

John Rawls on Two Concepts of Rules

Some Speculations about Their Ecological Validity in Behavioral and Social Science Research

AARON V. CICOUREL University of California, San Diego, CA, USA

ABSTRACT Over fifty years have passed since the publication of John Rawls' paper 'Two Concepts of Rules' (1955). The paper remains a unique work. Rawls' seminal 'distinction between justifying a practice and justifying a particular action falling under it' (1955: 3) provides us with a powerful analytic proposition that can have extensive theoretical and empirical consequences for the social sciences, as I seek to demonstrate below. In footnote 1 on page 3, Rawls states that 'practice' is a technical term that refers to 'any form of activity specified by a system of rules which defines offices, roles, moves, penalties, defenses, and so on, and which gives the activity its structure. As examples one may think of games and rituals, trials and parliaments.' Rawls' philosophical objective was to defend utilitarianism vis-à-vis 'punishment and the obligations to keep promises.' The general idea was to provide a clearer understanding of a rule regardless of whether or not it is defensible. The notion of two conceptions of rules is central to his discussion. I ask: can Rawls' unique analytical notion of two concepts of rules be clarified by empirical research in the social sciences? I present some recent data from a criminal justice case to illustrate the notion's potential and limitations. The empirical circumstances are somewhat dramatic. The case involved an allegation of inter-racial sexual molestation and two counts of Grand Theft. The sexual molestation allegation is a theme at the heart of deep-seated cultural tensions between Caucasians and African Americans that can be traced back to initial importation of slaves from Africa. The inter-racial sexual molestation allegation was documented in detail by two law-enforcement agencies but was never pursued. One major consequence of this decision was to render empirically problematic the issue of when a case is said to fall under a rule of law.

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In order to defend the distinction between utilitarianism and the retributive view of punishment, Rawls introduces a key phrase:

To explain how the significance of the distinction may be overlooked, I am going to discuss two conceptions of rules. One of these conceptions conceals the importance of distinguishing between the justification of a rule or practice and the justification of a particular action falling under it. The other conception makes it clear why this distinction must be made and what is its logical basis.

(1955: 4)

Rawls' distinction leads to interesting empirical consequences if we recognize that an individual or group's cognitive/cultural/linguistic understanding of a rule must be embedded in the practical, locally organized social interaction in which a decision is made that a rule can be applied. For example, when we possess some sense of the extent to which an individual (or participants) claims that a particular action falls under a given rule, the action must be shown to be consistent with existing observable/reportable social/cultural, scientific or technical practices. Rawls continues:

From my introductory remarks it is obvious that the resolution which I am going to propose is that in this case one must distinguish between justifying a practice as a system of rules to be applied and enforced, and justifying a particular action which falls under these rules; utilitarian arguments are appropriate with regard to questions about practices, while retributive arguments fit the application of particular rules to particular cases.

(1955: 5)

The idea that a 'practice' or 'rule' is a 'system' that can be applied and enforced suggests that abstract, bureaucratically derived statements such as legal statutes, institutional codes of conduct, written corporate policies and procedures, and similar forms of guidelines or mandatory behavior are sufficiently self-evident such that they can be readily applied and enforced. The application and enforcement of a practice as a system of rules to particular cases presumes decisions based on diverse empirical circumstances that can vary considerably in different legal settings. The kinds of evidence invoked and scrutinized by adversaries and monitored by judges and related entities occur in socially organized settings in which both explicit and implicit judgments are made, mediated, and called into question. Understanding these judgments remains a daunting empirical challenge.

In Rawls' paper, the assumed prototypical bureaucracy is a legal or judiciary system. I assume that challenging the way rules or regulations come into existence is not the focus of his discussion. Instead, he addresses how utilitarian

references to such rules or abstract regularities are to be applied and enforced within a retributive framework. For Rawls, the issue of ‘documentation’ also is not a concern: for example, showing (‘justifying’) empirically how frames of reference come into existence (Kahneman and Miller, 1986) from which judgments are made or briefs are crafted about how a particular action can be said to fall under a given ‘system of rules.’

Every set of socially organized and formally stated policies or rules and practices, for example, presupposes informal, tacit or implicit non-contractual conditions as noted by Durkheim (1947: 6–14; and Parsons, 1949: ch. VIII). In addition, the judgments that must be made are often empirically illusive, and require references to procedures by which notes are created based on reading written documents, local observations of a setting, the use of open-ended and forced-choice elicitation techniques, and discourse preserved by audio- or video-recordings or a court reporter. An additional gap exists between what is formally documented by a socially organized system or institution (for example, the use of official reports and aggregated information such as numerical distributions) and inferences based on implicit actions or decisions (Polanyi, 1958) within a world assumed to be known in common and taken for granted (Schutz, 1962).

