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RULES, LOGIC, AND JUDGMENT

*Ronald J. Allen**

Regina v. Kearley[1] is quite interesting from many different perspectives. The legal question, the admissibility of implied assertions over a hearsay objection, is well known in this country. It has been thoroughly analyzed,[2] and has more or less been resolved through the now frequently copied definition of hearsay in Federal Rule of Evidence 801. A number of cases have applied the definition of hearsay in the Federal Rules in concluding that unintended assertions are not within the hearsay rule, some virtually identical to *Kearley*[3] and some off a bit on tangents.[4] The primary contribution *Kearley* makes to our understanding of legal issues at the doctrinal level comes in Lord Browne-Wilkinson's dissenting opinion in which he argues that the phone calls demonstrate a market, which in turn demonstrates that Kearley had the opportunity to engage in the sale of drugs, which increases the probability, however slightly, that he distributed drugs intentionally.[5] It is a nice point about relevancy, although it is not directly importable to the United States. Here two further questions would have to be addressed: first, whether the obvious prejudicial value of the phone calls (given how Lord Browne-Wilkinson analyzes them) substantially outweighs their probative value,[6] and second, whether even with this evidence the case against Kearley is sufficient.

Whether Federal Rule 801 correctly resolves the issue of the admissibility of implied assertions, and thus whether their admissibility should turn primarily on relevancy considerations, is another question. I take it that this is the question that most of the distinguished commentators in this symposium will address, and I look forward to learning from their discussions. The individuals asked by the editors of the *Mississippi College Law Review* to participate in this Symposium

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* Professor of Law, Northwestern University. I am indebted to my colleague, Professor Tony D'Amato, and to the participants of the Northwestern School of Law Faculty Workshop for comments on an earlier draft of this Article.

1. 2 App. Cas. 228 (H.L. Eng. 1992).
2. *See, e.g.*, Roger C. Park, *"I Didn't Tell Them Anything About You": Implied Assertions as Hearsay Under the Federal Rules of Evidence*, 74 MINN. L. REV. 783 (1990); Paul R. Rice, *Should Unintended Implications of Speech Be Considered Nonhearsay? The Assertive/Nonassertive Distinction Under Rule 801(a) of the Federal Rules of Evidence*, 65 TEMP. L. REV. 529 (1992); Glen Weissenberger, *Unintended Implications of Speech and the Definition of Hearsay*, 65 TEMP. L. REV. 857 (1992); Note, *The Hearsay Rule: Are Telephone Calls Intercepted by Police Admissible to Prove the Truth of Matters Impliedly Asserted?*, 11 MISS. C. L. REV. 349 (1990).
3. *See, e.g.*, U.S. v. Lewis, 902 F.2d 1176 (5th Cir. 1990); U.S. v. Zenni, 492 F. Supp. 464 (E.D. Ky. 1980). U.S. v. Reynolds, 715 F.2d 99 (3d Cir. 1983), reaches a different result, but the case analyzes only Federal Rule 801(c), not 801(a), and thus is clearly erroneous under the federal rules. Park is not so sure; he sees cases like *Reynolds* sensitively analyzing the implications of statements and deciding admissibility accordingly. Park, *supra* note 2, at 804-05. As the rest of this paper makes clear, I am happy to accept his assessment of the situation.
4. *See, e.g.*, U.S. v. Groce, 682 F.2d 1359 (11th Cir. 1982).
5. *Kearley*, 2 App. Cas. at 278.
6. *See, e.g.*, Wilson v. Clancy, 747 F. Supp. 1154 (D. Md. 1990), *aff'd*, 940 F.2d 654 (4th Cir. 1991).

are all extremely knowledgeable about the intricacies of the hearsay rule and have a profound grasp of the policies that inform it. In the face of this impressive collection of talent, burdening the reader with my views of these matters seems superfluous at best, and in any event my interest in *Kearley* lies in a different direction. *Kearley* seems to be an example of positivism, a philosophical movement whose charms have, in many fields of intellectual inquiry, noticeably faded. The legal manifestation of positivism is doctrinalism, in which the legal doctrines are analyzed as though they constituted a deductive system. The objective is to state a set of assumptions and to deduce propositions from them. The three judges in the majority were at pains to demonstrate that their views are directly derivable from established precedent, and that the case called merely for logical analysis without the need for the exercise of judgment. Lord Browne-Wilkinson's dissenting opinion is clearly in this vein as well.[7] Only Lord Griffiths' dissenting opinion called for some common sense at the expense of logical, legalistic reasoning.[8]

