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**Commentary:
A Response to Professor Friedman**

**The Evolution of the Hearsay Rule
to a Rule of Admission**

Ronald J. Allen*

The hearsay rule in its early form was a broad rule of exclusion, the justifications of which were virtually indistinguishable from those generally given for the Anglo-American adversarial process. The hearsay rule encouraged trials to be joined upon evidence presented by the parties in open court through witnesses testifying from present memory to first-hand knowledge, and thus available to be tested through cross-examination. But the rule, the system, and their justifications all developed during rude and simple times. With rare exceptions, trials involved quite local events in virtually every respect: the acts and the actors (parties and witnesses) were of the locale. Consequently, there was very little need for complex rules concerning the form of evidence. Those with personal knowledge either decided the case themselves or could be called to the bar to provide their evidence with relatively little inconvenience. The cases were not very complicated; they did not call for the multitude of witnesses and blizzard of paper that so characterizes contemporary litigation.

Centuries later, the conditions have changed. Although specifying the paradigm case of litigation is not easy, it very well may possess an intercity, if not interstate, aspect. In addition, the typical case may entail at least some complexity that can be dealt with only through rules permitting untraditional forms of evidence, evidence other than testimony from a witness with first-hand knowledge. Moreover, even if the modal case of litigation is not all that different from that of centuries ago, the distribution of cases is much more widely scattered. There are today too many complex cases involving evidence

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from large geographical areas to allow the simple case to set the rules for the entire system as a whole.

As the nature of litigated cases has changed, so too have the rules of evidence. Untraditional forms of evidence are increasingly common in litigation. Perhaps the best example is the proliferation of the use of various kinds of experts, but there are many other examples. The *Frye* rule¹ exists only in theory as a restriction on new types of evidence, and the common law relevancy rules largely have been swept away through the adoption of rules modeled on Article IV of the Federal Rules of Evidence.²

Notwithstanding all this change, the hearsay rule remains and looms large, surviving as perhaps the last bastion of the traditional conception of the Anglo-American form of trial. Even its twin pillar, party presentation of evidence, has been under assault through the combined force of managerial judging, the explicit power of judges to call and examine witnesses (still infrequently used, however), the advent of alternative forms of dispute resolution, and the shifting of substantial adjudicatory power to (or locating it in) administrative agencies. But the hearsay rule has stood its ground even though the ground under its feet has been eroding.

Or has it?

The positive argument for the proposition is made quite simply. All rules of evidence in our country, to my knowledge, have a hearsay rule, for which Article VIII of the Federal Rules apparently has become the paradigm.³ Courts deal with hearsay daily, commentators focus attention on the rule through a complex and apparently never ending literature, and evidence classes spend considerable time learning the rule's contours. That the rule exists, is implemented by courts, discussed by commentators, and taught in law schools is a powerful argument for its vibrancy.

There is a contrary argument, however, and it is more compelling than its competitor: The activity surrounding the hearsay rule is less evidence of its vibrancy than part of its death throes. Although the many exceptions to the hearsay rule are

1. See *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (holding that an expert's scientific testimony had to have achieved general acceptance within the scientific community before it would be admissible in evidence).

2. Article IV of the Federal Rules of Evidence addresses "relevancy and its limits." See FED. R. EVID. 401-412.

3. Article VIII of the Federal Rules of Evidence provides the guidelines on hearsay. See FED. R. EVID. 801-806.

often noted, little attention has been paid to the conceptual inroads made to the rule by discovery systems. In civil cases typically, and increasingly in criminal cases, forms of discovery are supplanting the hearsay rule.⁴ For example, in federal litigation, any witness outside the subpoena power of the district court may be deposed, and the deposition, although obviously hearsay, may be used at trial.⁵ Under normal discovery rules testimony also may be perpetuated for those within the subpoena power, and again, if used, the form of testimony will be hearsay. Somewhat more noted is that what discovery rules have done for witnesses, the hearsay rule⁶ has done for parties by excluding from hearsay the admissions of party opponents.⁷ Thus, it is only a marginal overstatement to say that today, at least in civil cases, the hearsay rule applies in any robust fashion only to available nonparty witnesses within the subpoena power of the court.⁸