The term ‘practices’ as used in the present work shall refer to observable action or activities in real time, as well as using such observations to claim or ‘verify’ that particular cases have or can be justified by reference to identifiable ‘rules’ or system thereof.

The justification of ‘particular actions’ by personnel claiming the legal right to represent individuals, groups, nation-states or institutional or tribal settings, therefore, assumes that ‘appropriate evidence’ (witnesses, physical and electronic artifacts, verbal and nonverbal communication) can be produced to convince a legislature, a committee or board, judge(s) or legal tribunal or jury that a particular set of descriptive verbal, visual or acoustic actions or retributive judgments falls under a system of specifiable, identifiable rules. Yet, despite the legal precautions that exist within a judicial system, the notion of the prosecution’s goal may be to ‘paint’ the defendant as an ‘evil person,’ or as ‘predatory,’ or ‘deceitful,’ or ‘abusive,’ ‘greedy,’ a ‘violent rapist,’ and the like, so as to justify that the case presented falls under an existing rule of law and that the defendant should be convicted.

The literature on witches provides a comparable context for understanding the prosecution’s reasoning. The historical story of witches shows that accusers must convince neighbors and law-enforcement personnel that someone’s behavior falls under a particular rule or set of rules. The notion, therefore, requires representational re-descriptions (Karmiloff-Smith, 1992), namely the formidable human capacity for behavior that is always a fusion of activities and allegations that must be inferred from indirect ‘evidence’ because it is seldom observed directly. Human-scale realities appear to conform to temporal periods of human memories and comprehension. I return to the notion of representational re-description and

‘human-scale realities’ after discussing a few fragments of ‘data’ from a recent criminal case that seeks to justify a case falling under a rule, namely an application of the California ‘Three Strikes Law.’

Conceptual and Empirical Issues

Rawls is not explicit about what conditions enable human subjects to create decisions about the relevance of a rule and how a given case is said to fall under it: for example, the information police officers possess or assume before interrogating suspects and witnesses, and the selective judgments of law-enforcement officials when they are writing reports and during appearances in a court setting. We can allude to similar circumstances when judges exercise their privilege to raise questions in court using police documents and witnesses. In both activities there is an attempt to create credible representational re-descriptions.

Our limited, temporally constrained conditions of information processing and the individual and/or collective frame of reference that emerges should not be taken for granted; they constitute key issues in how a given rule appears to be relevant and the extent to which a case has been said to fall under it.

Within a bureaucratically organized work setting, therefore, local conditions can be repetitive and extensive, and subject to considerable compression and elaboration of representational materials. The focus is on producing coherent, tightly woven written representational re-descriptions.

Two Concepts of Rules and the California Three Strikes Law

In the California criminal justice system, individuals who have been convicted of a felony on three occasions can be sentenced to life imprisonment. Establishing the alleged ‘three strikes,’ however, is never self-evident. I will review some of the empirical conditions of a recent case in which a selective set of an individual’s actions was deemed to fall under the ‘Three Strikes Law.’ The empirical circumstances that the prosecution and defense selectively use typically emerge implicitly and explicitly during the legal processing and are disputed and agreed upon by the prosecution and defense yet seldom if ever revealed publicly. Hence, the decision to claim that a case falls under a rule is always disputed, empirically problematic and embedded in tacit or unstated local and national cultural biases and conditions that the legal system depicts by the use of semantic and pragmatic subtleties. Legal processes, like all socio-cultural practices, are always subject to representational re-descriptions that routinely selectively mask or highlight everyday life circumstances.

The case I discuss below assumes that a prosecutor and defense attorney both have the same legal training for interpreting a given law, but their interpretations

of legal statutes are contingent on how they selectively present and construe ‘evidence’ and challenge each other’s evidential claims. The Three Strikes Law in California is much disputed because of the problem of validating the evidence needed to confirm that particular legal ‘rules’ have been violated. The case in question is of a 31-year-old African American (now incarcerated) who has given his defense counsel permission to discuss the case with me.