Why were all the judges but Lord Griffiths confined by the mode of "logical" reasoning? One reason given by the judges in the majority was that to behave otherwise — to rely for example, on "common sense" or even "principle" at the expense of doctrine — would violate the judicial role, that it was up to Parliament, not the judges, to revise the hearsay rule even though it was the judges, not Parliament, who created the rule in the first place.[9] This raises an interesting question of the relationship between British judges and Parliament. Another, deeper, question lurks in the shadows, what exactly is this court's conception of a rule? What "is" the rule laid down in 1837 in *Wright v. Tatham*,[10] and how does it apply today to the facts before the court? Similarly, what is this court's conception of "logic," and what exactly do the judges think can be asked of it? And what do I mean by suggesting that logic has only a limited, although important, role to play in judgment? Can it be that the dictates of "logic" should defer to other modes of reasoning? Indeed, what other modes of "reasoning" besides "logic" might there be? If judgment is not to be constrained by logic, is it then illogical? These are intensely important and intriguing issues that perhaps I can begin ever so slightly to unpack in the few pages I have here — that at any rate is the burden of the remainder of this Article. To do so, I will first briefly describe the approach all the judges but Lord Griffiths brought to the legal question before the court. I will then criticize it in various ways, in the process demonstrating an alternative conception of what it means to have a "rule" and why for all its power "logic" can lead on occasion in the wrong direction. Hopefully the comparison of different conceptions of rules and different reasoning methodologies will prove instructive in various ways, in particular opening up for examination some important contrasts between rules, logic, and judgment.

7. *Kearley*, 2 App. Cas. at 278.
8. *Id.* at 236.
9. *Id.* at 277.
10. 112 Eng. Rep. 488 (K.B. 1837).

The structure of the three majority opinions, by Lord Bridge of Harwich, Lord Ackner and Lord Oliver of Aylmerton, is essentially the same.[11] Each points out that the most persuasive use of the evidence of the telephone calls is to demonstrate the belief of the callers that Kearley was dealing drugs, from which it is to be inferred that in fact he was.[12] They further point out that none of the callers had been called to testify, and consequently could not be examined in court as to the basis of their beliefs.[13] Thus, the use of the phone call evidence to establish the callers' beliefs in order to establish the truth of what they believed is hearsay.[14] That this is so, the majority reasoned, is obvious.[15] If each of these callers had said "Mr. Kearley is a drug dealer; I am his customer; I would like to buy some drugs," anyone who heard these statements and testified to them in court in order to establish that Kearley is a drug dealer would undoubtedly be testifying to hearsay. A witness called for such a purpose would be relating an out-of-court statement offered to prove the truth of the matter asserted therein, which of course is the standard definition of hearsay. If a witness could not relate the direct assertions of a caller, neither could the indirect or implied assertions be related. In, from my point of view, wonderfully expressive language, Lord Oliver of Aylmerton explains that "I confess that I find difficulty in seeing a logically defensible distinction between a [sic] inference to be drawn from an express assertion . . . and an inference to be drawn from precisely the same assertion made by implication . . . ."[16] That of course ends the matter, for if logic provides us no answer, what possibly could?

Anyway, even if logic were not so clear, the cases are. *Wright v. Tatham*[17] held that implied assertions are within the hearsay rule and, as Lord Bridge of Harwich argued, this authority is serious.[18] Just how serious is evident from *Myers v. Director of Public Prosecutions*.[19] In the words of Lord Bridge of Harwich:

> [T]he prosecution's case [in *Myers*] was that a number of cars sold by the defendant were not, as he claimed, wrecked cars which he had legitimately bought and reconstructed, but were, in truth, stolen cars made to resemble those wrecked cars and to which the registration, engine and chassis number plates of the wrecked cars had been falsely attached so as to enable the stolen cars to be sold with the log books of the wrecked cars. The disputed evidence led by the prosecution was that the manufacturer's records, made routinely in the course of production, identified the cars in question as the stolen cars because they recorded not only the relevant registration, chassis and engine numbers but also numbers indelibly stamped inside the cylinder blocks which, in each case, corre-

11. *Kearley*, 2 App. Cas. at 243, 254, 262.
12. *Id.*
13. *Id.* at 245, 254, 259.
14. *Id.* at 246, 255, 262.
15. *Id.*
16. *Id.* at 273.
17. 112 Eng. Rep. 488 (K.B. 1837).
18. Regina v. Kearley, 2 App. Cas. 228, 242 (H.L. Eng. 1992).
19. 2 All E.R. 881 (1962).