And it does not apply to them very rigorously. There are numerous exclusions from the definition of hearsay, twenty-seven formal exceptions,⁹ and two provisions explicitly encouraging the ad hoc creation of exceptions,¹⁰ an encouragement, it should be noted, of which much has been made.¹¹ Moreover, hearsay exceptions, once formed, remain. To my knowledge, there are virtually no examples of hearsay exceptions being eliminated; the dynamic is one of ever-increasing scope for the exceptions. In another assault on the hearsay rule, some courts

4. Perpetuating testimony in criminal cases is becoming more common, for example. Under Rule 801(d)(1) of the Federal Rules of Evidence, testimony given before a grand jury may be admitted if inconsistent with a witness's trial testimony. FED. R. EVID. 801(d)(1). Under Rule 804(b)(1), testimony at a preliminary hearing also may be admissible at trial. FED. R. EVID. 804(b)(1).

5. See FED. R. CIV. P. 32(a)(3); FED. R. EVID. 804(b)(1).

6. I will now shift to focusing solely on the Federal Rules of Evidence.

7. See FED. R. EVID. 801(d)(2).

8. As the text implies, this is a bit of an overstatement, but not much of one. For example, under the rules so far discussed, a party may not rely on its own statement, but of course that is hardly ever necessary because the party will be there to testify. In any event, given all the exceptions to the hearsay rule which I will discuss in the text, a party often can rely on its own statement. Criminal cases are different because of the Confrontation Clause and the crude systems of discovery.

9. See FED. R. EVID. 803(1)-(23), 804(b)(1)-(4).

10. See FED. R. EVID. 803(24), 804(b)(5).

11. There are probably thousands of cases admitting evidence under the residual exceptions. The difficulty in counting these cases is compounded by the fact that not all decisions are reported, nor are all examples litigated to an opinion.

now are requiring that expert testimony be provided in affidavit form, requiring, rather than forbidding, hearsay. The hearsay rule is, in short, no longer a rule of exclusion; it is instead a rule of admission that is doing its subversive work under the cover of darkness. Article VIII of the Federal Rules purports to continue the common law development of hearsay in most respects, but it is a false promise. The Federal Rules, in concert with modern discovery principles, are quite clearly the harbinger of its demise.¹²

My instinct is that it is a death well-deserved, and after a burial suitable to its station, the hearsay rule should be allowed to lie quietly, undisturbed, for eternity. Given all the inroads into the rule, it no longer can seriously be contended that the rule contributes in any robust way to substantial justice.¹³ To be sure, an occasional case will turn on hearsay, and occasionally justice might be done because of exclusion for reason of hearsay, but against this must be balanced the probability that without a hearsay rule the evidence would have been excluded under some other rule, most likely relevancy. Further to be considered in the balance are cases of injustice resulting from the exclusion of hearsay as well as the astounding cost of maintaining the rule.

The cost of maintaining the rule is not just a function of its contribution to justice. It also includes the time spent on litigating the rule. And of course this is not just a cost voluntarily borne by the parties, for in our system virtually all the cost of the court—salaries, administrative costs, and capital costs—are borne by the public. As expensive as litigation is for the parties, it is supported by an enormous public subsidy. Each time a hearsay question is litigated, the public pays. The rule imposes other costs as well. Enormous time is spent teaching and writing about the hearsay rule, which are both costly enterprises. In some law schools, students spend over half their time in evidence classes learning the intricacies of the hearsay rule, and, as the Minnesota Hearsay Reform Conference demonstrates, enormous academic resources are expended on the rule.

