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THE FRENCH *HUISSIER* AS A MODEL FOR U.S. CIVIL PROCEDURE REFORM

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Huissiers de justice *serve multiple roles in the French legal system. One is that of a court officer who compiles dossiers (reports). In that role, the* huissier *is* d'audiencier *(literally translated as "hearing" or "assisting") and works directly for the court system itself.*

The huissier's *report remains alien to the American lawyer, who is steeped in notions of procedure and "testimonialism" and in principles of fairness which appear ancient, but are rather modern dissimulations of law and equity's rich history in the American tradition. An important aspect of most legal processes, the collection of data in preparation for litigation is particularly marked by rhetorical differentiations and historical adaptations reflecting upon (actually, reinforcing) a cross-cultural dissonance that discourages both harmonization and legal experimentation between the two great Western legal cultures (Civil Law and common law).*

The apparent discord between the two systems leads courts and commentators routinely to overestimate the disparity between the use of a French-styled investigative magistrate as opposed to the U.S. trial method. Despite the distinct nature of gathering evidence according to the French and U.S. traditions, the huissier *is a type of figure found since the origin of the Western legal tradition. Vestiges remain in the United States, although American scholars and practitioners often overlook these manifestations (e.g., trustees and bailiffs). Still, the increasing complexity of commercial litigation, the harmonization of international civil procedure outside the United States, a growing corpus of international privacy standards, and a concern for the competitiveness of U.S. courts in attracting and inducing business development may cause re-examination of discovery rules, particularly the use of masters and investigative magistrates.*

Realizing that the French system is reflected in U.S. law not only may aid in resolution of disputes where both French and U.S. courts might claim jurisdiction, and where issues of transnational discovery often become key to resolving conflicts of law, but further can function as a paradigm from which particular administrative functions in U.S. courts may be reformed and harmonized with international standards and with principles of efficiency.

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I. INTRODUCTION TO THE *HUISSIER*

A. Gathering and Reporting Evidence

It is rare, but far from astonishing, for an American adjudicator to adopt factual determinations from a non-U.S. jurisdiction.[1] That seems to be far less controversial, or at least newsworthy, than when a U.S. court refers to foreign laws for support.[2] Indeed, it seems that after a lengthy history of utilizing foreign case law in its decision making,[3] American courts now face considerable criticism for doing so.[4]

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1. *See, e.g.*, Hilton v. Guyot, 159 U.S. 113, 202 (1895) (finding that a foreign judgment will not be recognized by a U.S. court unless "there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment"); *see also* Norex Petroleum Ltd. v. Access Indus., Inc., 416 F.3d 146, 158–59 (2d Cir. 2005) (same).

2. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 575–78 (2005) (disallowing capital punishment for minors under the age of 18, with Justices citing various international human rights laws, treaties, and cases). Justice Scalia criticized the use of international human rights standards. *Id.* at 622–28 (Scalia, J., dissenting). The majority's discussion of foreign law was discussed widely in the media. *See, e.g.*, Mary Ann Glendon, *Judicial Tourism: What's Wrong with the U.S. Supreme Court Citing Foreign Law*, WALL ST. J., Sep. 16, 2005, at A14 (on file with the University of Michigan Journal of Law Reform), *available at* http://www.opinionjournal.com/editorial/feature.html?id=110007265; Charles Lane, *5-4 Supreme Court Abolishes Juvenile Executions*, WASH. POST, Mar. 2, 2005, at A1 (on file with the University of Michigan Journal of Law Reform), *available at* http://www.washingtonpost.com/wp-dyn/articles/A62584-2005Mar1.html; Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, NEW YORKER, Sep. 12, 2005, at 42 (on file with the University of Michigan Journal of Law Reform), *available at* http://www.newyorker.com/archive/2005/09/12/050912fa_fact.

3. Justice O'Connor, dissenting, argued that "[o]ver the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency." *Roper*, 543 U.S. at 604 (O'Connor, J., dissenting).

4. The swelling debate has engendered heated commentary, both in popular and academic periodicals. *See* Dahlia Lithwick, *We Can't Execute Them, but Should We Lock Up Teens for Life?*, NEWSWEEK, Nov. 16, 2009, at 28; Stuart Taylor Jr., *The Court, and Foreign Friends, as Constitutional Convention*, 37 NAT'L J. 655 (2005). *Compare* Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63, 64–75 (2007)

Yet, adapting foreign legal innovations is still crucial to the evolution of law. Adjustments and inclusions by U.S. courts come from a multiplicity of sources, including brief encounters with foreign legal professionals. For example, a quarter-century ago, with little fanfare, an Illinois appeals court relied on the reports of French administrative officers—*huissiers*—to support its holding that McDonald's Corporation justifiably terminated the right of its franchisee, Raymond Dayan, to develop and operate certain restaurants in Paris.[5] Stating that the central issues were factual,[6] the Court then upheld the use of *huissier d'audiencier*[7] reports produced for previous French litigation: "[T]he trial court properly admitted . . . the *huissiers*' reports in evidence as past recollection recorded. The underlying rationale . . . relies on the fact that the proffered document contains sufficient circumstantial guarantees of trustworthiness and reliability . . . ."[8]