> sponded to the numbers found in the cylinder blocks of the cars sold by the defendant. The probative force of this evidence was, of course, overwhelming; it established conclusively that the cars sold by the defendant were the stolen cars. It was, nevertheless, held by a majority of three to two in your Lordships's House to be inadmissible as hearsay.[20]

In *Myers*, as in *Kearley*, there was no intent by anyone to assert the proposition relevant to the case at hand, and there was no doubt about the trustworthiness of the evidence; it conclusively established guilt, no ifs, no ands, no buts. Nonetheless, logic is logic, and a rule is a rule. The evidence "logically" was hearsay, even if involving an implied assertion, and the hearsay "rule" as given by *Wright* forbids its admission. End of case. And end of *Kearley*, for *Kearley* is an *a fortiori* case. The evidence in *Kearley* was compelling, indeed overwhelming, but not quite indisputable, as it was in *Myers*. If the stronger evidence in *Myers* is not admissible, logically the slightly weaker evidence in *Kearley* is not either.

So there it is. Logic gives no escape from identity between implied and express assertions, and in any event the rule is clear. Notwithstanding the implacable force of logic and the antiquity of the British rule against implied assertions, in my judgment *Kearley* is wrongly decided. The result in *Kearley* is not just an example of the truism that all decisions, and all rules, have positive and negative consequences, or more to the point that obstructing the conviction of an obviously guilty person must simply be tolerated as a necessary cost of obtaining whatever advantages application of the rule may bring. Application of the "rule" in *Kearley* that implied assertions are covered by the hearsay rule simply impedes an accurate conviction for no good reason, except that to do otherwise would not be to apply the rule as some judges understand it. That a rule is to be applied simply so that the rule is applied is to make a mockery of good sense if not of law; and if the law is not mocked by such a result, this confirms, as Lord Griffiths suggests, that the law is an ass.

But the law need not be an ass. It can be sensible and enlightened. Two paths to a different result in *Kearley* exist, either of which would have been considerably preferable to the path taken by the majority. I will briefly indicate them, and then return to the question of the conception of rules implicit in the case and its implications.

The first path to a better result in the case would be to recognize that, logic apparently to the contrary notwithstanding, there is a crucial difference between implied and express assertions. Implied assertions involve individuals who are not at the moment of the making of the statement reflecting upon its propositional content, which is precisely what is meant by the phrase that such "assertions" are "unintended." By being unintended, the chance of an implied assertion being the result of prevarication goes down considerably, at some cost to attentiveness, to be sure. The only discussion of this in the case is in Lord Bridge of Harwich's

20. *Kearley*, 2 App. Cas. at 250.

opinion, who responds to it by simply denying the judiciary the power to change a "rule" no matter how powerful the justification.[21]

Two interrelated questions nag: Why is there a hearsay rule in the first place? And isn't the justification of a rule significant to its application? The hearsay rule exists because, as Lord Oliver of Aylmerton points out quoting the cases, "of the great difficulty, even more acute for a juror than for a trained judicial mind, of assessing what, if any, weight can properly be given to a statement by a person whom the jury have not seen or heard and which has not been subject to any test of reliability by cross-examination."[22] This is undoubtedly an important consideration, but every single one of the judges in *Kearley* admits that the evidence of the phone calls is extremely powerful evidence of guilt. The only mistake the poor benighted English jury could have made would have been to underestimate not overestimate its probative value. Thus, the "logic" of the case is that powerful evidence must be excluded at the request of the defendant because of a concern that jurors may underestimate its inculpatory significance.