Like other social practices, the hearsay rule should be required to pull its own freight; only if its costs are justified

12. This is a task apparently pursued directly by the drafters of the rules. For example, proposed Rule 804(b)(2), dealing with statements of recent perception, would have liberalized further the hearsay rule. *See* FED. R. EVID. 804 advisory committee's note (discussing proposed Rule 804(b)(2)).

13. I put aside Confrontation Clause questions in criminal cases.

should it be maintained. Of the three possible justifications for the rule, one is implausible, one is somewhat scandalous, and one has some but not much merit.

The implausible justification is the rule's standard, although often implicit, rationale that somehow it contributes to justice. Perhaps this was once true, but the world in which it was has passed, and in our world no serious argument along these lines can be made, most particularly for the reason already suggested: The hearsay rule today is more a rule of admission than exclusion.¹⁴ Most hearsay comes in, and most that does not would probably be excluded under other rules. The power of this point is made evident by the complete lack in the literature for over twenty years of any effort to provide a justification for the hearsay exceptions, taken as a whole.¹⁵ No one argues any more that the exceptions can be understood as driven by a coherent mix of necessity and reliability, and no one has any explanation but tradition for the administration of the availability requirement. Accordingly, the hearsay exceptions, and thus the rule, make no sense from this point of view unless seen as a step in the progression leading to the rule's eventual demise.

The potentially scandalous justification is that maintaining the hearsay rule protects the competitive advantage of those who know it, a point that extends to practitioners and scholars (and perhaps judges). Any complex set of rules, whether sensible or crazy, gives an advantage to the person who knows them; they constitute a tool for the knowledgeable to use against the less well-informed. The seasoned trial lawyer who knows the procedural and evidentiary intricacies of the relevant law can use that knowledge to good effect when competing at trial with a less experienced opponent. Proposing the abolition of the hearsay rule asks these individuals to give up this advantage, to throw away all the time they have spent mastering the topic. In addition, complex rules reduce competition by restricting entry to practice. Needless to say, the standard opposition from the experienced trial bar to general reform of evidence law is quite easy to understand. The point extends to academics. Elimination of the hearsay rule would at a stroke make obso-

14. Again, I wish to avoid the emotional debate that surrounds Confrontation Clause problems in criminal cases.

15. "Exceptions" as defined in this Article includes both "exceptions" and "exemptions."

lete the learning of all who have mastered the topic, and would make entry into the field by competitors easier.

The only meritorious justification for the hearsay rule is that it limits judicial discretion. Elimination of the rule would not mean that all evidence now subject to a hearsay argument would be automatically admissible. Rather, it would mean that judges would have to decide, primarily but not exclusively on relevancy grounds, whether to admit evidence. That determination would be less rule-bound than the present treatment of hearsay because it would focus generally on probative value and prejudice. The point should not be pressed too far, however, for the residual exceptions giveth in some measure what the rule-like structure of hearsay taketh away. Nonetheless, the primary analytical issue for hearsay today is whether the hearsay rule is a sensible specialized relevancy rule. That is precisely what it has become, and that is how it must be justified.

Moreover, the hearsay rule is a specialized relevancy rule that, like its more general counterpart in Article IV, favors admission over exclusion. Thus, the deep question for hearsay is whether its costs are justified given its contribution to rule-based relevancy decisions. I am skeptical that the answer is yes, largely because I am convinced by the general policy of the Federal Rules of Evidence to increase the flow of information to the fact-finder, in part by the sweeping away of common law relevancy rules. Those who wish to defend the hearsay rule, to extend its final days, as it were, must, I think, develop a justification explicitly in relevancy terms, explaining why the structure of Article VIII is preferable over its domain to the structure of Article IV—why, in other words, the policy of sweeping away the highly articulated relevancy rules should not extend to the last highly articulated relevancy rule.¹⁶

I suspect that these preliminary remarks make it quite clear why I am such an admirer of Professor Friedman's work.¹⁷ Professor Friedman purports to be attempting to rationalize the hearsay rule, to improve its functioning, but like all praiseworthy efforts involving the hearsay rule, his work contributes to its ultimate elimination. For that reason alone I

16. The only other remaining candidate for a highly articulated relevancy rule is the best evidence rule. See FED. R. EVID. 1001-1008 (describing the best evidence rule and exceptions).