I will follow Rawls’ two rules notion by addressing how the prosecution (a district attorney) argues that the Three Strikes Law or Rule should be invoked, and then proposes a justification for the relevance of the law or rule by reference to a recent felony by the defendant. The defense attorney, in contrast, feels obliged to challenge the prosecution’s invocation of the Three Strikes Law by claiming mitigating circumstances that suggest his client’s behavior does not warrant invoking this measure. The two lawyers construct their ‘stories’ by reference to the ‘same evidence.’ The lawyers, however, also unofficially engage in a delicate plea-bargaining agreement that dramatically alters the way the case is framed for the judge. The alterations reveal the way a system of justice can re-constitute a case by the differential use of representational re-descriptions. At issue are the ways in which legal scholars and practitioners confront the claim that a violation is said to fall under a law by examining unstated daily-life socio-cultural circumstances and attributions of meaning often treated as self-evident.

Law-enforcement agencies (in the present case, the local county sheriff’s office and officers from a city in the county) are responsible, initially, for eliciting evidence from alleged victims, suspects and witnesses. The prosecution must decide the relevance of the evidence reported by the officers and if viable grounds exist for claiming that the violation of a rule of law has occurred.

In the present case, the officers appeared to be preoccupied with what could be called ‘salacious’ elements of the case, elements that are deeply rooted in historical inter-racial sexual relations and conflict embedded in American culture. A Caucasian, under-drinking-age female is alleged to have been sexually molested and raped by a 31-year-old male African American after she, her brother, and the defendant came to engage in conversation in a local bar. There are no clear statements by either the prosecution or the defense attorney explaining why the alleged police claims of sexual molestation and ‘brief’ penetration by the defendant were not pursued in the initial filing of a felony complaint by the District Attorney’s office. The officers’ written descriptions include claims by the victim that she had been ‘fondled’ and subjected to ‘sodomy’ and ‘brief penetration.’

These same descriptions state that the defendant, an African-American male, a male Caucasian and the latter’s Caucasian sister all met in a bar. The circumstances of how this group came into existence at 1:30 a.m. are not specified, nor is precisely how long the two Caucasian ‘victims’ had been drinking. (The brother was also a victim as he was to have his laptop computer stolen by the defendant.) When the bar was to close, all three, under unknown circumstances,

agreed to move first to the home of a friend of the defendant and then to the male 'victim's' home.

Interpreting the California Three Strikes Law

The legal-philosophical issues presented by Rawls provide the reader with a useful analytic exposition of the notion of a rule and when a case is said to fall under a rule. What also needs to be addressed, however, are the selectively pursued empirical circumstances used by prosecutors and defense attorneys to bring a frame of reference into existence that would be relevant within the American criminal justice system.

Discretion and Evidence

Under California criminal law and California Criminal Defense Practice:

The charging decision is the heart of the prosecutor's function. The prosecutor has the authority not only to select who will be charged with what crime, but also whether anyone will be charged at all. There are few enunciated standards to assist the prosecutor in determining whether or not to prosecute. What constitutes sufficient evidence to establish probable cause to arrest or to charge an accused differs from what constitutes sufficient evidence to a judge or jury beyond a reasonable doubt.

(California Criminal Law: Procedure and Practice, 2009: 2)

Another source of discretion described in the above document states:

The prosecutor has discretion to choose the offense to be charged. This discretion includes a decision to proceed to a greater or lesser charge, if the defendant might be convicted on either, and the number of offenses to be charged.

The prosecutor's exercise of discretion can be attacked, however, when the prosecutor fails to charge all offenses arising out of the same transaction that the prosecutor is aware of, at the time of the filing of the original complaint, and then seeks to charge these offenses at a later date.

(2009: 3)

The discretion given to the prosecutor suggests at the outset that charging someone with a criminal offense and claiming it falls under a specifiable statute presupposes explicit and tacit meanings being attributed to conditions of evidence over which the prosecutor does not have direct control. An example here is when and how law-enforcement agents are contacted or perceive a state of affairs

involving criminal intent or activity and decide to designate the conditions as a violation of law. In an important sense, therefore, the police create the circumstances for addressing Rawls' two concepts of rules.

Additional discretion is evident in texts on California Criminal Procedure and Practice (2009: 1131) where 'The Three Strikes Law' refers to a law enacted by the California legislature (effective March 12, 1994). An alternative sentencing procedure passed in the general election of November 8, 1994 allowed for enhanced punishment for recidivists who had been charged with any prior 'violent or serious felony convictions.' Although cited as one law, there are two statutes. Thus, there exist two sentencing procedures and the California Supreme court has not resolved the issue. Space does not permit me to pursue the complexities of the law and what constitutes 'three strikes.' In the present case, the dispute over what should constitute a 'strike' was a central issue, but this would require a separate paper and data difficult to access. Some of the mitigating circumstances in the present case will be discussed below.