Nonetheless, is not a rule a rule, and did *Wright* not decide this clearly? I am not so sure, which takes us to the second path leading to a different result in *Kearley*. Everyone reading this symposium knows that *Wright* decided that the three letters written to the testator were not admissible to establish the testator's competence, and that the reason given was that they were hearsay for that purpose.[23] But did the court in *Wright* really decide that? As my colleague, Richard Kuhns, has pointed out, one of the letters was written twenty-six years before the execution of the will, one thirty-seven years and the third thirty-nine years before the execution.[24] Regardless of the hearsay issue, the probative force of these letters is weak to the point of vanishing. Thus, what the court actually did is exclude evidence that had virtually no (I would be content to say "no") probative force. To be sure, the court did so under the rubric of the hearsay rule, but it has been obvious for a long time that the hearsay rule is a specialized relevancy rule. That a factfinder may misappraise the force of uncrossexamined material is a concern about the probative force of evidence, which is an aspect of relevancy. Perhaps the *Wright* Court was fully aware of this point, and merely used the hearsay form as the means of accomplishing the correct result of exclusion of meaningless evidence. Perhaps, however, the jurists of the time did not appreciate fully the intricacies of relevancy. For all I know, they harbored what we would think to be rather peculiar views of the matter, and thus lacked a refined sense of the power and utility of the concept. In that case, perhaps the hearsay rubric was merely the way to get to a result dictated by the probative force of the evidence but for which no good vocabulary or set of concepts existed.

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21. *Id.* at 249.
22. *Id.* at 267 (quoting Lord Bridge).
23. Wright v. Tatham, 112 Eng. Rep. 488 (K.B. 1837).
24. RONALD J. ALLEN & RICHARD B. KUHNS, AN ANALYTICAL APPROACH TO EVIDENCE: TEXT, PROBLEMS AND CASES 321 n.29 (1989). The cite is to our book, but the point is Professor Kuhns'.

We, in other words, do not know what the "rule" in *Wright* is without knowing a good deal more of the jurisprudence of the time. What we do know of it suggests caution in interpreting the legal maneuvers of the early nineteenth century. According to William Twining, in 1794 Burke, commenting on a trial, is reported to have said: " 'It was true, something had been written on the law of Evidence, but very general, very abstract, and comprised in so small a compass that a parrot he had known might get them by rote in one half-hour and repeat them in five minutes.' "[25] The leading work on the law of evidence bridging the eighteenth and nineteenth centuries was Gilbert's, *The Law of Evidence*.[26] The central organizing feature of Gilbert's work was an elaborate best evidence principle. Employing it, "Gilbert proceeded to establish various categories of evidence and to grade them in terms of probabilities in something approaching a formal hierarchy . . . ."[27] As Twining puts it, "the core of the matter was the suggestion that the weighing of evidence could be governed by rigid rules."[28] Were the courts at the time under the influence of this theory? I do not know, but it is plausible that they were. "For over a hundred years, the ghost of Gilbert's formulation of the 'best evidence rule' had haunted the exposition of the law."[29] It was not until half a century later that attention shifted to relevancy as the dominant principle of the law of evidence.[30] Twining's work leaves for another day the impact of the treatise writers on, and their interaction with, the courts. Until Thayer, though, most of the significant work of the treatise writers, Bentham only excluded, was directed toward the profession.

Assume for the moment that the treatise writers either influenced or were influenced by the courts, that, in other words, the English courts of the early nineteenth century did not view relevancy as the dominant variable of evidence law, but viewed evidence law instead as providing a set of rigid rules designed to secure the best evidence. *Wright* becomes a pretty simple case. Three letters written from a quarter to almost half a century prior to an event are singularly unimpressive evidence of the competency of the testator. They are thus to be excluded, and the only question is the form of exclusion. The hearsay rule is at hand, and seems satisfactory to the task.

There is another historical problem. Another variable crucial to *Wright* about which we have little knowledge (none, in my case) is the level of understanding, and ability to manipulate, the concept of sufficiency. My sense is that an understanding of the subtleties of the relationship between admissibility and sufficiency is largely a twentieth century phenomenon. If this is true, another problem may have been posed for the *Wright* Court. Suppose it admitted the letters. Would that have created pressure for an obviously unjustifiable result? Was there, in other words, a conflation of admissibility and sufficiency concerns in

25. WILLIAM TWINING, RETHINKING EVIDENCE 34 (1990).
26. *Id.* at 35-36.
27. *Id.* at 36.
28. *Id.* at 37.
29. *Id.* at 56.
30. *Id.*

the case, a matter that would make perfect sense if the distinctions between the two concepts were not part of the standard legal repertoire? If so, yet another explanation of *Wright* is at hand that substantially modifies its implications for the hearsay rule. Perhaps 150 years ago sufficiency considerations exerted a more compelling influence over admissibility decisions than they do today, an implication certainly consistent with the emphasis on a generalized best evidence rule that characterized the times.