17. See Richard D. Friedman, *Toward a Partial Economic, Game-Theoretic Analysis of Hearsay*, 76 MINN. L. REV. 723 (1992).

would be enthusiastic, but there are many aspects of his paper equally deserving of praise. In what follows, I first briefly describe some of these admirable characteristics. I then explain how Friedman's analysis advances the noble cause of the destruction of the hearsay rule, and I will end with some constructive criticisms.

At the conceptual plane, Professor Friedman's article is an interesting and complex work that combines the best of traditional forms of evidentiary scholarship with an approach that continues the recent efforts to apply new analytical tools to evidentiary problems. Taken as a traditional paper, it is a very useful catalogue of the ways hearsay might arise and of the subtle differences in the implications of the varying situations. Friedman's well-constructed hypotheticals begin with simple cases of hearsay and become increasingly complicated as the paper proceeds. His analysis of the hypotheticals is clear and informative. This paper undoubtedly will prove to be a very effective pedagogical tool for introducing a number of the complexities of the hearsay problem.

The piece soon transcends pedagogy, however, primarily through its masterly presentation of the tactical implications of hearsay, and it is here that Friedman contributes to the recent efforts to expand the analytical tools available for evidence scholarship. Employing a microeconomic perspective in an accessible and attractively informal way, he analyzes the interaction of hearsay and trial tactics.¹⁸ His analysis is a substantial contribution on two levels. It is, first, a very enlightening discussion of the secondary consequences of the hearsay rule, of how the decision to admit or exclude evidence can affect the relative position of the parties, and of how the parties might react. The details of his discussion are interesting in their own right, but we are also in his debt for demonstrating the power of microeconomic reasoning applied to common evidentiary matters. To my knowledge, the only other area in which this has been done is the confidentiality rules,¹⁹ and thus Friedman's analysis continues the very healthy infusion of new tools

18. *Id.* at 724, 727-50.

19. See Ronald J. Allen et al., *A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine*, 19 J. LEGAL STUD. 359 (1990); Louis Kaplow & Stephen Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 565 (1989). For a lengthy replication of much of these two works, see Stephen Bundy & Einer Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation*, 79 CAL. L. REV. 313 (1991).

and perspectives into the field of evidence.²⁰

The primary conclusion that Friedman reaches is that the hearsay rule is otiose, although I am not sure that he would agree with that characterization. It is not how he explicitly characterizes the implications of his work, but it is the article's most powerful message. To see why that is so requires careful attention to Friedman's subtle analysis; indeed, I suspect I am enamored of this piece precisely because of its subtly subversive nature.

Friedman first sets up the problem he wishes to address by highlighting the inadequately considered question of the cost of producing the live alternative to hearsay evidence. Employing the microeconomic approach, he asserts, correctly I think, that "[t]he court may conceive of its task as selecting the ruling that has the greatest possible expected value."²¹ As he points out in a very helpful way, that task has three loci, for it requires comparisons between hearsay, no evidence, and a live witness. He then proceeds to articulate the relevant criteria for the comparison, and here the careless reader may be led astray. The criteria are quite conventional: efficiency, distributive justice, and fairness.²² However, the analysis of these criteria is quite unconventional. Friedman eventually concludes that the court will lack sufficient information to make a reasoned choice based on these variables: "In particular, the court probably will have difficulty determining whether L/T [live testimony] is sufficiently preferable for truth-determination purposes to H [hearsay] and NE [no evidence] to warrant the cost of producing the declarant."²³ What is the alternative? This is Friedman's most creative suggestion: "[I]ts [the court's] best approach is generally to try to allocate the burden of producing the declarant in such a way that, consistent with fairness, the parties' own self-interest will lead to an efficient result."²⁴ Friedman asserts that the court can implement his approach as long as it

20. One other quite provocative aspect of Friedman's article is that it equates a favorable finding that probative value exceeds prejudicial impact with a positive effect on truth determination (which, for purposes of this footnote, I will abbreviate as "relevant"). See Friedman, *supra* note 17, at 737-43. This seems to me to raise quite profound and interesting questions. For example, quite clearly any discrete bit of evidence could be viewed as relevant but nonetheless lead to wrongful results, given the evidentiary base as a whole.