The prosecutor, at the outset, creates a frame of reference by portraying the suspect as having been involved with other criminal incidents, starting with a conviction for 'carjacking with a firearm' in 1995. The prosecutor notes that the suspect 'has not spent 12 consecutive months free of custody' and that the (partially) described charges provide strong grounds for 'why the court should not even consider striking the violent felony.' The prosecutor's selectively crafted description of the case appears compelling and he refers to a recent Supreme Court decision that suggests 'limiting sentences to middle terms where aggravating factors must otherwise be found by the jury to be true, [but] in this case the upper term is appropriate based only on the defendant's criminal record.' In other words, the case in question as framed by the prosecutor appears to fall clearly within the jurisdiction of the 'Three Strikes' statutes.

The remainder of the paper will focus on a few fragments (Excerpts 1-3) from two original public reports from the county sheriff's office and police from the city in which the alleged violations of law occurred.

The sheriff officer's remarks (Excerpt 1) seek to create a frame of reference that would enable the reader to conclude it is a factual, 'straightforward' account of the case under review.

Excerpt 1

- 1 ... the victim and [brother] went to the [bar] to 'hangout.'
- 2 While at the bar, the victim was able to consume alcohol,
- 3 although she is only 19 years old,
- 4 using her 22 year old cousin's, [name], [state] identification card.
- 5 The victim said she consumed a lot of alcohol, beer, and hard drinks,
- 6 and felt 'pretty drunk' while at the bar.
- 7 At approximately 0130 hours [date],

- 8 the victim and her friends began talking with a black male subject
- 9 who identified himself as, [defendant].
- 10 [Defendant] was friendly with the victim and ‘very manipulative.’
- 11 [Defendant] and his friend went with the victim to [brother’s] house
- 12 on [street] [city] after the bar closed at 0200 hours.

Lines 1–6 (Excerpt 1) describe a brother and sister (the ‘victims’) as initially having visited a bar at some unspecified time. The sister, though 19 years of age, consumed alcohol using a cousin’s ID. A half hour before the bar closed, the ‘victims’ somehow ‘began talking with a black male subject.’ The defendant was said to have been ‘friendly’ and ‘very manipulative.’ The alleged ‘friendly’ and ‘manipulative’ behavior are not described. Somehow, a decision was made whereby they all (the two victims, the defendant and a friend of the defendant) went to the brother’s house after the bar closed at 2:00 a.m. The city police department’s report described the event of meeting the defendant at a bar and going to the male ‘victim’s’ home.

Excerpt 2

- 1 [Female victim], age 19, was visiting her brother [name],
- 2 age 21, a student at [name] Institute.
- 3 They went to the [name] [Bar]
- 4 where they met the defendant.
- 5 From the [name] [Bar]
- 6 they went with the defendant to a friend’s home
- 7 and later to (female [brother’s]) home
- 8 told his sister and the defendant
- 9 that he was going to spend the night with his girlfriend.
- 10 He assured his sister that
- 11 the defendant would be leaving in a taxi that had already been called.
- 12 He then left his sister with the defendant.
- 13 [The sister] was extremely intoxicated.
- 14 The defendant assured her he would be leaving in the taxi.

Line 1 (Excerpt 2) begins by describing the gender and relationship of the two victims and portraying the brother as a ‘student’ at a photography school. The report refers to a few circumstances in which the siblings met the defendant and how the latter (lines 5–6) and an unspecified ‘friend’ had gone to the friend’s home after the bar had closed. No details are given about the conversations at the bar or subsequently at the defendant’s friend’s house nor at the ‘victim’s’ home.

No additional descriptive information about the male ‘victim’ or his sibling exists in the sheriff and police reports: for example, whether the brother was intoxicated. The prosecutor does not describe the ‘[name] [Bar],’ nor how the

four individuals met and the content of their talk. Nor did the officers mention how it came to pass that the ‘victims’ and defendant all went to the defendant’s friend’s home in the early morning hours. For example (Excerpt 2, lines 6–7), why did they go to the defendant’s friend’s home before taking the intoxicated sister to her brother’s home? According to the defendant’s attorney (personal communication), the defendant and his friend were engaged in selling the brother drugs, but this information was not part of the official reports by the officers. Nor did the allegations about rape become a part of the prosecutor’s attempt to have the defendant charged with a felony that would be considered a ‘third’ strike.