What, then, is the rule in *Wright*? The holding was the exclusion of the three marginally (at best) relevant letters, and the language employed to reach this result was the hearsay rule.[31] But the hearsay rule existed then, as it does now, in a web of relationships with other rules that give both it and the other rules meaning. To say of a system of interrelated rules that mutually define their respective boundaries that one rule is the reason a result was reached is to misunderstand the nature of the enterprise. More accurate would be to say that, given the other rules as background, a certain result is reached for a particular reason. This is to say in turn that the background informs the rule, as it clearly always does.

If the background informs the rule, and the background changes, what happens to the rule? Well, I do not really know, but that is the question at the heart of the *Kearley* case, and it is simply another way of asking what we mean by having a rule. Rules are designed to capture something significant about the reasons that give rise to them, which is precisely why the background to the rules, including the other rules that co-exist with the one under examination, matters. The set of relevant rules implement the preferences of the rule maker, which is why we often talk of the intention of rules. But, does the intention of rules extend to the reasons that gave rise to them or only to the particular choice encompassed by the language of the rule itself? Do, in other words, rules exist independently of the reasons that gave rise to them[32] or are they mere summaries of those reasons,[33] thus having truly no independent significance? Or perhaps there is some middle ground between those two extremes?[34]

That rules have an independent existence from their reasons is obviously true in some walks of life, like mathematics, sports, and the internal revenue service. Just as obviously in other walks of life rules have little or no precedential value, and thus are merely the sum of the reasons perceived at the time, such as in child rearing and financial planning. The law seems generally a halfway house in which rules do matter because of the concern for stability and the ability to plan one's affairs, but in which is recognized that the rules are always defeasible if a

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31. Wright v. Tatham, 112 Eng. Rep. 488 (K.B. 1837).

32. *See, e.g.*, Larry Alexander & Emily Sherwin, *The Deceptive Nature of Rules*, 142 U. PA. L. REV. 1191 (1994), exploring this conception of rules.

33. This is the view of MICHAEL J. DETMOLD, THE UNITY OF LAW AND MORALITY: A REFUTATION OF LEGAL POSITIVISM 9-17, 74-78 (1984).

34. This is the view of FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991). My view is similar. Rules, like logic, are just tools, sometimes having one import, sometimes another. As the references in the last three footnotes suggest, the concept of a rule has a deep and interesting philosophical lineage, the surface of which only will be scratched here.

really good reason is at hand. What exactly a really good reason is, is a bit difficult to say in advance.

An example: On October 30, 1978, Daniel Barth, then a sixth grader in Chicago, was playing kickball on his elementary school playground.[35] He collided head-on with another child and was immediately taken to the principal's office complaining of a headache and vomiting.[36] Daniel's mother was called and she directed the school officials to take him to Holy Cross Hospital, which is located across the street from the elementary school.[37] An ambulance was called, but it did not arrive for over an hour. Notwithstanding the closeness of the hospital and the instructions of Daniel's mother to take him there, the school officials waited for the ambulance to arrive.[38] By the time Daniel was seen by medical personnel, irreversible brain damage had occurred that could have been avoided if Daniel had been treated within half an hour of his accident.[39]

How could the school officials have been so stupid as to delay taking a child with a possible head injury to a nearby hospital simply because an ambulance had not arrived? It turns out that the school officials were less stupid than law-abiding. There was, and still may be, a Board of Education rule that mandates that school children be sent to hospitals in ambulances, a rule that surely resulted from unfortunate results accompanying other incidents of children being transported by other means to hospitals.[40] Notwithstanding the rule, Daniel Barth won a verdict of $2,500,000 for his injuries.[41] The jury must have concluded, and the judge concurred, that the school officials had discretion to send Daniel to the hospital without waiting for the ambulance to arrive under the circumstances as they were on October 30, 1978, and the judgment is obviously correct. The rule in question surely did not anticipate head injuries combined with ambulances that did not arrive promptly. That these factors defeat the rule is obvious to any rational observer, even though one cannot state in advance all the conditions that defeat the rule (that is, write a different rule) nor state at any helpful level of generality when the rule is defeasible.[42]