21. *Id.* at 735.

22. *Id.* at 736.

23. *Id.* at 750. For a general discussion of Friedman's three criteria, see *id.* at 736-48.

24. *Id.* at 751.

can evaluate whether hearsay evidence is better than no evidence and has a general idea about the difficulty and expense each party would face in producing the declarant.²⁵

At this point in Friedman's analysis, his critics may begin to fear that they detect signs of Law Professor's Disease.²⁶ The most common symptom of Law Professor's Disease is an extremely close and critical analysis of an unfavored position, followed by the assertion of some more favored alternative,²⁷ which remains untouched by the ferocious critical capacity previously demonstrated by the author. If it so difficult for a court to make a determination of the relative value of hearsay, Friedman's critics may wonder, why should we assume that the court can make a determination of the relative difficulty and expense for each party to produce the declarant? Do we have here, in short, the pristine case of Law Professor's Disease: a critical analysis followed by a set of sympathetic suppositions?

Other questions arise as well. Why in an efficiency analysis does the criterion change from the parties' views of their own costs to whether the court "has a general sense, which it believes to be accurate, as to how difficult and expensive each party would find it to produce the declarant?" Isn't this mixing apples and oranges? In any event, wouldn't the proper question be whether the court was likely to be right in its assessment rather than whether it merely believed itself to be correct? It is part of the beauty of Friedman's analysis that these criticisms do not matter, and thus are not criticisms. Explicating this point, in turn, uncovers how Friedman's argument advances the elimination of the hearsay rule.

In Friedman's analysis, the key variables are the probative value/prejudicial impact determination and the cost of producing the declarant. The first of these is quite simple to implement. In Friedman's view, hearsay is virtually always more probative than prejudicial if the underlying testimony would have been so.²⁸ He does not analyze the inverse proposition, but it follows *a fortiori*: if the live testimony would be more prejudicial than probative, so too would be the hearsay. But now, observe where we are. In Friedman's view, putting aside the question of cost, hearsay should be admissible whenever the

25. Friedman's specific language asserts that the "court needs some, but not necessarily full, information with respect to this factor." *Id.* at 751.

26. I believe I am the first to isolate this as a distinct syndrome.

27. This is usually referred to in technical terms as the "Professor's Pet Theory."

28. Friedman, *supra* note 17, at 752.

live testimony would have been admitted, and should be excludable on traditional relevancy grounds whenever the live testimony would have been excluded. This essentially collapses hearsay to relevancy, or, in my view, recognizes that the collapse has already taken place.

Friedman's analysis of cost confirms the implications of his analysis of probative value. He analyzes all the possible combinations of cost, and he concludes in every case save one that the burden of producing the declarant should rest on the opponent of the hearsay offer. Only when the physical burden is much more easily satisfied by the proponent would the proponent have to produce the declarant in order to use the hearsay, but even here the financial burden would rest with the opponent. Under Friedman's analysis, in virtually every case of hearsay,²⁹ the court will admit the evidence, and the opponent will have to choose whether to expend resources in responding. This, though, is precisely how a court handles virtually all evidentiary proffers at trial under the relevancy standard. If the judgment is made that the evidence is more probative than prejudicial, the court admits the evidence, and the opponent can respond as it chooses. Friedman's analysis thus collapses hearsay to relevancy,³⁰ with a pinch of best evidence principles thrown in for good measure.³¹

Friedman extends his analysis to cases where prejudice exceeds probative value, but this is unnecessary. If prejudice exceeds probative value, the court should exclude the evidence, again on traditional relevancy grounds.³² No more needs to be said about the matter.