The rape would have been a second strike, a second violent felony. This would not have resulted in a life sentence but could result in a life sentence if the defendant were ever charged and convicted of any future felony. The legal complexities of the ‘Strikes’ law will not be pursued in detail, but appear to include the following reasoning:

1. If a person has a prior strike on her or his record, and is later charged and convicted of any felony, the defendant’s prison term is doubled and he or she must serve a minimum of 80 percent of the sentence.
2. If a person has two prior strikes (violent and serious felonies) on his or her record, and is charged and convicted of any felony, he or she would be sentenced to prison for twenty-five years to life.
3. The above statements assume the District Attorney has alleged and proven the prior strike allegations: that is, the strikes must be ‘pleaded and proven.’
4. The defense counsel, therefore, may attempt to have the District Attorney agree to dismiss a strike prior to filing the charging document (complaint or information), or try to have the judge strike the prior alleged strike(s) ‘in the interest of justice’ under Penal Code section 1385 (that is, a Romero motion).

Below, I review some reasons for the prosecution and defense attorneys not introducing the rape and drug issue publicly.

Lines 8–9 reveal that the brother ‘told his sister and the defendant that he was going to spend the night with his girlfriend.’ Further (lines 10–11) he assured his sister that the defendant would be leaving as soon as a called taxi arrived. Lines 12–14 by the officers can be viewed as creating a frame of reference for understanding the construction of lines 15–24.

Excerpt 3

- 15 After [the brother] left [his sister] went to bed but was followed by the defendant.
- 16 The defendant kissed [the sister] and removed her blouse.
- 17 He kissed and fondled her breasts

- 18 and removed her shorts and performed oral sex on her.
- 19 He then had intercourse with her.
- 20 [The sister] was too intoxicated and confused to do much of anything about it.
- 21 She fell asleep.
- 22 The next morning Defendant was gone
- 23 along with a Mac lap top computer that had belonged to another brother
- 24 who had died earlier that year.

The officers' descriptions in lines 15–19 (Excerpt 3) are stated in a matter-of-fact manner based on questioning the female 'victim' the day after the late-night event. Nothing is said about the legal implications of the brother allowing his under-age sister to use false identification to consume alcohol and leaving his 'extremely intoxicated' sister with a stranger they met at a bar earlier and who later was invited to come to the brother's home. The officers' reports selectively ignore the brother's culpability in creating the conditions in which the defendant could interact with the victim under highly compromised conditions in which 'he sexually abused her.' The prosecution's charges against the defendant, however, did not specify rape. The victim's brother's role in leaving an 'extremely intoxicated' sister with a stranger they had met at a bar less than two hours earlier was not mentioned by two police officers or the prosecuting attorney. The prosecutor selectively focused on the alleged theft of the computer (Excerpt 3, line 23) to claim that this act constituted the additional felony needed to claim the defendant's case fell under the Three Strikes Law. Another incriminating condition was the defendant pawning the computer.

The circumstances described by the prosecutor do not specify any detail about what happened after the victim's brother left her with the defendant and went to stay with an alleged girlfriend. The defendant, however, alleged to his attorney that the 'victim' (the brother) went to find a prostitute. The police did not question the veracity of the 'victims,' but instead focused their attention on the defendant, whom they did not interrogate.

Without a jury trial, and more systematic interrogation of the 'victims' and the accused, additional information about the circumstances surrounding the events of the evening in question could not emerge. It is difficult to know how aware the sister was of the defendant's 'sexual molestation.' The extent to which the victim 'resisted' or was 'passive' vis-à-vis the defendant's actions cannot be ascertained from what the officers noted in their interrogation of the victim. There is no indication that the two victims asked that the defendant be prosecuted for rape. Indeed, it can be inferred that neither victim nor the defense attorney wanted more details to emerge if the defendant's allegation about selling the brother drugs was taken seriously. The burden of proof remains squarely on the defendant with a prior record of convictions. The purchase of drugs tends to be

one-sided in the American system of justice: the seller is invariably viewed as the one who should be prosecuted, but sellers (largely people of color) represent a large proportion of those incarcerated.

In the case described briefly above, the focus of two law-enforcement agencies on the alleged sexual molestation by the African-American defendant of a white female ‘victim’ is a reminder of centuries-old tensions between black and white Americans. The police focused on the defendant’s alleged ‘rape’ of the female ‘victim’ and stealing the brother’s laptop computer. Yet the officers ignored the activities of the male ‘victim’ who took his visiting under-drinking-age sister to a bar. The officers’ reports state that the female ‘victim’ used a cousin’s identification to enable her to purchase alcohol. Her brother also facilitated her smoking marijuana and allowing her to become ‘extremely intoxicated.’ Even if we ignore the defendant’s allegations that the male ‘victim’ came to the bar to purchase drugs and look for a prostitute, the officer’s did not interrogate the defendant about how two Caucasians and two black males came to meet for approximately thirty minutes and then leave together.