In my view, as I will explain below, most legal rules are necessarily similar to the ambulance rule, but the *Kearley* Court rather obviously disagrees with me. However, that disagreement contains a high irony. The *Kearley* Court seems to have decided as it did because of its view that rules eliminate rather than impart discretion, by which I mean the capacity for judgment, but why did it do so? The hearsay rule does not provide us its means of self-interpretation. The hearsay rule does not say to us that "the rule on implied assertions is to be applied regardless of the changes in the related rules that give this rule its meaning in

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35. Charles Maint, *An Injured Boy, City Pay Dearly for a Rule*, CHI. TRIB., Nov. 9, 1984, at 1.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. For a discussion of similar issues from a different perspective, *c.f.* Anthony D'Amato, *On the Connection Between Law and Justice*, 26 U.C. DAVIS L. REV. 527 (1993).

part, and regardless of any other matter affecting the legal system." Rather, that meaning of the rule must be imported from somewhere, and it cannot be from some previous rule, or else we would have an infinite regress. Somewhere in the system judgment must be exercised; thus the majority opinions in *Kearley* are interestingly, although I am sure completely unintentionally, misleading. They read as though the judicial role cannot involve the exercise of judgment, yet in the very act of so speaking, judgment is exercised. If it can be exercised at that point, why can it not be exercised at the level of analyzing whether an ancient rule makes sense in modern times?

There are two answers to this question that I wish to mention, although I am sure there are many more. The first answer I have already suggested, which is that the self-conception of English judges denies them the power to modify comprehensible rules once they are laid down. That is a job for Parliament, no matter how perverse the rule might be or become. The second answer might be faith in the power of logic, that guiding tenet of positivism that is largely responsible for the giving of meaning and authority to rules. Logic unites these two reasons. Obviously, the *Kearley* Court believes that the logical unfolding of a pre-existing rule is within judicial competence. Thus, attention must turn to the nature of logic.

I share the *Kearley* Court's affection for logic. Nonetheless, it is just a tool rather than a panacea, and one with curious implications. For example, from inconsistent premises anything at all can be deduced, but we carry inconsistent premises around in our heads all the time. Take for example the existence of matter. Matter must have come from something, for all things do. Matter cannot have come from anything, for if it did, that something must in turn have come from something, which in turn . . . and off into an infinite regress. Or put more boldly, it must be true that the universe had a beginning and that it did not have a beginning. Let *U*=universe had a beginning, and -*U*=universe had no beginning, both of which everybody believes. Now, what would we like to prove? How about that the decision in *Kearley* is wrong? Fine. Let *K*=*Kearley* is wrong:

1. *U* from our hypotheses
2. *U* or *K*
3. -*U* from our hypotheses
4. Therefore *K*, *Kearley is wrong.*

Of course, *K* could just as easily be that *Kearley* is right, or the moon is made of green cheese, or anything at all.[43] Such is the power of logic.

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43. For a related discussion, *see also* Ronald J. Allen, *Foreword — Evidence, Inference, Rules, and Judgment in Constitutional Adjudication: The Intriguing Case of Walton v. Arizona*, 81 J. CRIM. L. & CRIMINOLOGY 727 (1991); Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83 (1993). Both Professor Nussbaum and myself argue that discretionary mercy, the invocation of judgment unconstrained by rule, is perfectly comprehensible, indeed morally laudatory and cognitively essential, in the context of capital sentencing schemes. Our main foil is Justice Scalia, who in his opinion in Walton v. Arizona, 497 U.S. 639, 656 (1990), and elsewhere has argued that capital sentencing schemes that require a rule laden aggravation determination and a mercy driven mitigation determination are self-contradictory.

In our natural state we can deduce anything at all any time we want. There may appear to be a problem here, though: What possible bearing does the unresolvable paradox of existence have for the admissibility of implied assertions over a hearsay objection? Perhaps the entire universe may be observed in a flower, but is it too much of a stretch to see it in a rule of evidence? An intriguing question that I leave for another day, for my point here is about logic, not about the cosmos. Logic is a wonderful tool for spinning out the implications of premises, but that is all it is. Merely to apply deductive logic requires considerable exercise of judgment. Judgment has to be exercised with respect to whether to employ logic, what to put into the premises, whether given the result achieved there is something wrong in the premises, how to handle inconsistency, and so on. None of these are matters that "logic" of any kind resolves.

