation, it nevertheless permits the attribution of special significance to single causative factors. Alcohol use in traffic accidents is one of the single causes stressed by the criminal law, even though alcohol use may have been a remote cause. Other contributory factors are de-emphasized for purposes of imputing responsibility. Neither cultural factors (e.g., the normative climate surrounding alcohol consumption)<sup>89</sup> nor structural factors (e.g., poor road or automobile design) are considered for purposes of affixing criminal responsibility in drinking and driving cases.

The preceding analysis of legal fictions illustrates how legal structures are value-laden even if individual legal actors are primarily value-neutral. As Chambliss and Seidman note, "[e]very decision-making structure limits the range of potential inputs with respect to the problems to be considered, the potential hypotheses for their solution, and the data to be examined. By these limitations, decision-making structures necessarily predetermine the range of potential outputs."<sup>90</sup> The legal fictions incorporated in the law of drunk driving make handling cases more convenient, but they also limit inputs and outcomes. With respect to drunk driving, inputs and outcomes which address group-level processes are systematically ignored by the law. Ironically, strategies which address these group-level processes may be far more effective in curtailing the aggregate social harm.

By extending Fuller's insights into legal fictions, we have tried to make sense out of both the legal theory on drunk driving and the empirical literature on drinking and driving. We have argued that the current theory of criminal law contains two Big Fictions: collectivized defense and individual responsibility. The tension created by the opposing pulls of these presuppositions gives rise to lesser legal fictions which influence the implementation of the law in everyday situations. It has been our thesis that one cannot understand either the criminal definition of drunk driving or the legal response to it without appreciating the role of these fictions. Finally, we have asserted that the failure of most criminal justice interventions to

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<sup>89</sup> See, e.g., Andenaes, *The Effects of Scandinavia's Drinking-and-Driving Laws: Facts and Hypotheses*, 6 SCANDINAVIAN STUD. CRIMINOLOGY 35 (1978); Larsen & Abu-Laban, *Norm Qualities and Deviant Drinking Behavior*, 15 SOC. PROBS. 441 (1968); Mizruchi & Perrucci, *Norm Qualities and Differential Effects of Deviant Behavior: An Exploratory Analysis*, 27 AM. SOC. REV. 391 (1962); Ross, *Costs, Benefits, and Alternatives: Another Look at Detering Drinking Drivers* 3 JUSTICE Q. 167 (1986) Wallace, *Drinking and Abstainers in Norway: A National Survey*, Q.J. STUD. ALCOHOL 129 (1972).

<sup>90</sup> W. CHAMBLISS & R. SEIDMAN, *LAW, ORDER, AND POWER* 113 (1971).

control the social harm associated with drinking and driving is predictable given the nature of the legal fictions. The most damning indictment of the frame of mind fostered by these fictions is that it has prevented us from searching for more effective means of social defense (e.g., passive restraints).

To the extent that the tension between the two Big Fictions applies to virtually all substantive crimes, this analysis has wider implications. The legal definitions of other crimes are necessarily limited and affected by the Big Fictions, the tension between them, and any derivative lesser fictions. The legal reaction is similarly limited. Our ability to respond to and alleviate social harm is consequently constrained, and some of the resulting well-intentioned interventions may be doomed to failure. Meanwhile, the individuals caught in the criminal justice system are treated unidimensionally. We not only screen out some of the reality but also distort retained features of reality to make the theory of criminal law work. Challenging the lesser fictions through logical and empirical analysis reveals these distortions and raises nagging doubts about the justice of it all. If our analysis is correct—if the current theory of criminal law posits contradictory Big Fictions which give rise to derivative lesser ones that distort reality and compromise justice—then perhaps a radical rethinking of both the premises of criminal law theory and the applications of criminal law are in order.