The police reports state that the foursome first went to the defendant’s friend’s house. Then the defendant and the two ‘victims’ went to the male ‘victim’s’ home. The officers do not recommend charging the male ‘victim’ with contributing to the sister’s illegal drinking and smoking marijuana. Nor do the officers expound on their statements that the male ‘victim’ left his ‘extremely intoxicated’ sister with an African-American stranger while he supposedly went to see his ‘girlfriend’ while assuring his sister that the male stranger would leave soon with a taxi that had been called.

The way the case is described by two law-enforcement agencies suggests that the officers were interested primarily in the alleged ‘rape’ of a Caucasian woman by an African-American male, yet they did pursue the allegation of a stolen laptop and were able to confirm the theft when a pawnbroker called one of the investigating officers to report that it had been pawned the day after the incident.

The question of what charges were to be made against the defendant that would enable the case to be viewed as falling under the Three Strikes Law became a contested issue between the two attorneys. They discussed the case extensively and reached an agreement not to mention the charges of ‘rape’ and ‘drugs.’ The agreement was that if the defendant pleaded guilty, the District Attorney would not amend the felony complaint to allege a charge of rape. If the defendant chose to go to trial, the District Attorney stated he would amend the complaint and charge the defendant with rape. The charge of ‘theft,’ however, could be mitigated by the fact that there was no forced entry into the male ‘victim’s’ home, and by the fact that the ‘victim’ facilitated the removal of the computer. The extent to which the defendant could claim he was underpaid for the drugs became a moot point.

The defense attorney could have argued that the police provided evidence from both victims that could lead to charges against the brother for leaving his 'extremely intoxicated' sister with a stranger. He was, however, also aware of the fact that he could not readily bring up the alleged purchase of drugs for reasons stated above. Even if the brother was intoxicated, and also had consumed illegal drugs, the bias against the seller, especially if African American or Latino, would likely prevail in the American system of justice. There is no information presented on the brother's use of drugs, but according to one officer's report, the female 'victim' was smoking marijuana in the bar. The lawyers explicitly recognized the advantages of not pursuing the allegations regarding drugs, contributing to the delinquency of a minor, and rape. They thereby selectively altered the case such that it would be viewed as falling under a less serious rule of law. Such an agreement would favor each of their clients.

The selective use of interrogatives by the police and lawyers and the particular topics covered by defense and prosecuting attorneys to bring charges against a defendant are routine aspect of all legal activities, especially when seeking to impress a judge and jury. The prosecution chose not to refer to the sheriff and police reports that stated the victim was using false identification in order to purchase alcohol, and the fact that her brother was the one who brought her to the bar. The prosecutor also was not interested in pursuing the law-enforcement reports on how the defendant was alleged to have sexually molested the 'extremely intoxicated' female 'victim.'

The felonies to which the defendant pleaded guilty amount to a collaborative effort by the prosecution and defense to find a way of charging him with a felony that would benefit both clients. The focus of attention was on theft, not on the police officers' concern with the alleged 'rape' of the female 'victim' of the case. If there had not been any alleged stolen property, a serious legal violation, the illegal behavior of the brother and his sister presumably would not have been divulged to the sheriff and police officers.

Discussion

Throughout the paper, I have assumed that the notion of 'practices' provides a warrant for pursuing Rawls' work by focusing on a set of empirical activities. The generality of the distinction between two concepts of rules is especially challenging if the goal is to specify how it may be applied to circumstances in everyday life settings. Rawls seeks to show that the distinction is often overlooked and its importance understated. The logical basis of the distinction between two concepts of rules is addressed carefully in Rawls' paper, as is the idea of recognizing the fundamental significance of the term 'practice.' The philosophical notion of 'practice' refers to complex analytical and abstract practical issues, but here I am concerned with empirical issues involving reported observation, representational

re-descriptions, and the description of audio-visual events reported in real-world daily-life activities,

Statistical distributions and categorization or classification remain essential for everyday life as they are for science, but we often forget that the implementation of such activities is never obvious. Classificatory acts invariably reflect an agenda, but the nature of the process itself is seldom clear. For example, what cognitive, behavioral, cultural elements does the classifier ignore or take into account when making judgments about which action or practice or indicator is viewed as justified?