Indeed, I would press the matter further. Outside the world of formal systems, such as mathematics, logic is much more a means of expressing a conclusion than arriving at one, which is the reason why most legal "rules" necessarily are like the ambulance rule. They are rough guidelines rather than parts of deductive arguments; they indicate the range of relevant variables perceived to date rather than providing assumptions from which conclusions are to be deduced. In virtually all forms of human endeavor, including law, the problems are too complex to be solved formally. Merely to put a problem in simplistic enough terms to permit statement in logical form requires exercise of discretion over an enormous range of variables. Once judgment is reached over the relevant range of variables, and a course decided upon, it becomes a simple matter to reconstruct the problem in "logical" language, which, in my view, is precisely what we observe in *Kearley*.

I will give one example of the implications of complexity for formal theories. Suppose we really wanted to decide a legal case "logically." One way to do it would be to view the case as like solving problems in boolean algebra, in which each relevant concept would be represented by symbols and logical operations would be done on the symbols. This requires that there be a unique symbol for each meaning of all the words employed in a parsimonious natural language description of the problem. As Christopher Cherniak has pointed out, "To prove theorems of only 617 symbols or fewer would require a network with so many boolean elements that, even if each were the size of a proton (with infinitely thin interconnecting wires), the machine would exceed the volume of the entire known universe."[44] Logic, in short, cannot displace judgment in human affairs. The great expectations for logic like those implicit in the opinions in *Kearley* will inevitably go unfulfilled.

Perhaps my argument is at cross purposes. The real attraction of rules may lie in their simplification of human problems, and the commensurate reduction in the problem complexity poses for logic. This would not constitute a denial of the points that I have been making but their acceptance, an acceptance that acknowl-

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44. CHRISTOPHER CHERNIAK, MINIMAL RATIONALITY 90 (1986).

edges the crudeness of many rules but that also perceives their simplifying advantages. Nonetheless, at its deepest level, this argument demonstrates that judgment cannot be avoided. The decision that it is inappropriate to change a rule, or more to the point the decision what a rule is, requires judgment, and thus the issue in cases like *Kearley* becomes the extent to which judgment may take account of the social costs of decision. Missing from *Kearley* is an explanation of why the social benefits of reversing the conviction of an obviously guilty man on the basis of a rule whose antecedents bear no obvious relationship to current affairs outweighs the costs. Put another way, missing is an explanation of why the value of maintaining the current rule offsets the value that would flow from more accurate adjudications under a revised rule. No amount of reliance on rules or logic can fill this gap. Required instead is an explanation of the grounds upon which the court's judgment rests.[45]

Two points remain, one brief, one more extended. The brief point is to highlight another irony. My criticism of *Kearley* is, in essence, that it involves rule-following and logic-chopping without the explicit assistance of judgment. However, in the first paragraph of this paper, I refer to the Federal Rule on the topic and its clarity. If I mean by that reference that the rule should be applied in a straightforward fashion, how is the situation any different under the Federal Rules from the English situation? In both cases, clear rules will be applied, the only difference being the result. Good question. The answer lies in the consequences of the respective decisions. Under *Kearley*, admissibility decisions are being made by the mechanical operation of rules that may bear little relationship to the purpose of the enterprise, which I take it remains factually accurate adjudications constrained by certain principles of proper behavior. Under the Federal Rules by contrast, the question of admissibility is merely shifted from the hearsay rule to the relevancy "rule"; but the relevancy rule is not really a rule. It is instead an admonition to admit relevant evidence, which requires human judgment about the relevancy of the evidence.[46]

Gilbert, in short, was wrong. The relevancy of evidence cannot be determined in advance through rules; the complexity and ever-evolving nature of the human condition is too complicated to be anticipated by pre-existing rules. Relevancy can only be determined as we go along by human actors bringing to bear the resources they have available at the time to the question. To be sure, second thought may conclude that a particular relevancy determination was in error, so egregiously so that it should be changed by legislation; but in truth such legislative interventions are toothless, for that particular relevancy determination never arises again. It passes with the moment. This is why modern evidence codes look pretty much like the Federal Rules of Evidence in containing no complicat-

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45. That the judges are not to change the rules is not an adequate response to the various arguments presented here. For the reasons previously given, it is not obvious that a rule change is necessary to permit a different result in *Kearley*. In addition, the House of Lords does overrule cases from time to time.