29. In fact, Friedman articulates only one exception.

30. The actual standard under Rule 403 prescribes that the testimony will be admitted *unless* the prejudicial impact substantially outweighs the probative value. FED. R. EVID. 403. From my point of view, that is an insignificant detail.

31. See Friedman, *supra* note 17, at 782 (analyzing a witness in court and a criminal defendant who wishes to admit his or her own statement). These passages create some ambiguity, and it is not clear to what extent Friedman is arguing for an expanded best evidence rule.

32. In *Green v. Bock Laundry Machine Co.*, the Supreme Court held that the Federal Rules of Evidence require a judge to permit impeachment of a civil witness with prior felony convictions even though unfair prejudice might result. 109 S. Ct. 1981, 1993-94 (1989). I do not think that the holding of *Green* will be extended to hearsay; even if evidence is within a hearsay exception, it still could be excluded on relevancy grounds. Friedman appears to imply that hearsay which is more prejudicial than probative might be admitted. Friedman, *supra* note 17, at 782-83. I think that this is just a presentational ambiguity, although I am not sure.

Thus, Friedman's analysis furthers the laudable goal of burying the hearsay rule. All the necessary decisions concerning admissibility can be made through a combination of relevancy and best evidence principles; an independent hearsay component is unnecessary. And thus it is that Friedman's analysis will be quite controversial, for its implications are highly subversive of conventional understandings. As I feel a bond of kinship with him on this particular issue—although, depending upon how things go, a blood bond may turn out to be more descriptively accurate—I will now press ahead to certain minor problems that I see in his text.

Given the revolutionary implications of his work, Friedman may wish to insulate it from the burden of having to fight unnecessary skirmishes. In its present form, critics may advance a number of points. The first of these takes us back to Law Professor's Disease. The present analysis is a curious mix of hard and casual analysis. For the reasons already discussed, I doubt this weakens Friedman's thesis, but aspects of it make him vulnerable to diversionary attacks.

For example, he purports to employ the rigors of a microeconomic approach, and at one point he defends his argument about the probative value of hearsay by assigning substantial weight to empirical evidence: "More importantly, there is no empirical support for the proposition that juries overvalue hearsay substantially, much less that they overvalue it to . . . a great degree."³³ This rigor is not always matched by the arguments in his favor, however. How do we know, for example, how probative hearsay is?³⁴ And why should we accept his assumptions about the court's ability to make a reasonable assessment of the relative costs of producing declarants? This is the general objection that "what is good for the goose is good for the gander," and I would urge Professor Friedman to respond to it, just because for the most part it is a mere distraction from his main thesis.³⁵

Friedman injects yet another ambiguity into the analysis

33. Friedman, *supra* note 17, at 739.

34. A critic may respond to Friedman by saying that his unadorned assertions should be empirically justified. *See, e.g., id.* at 740-43. If empiricism is to be considered on one side of the equation, it should be considered on the other.

35. Friedman's cites to the new work on hearsay, *see id.* at 739 n.32, do not address this point. They deal only with a small corner of the relevant universe, and they are rather preliminary. My main point, in any event, is that the use of empiricism at this point seems to be a bit premature, and it will encourage his critics to divert the discussion from analytics to empiricism.

through his treatment of cases in which the hearsay is more prejudicial than probative. At times, he implies that such evidence might be admitted,³⁶ and at one point he even says that hearsay more prejudicial than probative "is excluded unless [the proponent] produces [the witness]."³⁷ But why should that be so? If the evidence is more prejudicial than probative, why should it ever be admitted?³⁸ One possible explanation is that Friedman does not conceive of his work as I do, as, in other words, an attack on the hearsay rule, thus leaving open the possibility for some residual use of hearsay notions that escapes me (and that would somehow favor the admission of prejudicial material). That, too, might deserve some clarification.³⁹

The failure to explain why his analysis leaves open admitting prejudicial evidence also opens him to the attack that his piece is conceptually flawed. He sees "effect on the truth determining process" as determined by the probative value/prejudicial impact variable. Apparently, in Friedman's view, if evidence is more probative than prejudicial, it has a positive effect on truth determination; if it is more prejudicial than probative, it has a negative effect. If so, one would think a court should never admit prejudicial evidence, although at times he argues to the contrary. Why he does so is unclear, thus creating an impression of a conceptual problem.