Stated another way, can we say that specifiable everyday practices or actions involving classification or decisions fall under a self-evident specifiable rule? In the case of the police observing an action or event, the legal justification at the time is usually tacit and only becomes attached to a rule of law after the fact when having to justify in writing (or with audio-visual material) that the prior observed and/or reported practice can be viewed as falling under a specifiable rule of law. The notion of 'rule-governed' behavior, therefore, is always contingent on tacit locally emergent decisions that activate formal elements we associate with the idea of a 'rule.' All decisions involve selectively coding verbal expressions or physical action or practices that can be perceived as falling into a tacit or a particular, pre-established category.

Rawls' paper is a tightly and carefully argued analytic presentation, but to understand its possible empirical implications, we need plausible examples of idealized daily-life possibilities and socially distributed conventions that social scientists call a 'normative order' presumed to be known in common and taken for granted within a community (Schutz, 1962, 1964). One such example is how police come to charge someone for an alleged crime.

Rawls refers to the idea of an 'institution of punishment' that contrasts with the idea of 'always forgiving one another.' In addition, he refers to the idea of legislative and judicial systems and the notion of penalties for persons who harm others. These normative views also assume that the actors involved are 'reasonable,' educated persons who can not only distinguish between the two concepts of rules, but also can exercise appropriate judgment when used. The normative order presupposed by Rawls, therefore, need not be viewed as an attempt to avoid empirical issues, but can be seen as an attempt to clarify differences between utilitarian and retributive practices or rules.

For social scientists, however, empirical issues emerge vis-à-vis what constitutes a 'violation of law' and the process whereby someone is 'found guilty' by claiming the case falls under (violates) a rule. Another empirical issue is the extent to which legal practitioners will claim that the judicial process is consistent or not with legislative intent. Rawls refers to the utilitarian view as being 'more fundamental' because 'the judge carries out the legislator's will so far as he can determine it' (1955: 6). The notion of 'legislative intent' is an enormously complex set of challenging empirical processes that is embedded in contradictory or

conflicting political differences among legislators, their constituents, and special interests.

The social or normative order presupposed by Rawls (and other analytic philosophers) includes the idea of a division of labor within a judicial system and normative expectations about what children and adults must apprehend and follow under a variety of daily life circumstances. The analytic focus assumes ideal legislative bodies and an impartially applied system of law. The division of labor between legislators and judges in a system of law is consistent with Max Weber's (1968) view of persons holding offices (statuses) carrying out roles or duties according to (in the present instance) a normative interpretation of criminal law. These idealized normative expectations reflect Rawls' concern with a utilitarian view of justice that creates laws and assigns different penalties if the laws are violated (1955: 6) and situations in which judges are expected to carry out the 'intent' of the written law. The application of the system of judicial rules 'in particular cases is retributive in form' (1955: 7), but for social scientists remains a complicated empirical issue.

The idea of punishing innocent persons by 'mistake' (Rawls, 1955: 7-8, fn. 8) or deliberately ('fraud') is also empirically challenging. A 'mistake' can mean misinterpreting the law. For example, a prosecuting or defense attorney may point out to a police officer that he or she has misunderstood (the 'intent' of) a law. An appellate judge may say the same of a lower court judge, and the like. Deciding fraud involves a complicated legal process and is difficult to study as it unfolds in real time.

Much of what interests me in writing this paper is summarized by Rawls as follows:

It is simply that where a form of action is specified by a practice there is no justification possible of the particular action of a particular person save by reference to the practice. In such cases the action is what it is in virtue of the practice and so to explain it is to refer to the practice. There is no inference whatsoever to be drawn with respect to whether or not one should accept the practice of one's society. One can be as radical as one likes but in the case of actions specified by practices the objects of one's radicalism must be the social practices and people's acceptance of them.
(1955: 32)

In criminal trials, the routine practices of prosecution and defense attorneys means shaping their respective stories by human-scale conceptual (semantic) blends that shorten 'the causal chain many steps to few or only one ... and thus can differentially address information such that it can be construed as more or less actionable' (Fauconnier and Turner, 2002: 313, 385). An example here is when the police, prosecution, defense, and judge selectively focus on one or more events or statements that would support their respective perspectives.

The judicial system, therefore, is an ideal setting for studying and understanding how language creates different human-scale representational re-descriptions that compress differential amounts of information and visual imagery and thus facilitates the assessment of rule violation and the imposition of different forms and amounts of punishment. The notion of two concepts of rules can only be viewed as ‘practices’ by reference to the empirical circumstances in which alleged actual rule violations of legal statutes or rules occur. Hence, the use of representational re-descriptions or conceptual blends is always an integral aspect of how the criminal justice system can allege and document that a case falls under a rule, namely how legal frames of reference come into existence, come to represent ‘facts’ and their legal significance.