46. This is one of the main points of Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 Nw. U. L. REV. 604 (1994).

ed rules of relevancy, and why efforts like *Kearley* to implement relevancy rules, even if in the guise of the hearsay rule, will virtually always be unsatisfactory.

The concluding, somewhat more extended, point. Although for the reasons I have given I find the Federal Rules' approach to the problem of implied assertions to be preferable to the approach of *Kearley*, the forces that led to *Kearley* are vibrant in our legal system too, and for an unavoidable reason: They are a deep reflection of the human condition and our responses to it. We live in a universe of overwhelming, indeed frightening, ambiguity, and we navigate it through the formation of rules of various kinds that experience suggests to us. Rules are, in a very real and deep sense, our most important product, for they not only facilitate our survival but allow us to give meaning to our existence. Thus it is that we have a deep craving for the certainty and security of rules.

Just as ambiguity in the universe is threatening to our physical integrity, so too ambiguity in human relations like law is threatening to our social selves. Curiously, "law" has two antonyms, lawless and discretion. Lack of clarity in legal rules can result in the exercise of good judgment. It can also lead to arbitrary and capricious behavior, and the distinction between the two is often obscure and debatable. There is no way to ensure, in a rule-like fashion, that wise judgment rather than caprice will govern. Consequently, much legal regulation is driven by the desire to reduce the scope of judgment. If the various considerations that comprise good judgment can be identified in advance, they can be reduced to a rule that captures the essence of that good judgment, thus eliminating the risk of caprice. The contemporary significance and power of this impulse is nowhere more evident in this country than in the debate over the exercise of mercy in capital punishment.[47]

In many areas, the reduction of factors of good judgment into rules works well, but in many it does not. The primary determinant of success is complexity. If the area to be regulated is complicated, it will defy regulation by rule, and an area does not need to be all that complicated to defy reduction to rules. The endless struggle of the Internal Revenue Service to reduce taxation to a rules based system is a perfect example. Relevancy is infinitely more complicated than taxation, and consequently any effort to regulate it by rule will eventually be seen as a failure. *Kearley* is a perfect example in its application of a rule in a context that furthers no significant purpose of the rule. That is the inevitable fate of attempting to regulate relevancy by rule, whether through the guise of the hearsay rule or any other. We can thus sympathize with the forces that gave rise to *Kearley*, but at the same time doubt that it is a model to be followed. Only if we distrust so deeply the individuals in a position to make judgments, in this case of relevancy and prejudice, that we prefer the pathologies of attempting to regulate complex matters by rule to the risk of capricious behavior is the *Kearley*

47. *See supra* note 43.

approach appealing. But if that is the case, it would seem to uncover a deeper pathology in the legal system.[48]

Were any of the judges in *Kearley* thinking of any of these things? Probably not; they were probably just doing their jobs, and they certainly understand their job descriptions better than I do. My argument here is thus not a criticism of the opinions in *Kearley*; it is instead an attempt to examine the conditions, and their implications, that would give rise to opinions like *Kearley*. Nor do I have any simple substitute. I would not want all judges on all questions to constantly be exercising judgment; generally I want them to follow the rules. I do want them to have in mind the limits of rules and of logic, and to be able to exercise sound judgment when the situation calls for it, although I cannot say in advance when those situations will arise. Moreover, I cannot say that living in such a world is superior to living in a world that generates *Kearley*. Views on that matter will turn on how deep the impulse to eliminate ambiguity runs, and what costs it entails. Perhaps it is better to have clear rules than to reach accurate verdicts. Perhaps my view of relevancy is wrong in that clear rules of admissibility can be created that will lead to more accurate verdicts than would be the case in a discretionary regime. In any event, these are the questions that I find lurking in the shadow of *Kearley*. And of course, hovering over this entire article is the meaning of "judgment."

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48. There are many complications here. What we demand of rules is in part a function of relevant relationships. Those wedded to a hard edged conception of rules usually are thinking of rules governing primary behavior, like the criminal law. The real issue, or at least another real issue, in *Kearley* is how rules should bind high up in a hierarchical system of government. Lower courts should follow the rules of the House of Lords, I have no doubt, but the question in *Kearley* is the application of rules to a rule making institution. The only argument in the case for what it did is that, were the court to act otherwise here, it would soon be faced with lots of other bad evidentiary rules equally in need of correction. This is a rather curious slippery slope argument, for it amounts to the proposition that some good today should not be done because we may then have the opportunity to do some more good tomorrow.