In one respect, Friedman presses his microeconomic approach quite far. As he recognizes, in certain circumstances the proponent of hearsay may be in a better position than the opponent to produce the declarant. In a very interesting passage, Friedman argues that, nonetheless, the court should admit the hearsay, with the burden on the opponent to produce the declarant. Why should this be done, given that the proponent could more cheaply produce the declarant? Because "[t]here is room for a deal between the parties."⁴⁰ This is the correct microeconomic answer, but it flies in the face of a longstanding tradition. Parties do not have to purchase evidence; evidence is made available through the discovery process, which is supposed to be cooperative. It is a strength of Friedman's article

36. See, e.g., *id.* at 738 n.30 and accompanying text.

37. *Id.* at 783.

38. For this discussion, I am putting aside questions concerning the legislative power to require the admission of such evidence.

39. Friedman alludes to this point in the present version of his paper, see Friedman, *supra* note 17, at 782-83, but I think it deserves more development.

40. *Id.* at 768.

that it calls into question such sacred cows, but he would do well to anticipate the objections that will be raised.

Moreover, there are objections to be answered other than those from tradition. In the passage just referred to, Friedman goes on to examine those cases in which the parties might not strike a deal, and his analysis seems complete. He then concludes this section by asserting that the court might decide, even though the hearsay is more probative than prejudicial, that part of the burden of producing the declarant should be imposed on the proponent. Friedman concludes by noting that "[t]he best way to do this depends on the precise circumstances."⁴¹

Indeed it does, and those circumstances are quite complex. They entail determining whether the proponent is willing to deal, whether the proponent will attempt to extract too large a price, and whether transactional costs are too high for a private deal to be struck.⁴² That the circumstances are complex means that very difficult and time-consuming processes may be required to make the necessary determinations. Absent from Friedman's analysis is a satisfactory consideration of judicial costs.⁴³ This is striking in the context of a microeconomic argument, for judicial costs are just as much "costs" as are the parties' costs, and they must be taken into account. In fact, judicial costs are public subsidies to litigating parties. Friedman's scheme might increase that subsidy sufficiently to offset the advantage that making the parties bear their own costs in presenting evidence may achieve. Again, he should explain why that is not so, and, I think, explain it in detail. While I am glad to have Professor Friedman's assertion that "decision making under the system I am suggesting need not entail excessive administrative costs,"⁴⁴ I would prefer a more intense examination of the question.

One other point needs elaboration. Friedman considers some of the tactical consequences that his argument entails. In particular, he discusses the possibility that the increased admissibility of hearsay under his approach creates incentives for the production of hearsay, which, as he says, might "raise the possi-

41. *Id.* at 770.

42. *Id.* at 769-70.

43. Although I make the point here due to the complexity of these particular factual determinations, the point itself is a general one. Friedman's argument requires that the judge determine the relative ability of parties to produce the declarant, and that will be a costly procedure as well.

44. Friedman, *supra* note 17, at 751.

bility of trial by affidavit."⁴⁵ He does, I think, have adequate responses to this concern, but he does not examine all the possibly troublesome incentives his proposals might generate. The most important of these that occurs to me is that his scheme creates incentives, by creating the means, to shift costs to an opponent. Remember that Friedman is essentially arguing for the free admissibility of hearsay, with the opponent bearing any costs of producing live testimony. If hearsay is generally cheaper than live testimony, admitting it will transfer the cost of producing live testimony to the other side. At a minimum, Friedman should examine this incentive, which may be at odds with the settled expectations of who bears costs at trial.