‘Evidence,’ however, can be an empirical ‘slippery slope’ if we employ behavioral and social science procedures in which written, observational, audio- or video-recordings are cited as documentary evidence, and especially when open-ended and forced-choice elicitation interviewing techniques are used. Such evidence always requires the study of their differential framing and interpretation in situated daily-life settings.

Earlier, we referred to the way prosecutors and defense attorneys carefully craft their presentations by judgments that produce a selective use of allegations by law-enforcement agents and victims, defenders, and witnesses. We noted that claims of a case falling under a rule of law necessarily create ‘representational re-descriptions’ (Karmiloff-Smith, 1992). Humans employ cognitive-affective and socio-cultural mechanisms and types of communication that make it possible to understand the practices and beliefs we attribute to ourselves and others. In other terms, we can synthesize and compress or summarize our thinking, on the one hand, by producing speech narratives, gestures, bodily and facial movements, as well as artistic or graphical depictions of our thoughts and activities, and, on the other hand, by the development and use of such artifacts as calendars, written displays, tools, physical, chemical, and electronic products. In this way, we capture experiences and thoughts that go beyond the limitations of our sensory capabilities.

In order for law-enforcement and other forms of social organization to create frames of reference that synthesize or compress or compact informational resources, such resources invariably assume a self-evident status initially. Subsequent examination and selectivity by prosecutors and defense attorneys often subject the informational resources to a different level of analysis that invariably leads to the creation of different assessments of the same ‘raw’ information materials. The basic purpose of this essay, therefore, has been to show how these characteristic human abilities to create, differentiate, and integrate different types of explanation and analysis can be accomplished by the use of ostensibly the ‘same’ observable manifestations.

The fragments of ‘data’ from law-enforcement agents and the prosecuting and defense attorneys seek to represent their respective explicit and implicit or

hidden agendas as ‘objective,’ self-evident informational resources. Each side seeks to construct accounts that are ostensibly crafted to convince prosecutors, defense attorneys, judges, and juries of the ‘authenticity’ of their respective perspectives. I have tried to show that the unstated empirical conditions of formal accounts provide perhaps a more fine-grained understanding of how a case comes to be presented as falling under a given legal statute or rule of law: for example, in the present case, the circumstances or social context within which ‘rape’ and ‘drug use’ were dropped while the allegations of the felonies of theft and selling stolen property were agreed upon by the two attorneys. Both were aware of ‘leaving well enough alone’ vis-à-vis particular circumstances: for example, such unstated allegations as:

- (a) the defendant’s claim that the purpose of the meeting was to consummate a drug deal with a male ‘victim’ by first going to the defendant’s friend’s home to perhaps obtain the drugs, and then to the victim’s home for the payment;
- (b) stating the sister had smoked marijuana;
- (c) learning that the female ‘victim’ was under age when drinking in the bar and had used a cousin’s ID;
- (d) the defendant’s claim that he took the computer because the male victim owed him more money.

The adversarial legal system permits prosecutors and defense attorneys to create or impose a selective, particular, temporal bandwidth (milliseconds, seconds, minutes, hours, days, months, years, decades) explicitly or implicitly on the ‘same’ conditions attributed to activities deemed ‘criminal’ or ‘innocent.’ Each legal system, therefore, develops its own (sometimes overlapping) theoretical perspectives and methods to justify claims about the independent realities each seeks to control, explain, describe, and predict. The cognitive process of representational re-description and the use of linguistic conceptual blends allow us to understand each adversary’s attempt to present his or her own ‘integrated’ portrayal of when a case falls under a rule.

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Aaron V. Cicourel is research professor of cognitive science and sociology at the University of California, San Diego. He is a fellow of the American Association for the Advancement of Science, and a fellow of the American Academy of Arts and Sciences. Most of his research over the past thirty years has been in medical settings as professor of pediatrics and simultaneously as professor of cognitive science and sociology. For twenty-five years, he taught medical students how to interview patients, and was especially concerned with teaching them how to respect the patient's perspective about their illness(s). He has published a large number of papers on doctor–patient communication and the kinds of misunderstandings that can emerge. His current research addresses the ability, or lack thereof, of patients diagnosed with Alzheimer's Disease and Frontal Temporal Lobe Deterioration. The focus of the research is on the patient's social interaction, language use, and the extent to which they appear to have a sense of self and self-awareness.

Address: Departments of Cognitive Science and Sociology, 9500 Gilman Drive, University of California, San Diego, La Jolla, CA 92093–0515, USA. [email: cicourel@cogsci.ucsd.edu]