He should also explain why a variation on the race to the bottom will not occur, or is not a problem if it does. The incentive to shift costs from the proponent to the opponent is matched by a perfectly reciprocal incentive for the opponent to shift costs to the proponent by producing rebutting hearsay. If hearsay is generally not preferred to live testimony, a race to the bottom occurs.

The closest response to this problem is Friedman's argument that "[i]f the court concludes in the particular case that the evidence is really more prejudicial than probative, the theory should *not* allow the evidence."⁴⁶ This, though, is not an adequate response, for the problem emerges from Friedman's general assumption that hearsay is more probative than prejudicial, and from his arguments for opponents to bear the cost of responding.

One final clarification and one final comment are in order. I read Friedman's paper as calling for the expanded use of hearsay, but his paper is ambiguous in one respect. It bears the reading I have given it, but it also bears a reading that would merely superimpose a best evidence rule on top of the present hearsay rule. At the conference, Friedman distributed a proposed rule, designed to implement his proposals, which demonstrates this ambiguity by leaving open the status of hearsay when the declarant has been called to testify. His proposed rule (b)(4) provides that "[i]f the proponent does call the declarant as a witness, admissibility of the hearsay statement shall not be determined until the declarant first gives his or her current testimony with respect to the subject matter of the statement." Missing from this rule are the standards for admis-

45. *Id.* at 762.

46. *Id.* at 763.

sion of the hearsay. If, in his view, they are merely the relevancy requirements, then my reading of his work is intact. If, however, they are the normal requirements for hearsay, then all he has done is complicate matters by adding a best evidence principle that would change the implementation of the availability requirement and apparently make more hearsay subject to it. Similarly, it would no longer be clear what his analysis adds, because opponents of hearsay now can call the declarant if they like. In that case, this paper would collapse to his earlier hearsay paper arguing for procedural reform.⁴⁷ Were that to occur, much to my regret, we would find ourselves diametrically opposed on what to do about hearsay.

The final comment is related to Professor Friedman's paper but is generated by the entire conference at which it was presented. Other countries already have tried or proposed many of the suggestions for reform in Friedman's paper, as well as the reforms proposed by the other presenters.⁴⁸ Scotland has abolished the hearsay rule in civil proceedings,⁴⁹ and the New Zealand Law Commission plans to recommend abolition as well.⁵⁰ The Irish Law Reform Commission recommended dealing with hearsay through discretionary rulings similar to those called for by Federal Rule of Evidence 403.⁵¹ Scottish law permits the calling of additional witnesses if hearsay is admitted.⁵² Directly relevant to Friedman's paper, England provides for a notification procedure, which enables the notifying party to use hearsay.⁵³ The Scottish Law Commission proposed such a procedure, but it was not enacted because of concerns about its practicality.⁵⁴ None of this material is cited in Friedman's paper, nor did it play much of a role in the conference as a whole. This is regrettable. Much of the English-speaking world is experimenting with various approaches to hearsay and many other matters, and we should pay attention to these developments. Ironically, the Federal Rules of Evi-

47. Richard D. Friedman, *Improving the Procedure for Resolving Hearsay Issues*, 13 CARDOZO L. REV. 883 (1991). Friedman indicates that his intent is to "supplant, not supplement, the present hearsay system." Friedman, *supra* note 17, at 725 n.7. Several ambiguities remain, however.

48. A wonderful summary of this material is NEW ZEALAND LAW COMMISSION, PRELIMINARY PAPER NO. 15, EVIDENCE LAW: HEARSAY (1991).

49. *Id.* at 11.

50. *Id.* at 12.

51. *Id.* at 20-21.

52. *Id.* at 22.

53. *Id.* at 23-24

54. *Id.* at 23.

dence inspired much of this experimentation, but I fear that our insularity soon may transform us from a leading to an antiquated position, the metaphorical equivalent, perhaps, of our transformation from the leading creditor to the leading debtor nation.