So, who exactly are these *huissiers*? *Huissiers de justice* serve multiple roles in the French legal system, and the traditional translation as "bailiff" is not necessarily comprehensive or exact. For instance, according to Martin Weston, the Senior Translator at the European Court of Human Rights in Strasbourg, the only reasonably precise translation is "'court usher and bailiff,' though *either* 'court usher'

(arguing that the practice of citing foreign law is justifiable on the grounds that it aids in understanding U.S. constitutional issues), *and* Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, 2007 U. ILL. L. REV. 637, 637–42 (arguing such use must be made with caution), *with* Jacob J. Zehnder, Note, *Constitutional Comparativism: The Emerging Risk of Comparative Law as a Constitutional Tiebreaker*, 41 VAL. U. L. REV. 1739, 1740 (2007) (arguing that, outside of cases with international elements, the use of foreign law as precedent leads to a "slippery slope" toward thwarting domestic democratic institutions).

5. Dayan v. McDonald's Corp. (*Dayan I*), 466 N.E.2d 958, 969–71 (Ill. App. Ct. 1984). Franchisors tend to have a court-recognized right to terminate, regardless of contractual provisions, whenever a franchisee's breach threatens the viability not only of the franchisee's own business but has, or threatens to have, an adverse impact on the entire franchised system. *Id.* (finding that the franchisor had good cause to terminate regardless of contractual specifications because the franchisee had failed to maintain quality, service, and cleanliness standards). For more on franchising terminations, see Robert W. Emerson, *Franchise Terminations: Legal Rights and Practical Effects When Franchisees Claim the Franchisor Discriminates*, 35 AM. BUS. L.J. 559 (1998). Franchisees' rights of association are considered in Robert W. Emerson, *Franchising and the Collective Rights of Franchisees*, 43 VAND. L. REV. 1503 (1990), and the clauses typically found in franchise contracts are discussed in Robert W. Emerson, *Franchise Contracts and Territoriality: A French Comparison*, 3 ENTREPRENEURIAL BUS. L.J. 315 (2009); Robert W. Emerson, *Franchise Contract Clauses and the Franchisor's Duty of Care Toward Its Franchisees*, 72 N.C. L. REV. 905 (1994); Robert W. Emerson, *Franchise Encroachment*, 47 AM. BUS. L.J. 191 (2010); Robert W. Emerson, *Franchise Territories: A Community Standard*, 45 WAKE FOREST L. REV. (forthcoming 2010); Robert W. Emerson, Franchise Agreements, Alleged Fraud, and Parol Evidence: From Bedlam to Bright Lines (Oct. 18, 2009) (unpublished manuscript, on file with the University of Michigan Journal of Law Reform).

6. *Dayan I*, 466 N.E.2d at 962.

7. See *infra* Part III for a discussion of the *huissier d'audiencier*.

8. *Dayan I*, 466 N.E.2d at 970.

or 'bailiff' will usually suffice when the text is clearly referring to only the one function or the other."[9] The *huissier* operates as an enforcer of debt obligations and judgments, as well as a process server, when acting as a bailiff.[10] This Article focuses on the use of the *huissier* as a court usher, serving as a compiler of dossiers in the form of *constatations*, *consultations*, and the various forms of *expertise* in the French system.[11] In the role of usher, the *huissier* is known as a *huissier d'audiencier* or *huissier audiencier*. The designation *audiencier*, literally translated as "hearing" or "assisting," indicates that these *huissiers de justice* work directly for the court system and are not assigned to or paid by private parties.[12]

The *huissier*'s report, a dossier typically signifying accuracy and professionalism to French practitioners,[13] remains alien to the American lawyer, who is steeped in notions of procedure and in principles of fairness which appear ancient. These principles, however, are modern and often, in fact, dissimulations of law and of

9. MARTIN WESTON, AN ENGLISH READER'S GUIDE TO THE FRENCH LEGAL SYSTEM 107–08 (1991) (citing O'Rooney, Notes on the Criminal Laws and Related Matters in Certain Countries, U.N. Office of Conference Services, English Section (1962) (unpublished multilingual glossary of legal terms and "cursory notes on some systems of law, judicatures and courts")). Weston's work has been hailed as a superb work providing deft, lucidly reasoned translations that highlight the difficulties of translating French legal terms into English and gives excellent explanations for the preferred version of a term's meaning. Bernard Rudden, *An English Reader's Guide to the French Legal System By Martin Weston*, 40 INT'L & COMP. L.Q. 755, 756 (1991) (book review). See *infra* Part III.A.1 for a discussion of the meaning of *audiencier* and the historical development of the various types of *huissier*.

10. *See* UNION INTERNATIONALE DES HUISSIERS DE JUSTICE (UIHJ), THE JUDICIAL OFFICER IN THE EUROPEAN UNION, http://www.uihj.com/ressources/10066/96/3108.pdf [hereinafter UIHJ] (on file with the University of Michigan Journal of Law Reform); WESTON, *supra* note 9, at 107.

11. Those italicized terms are explained *infra* notes 212–236 and accompanying text.

12. *See Dayan I*, 466 N.E.2d at 968; WESTON, *supra* note 9, at 107; *infra* Part III.A.1.c (discussing the *expertise*); *see also infra* notes 207–211 and accompanying text.

13. "In France, oral testimony does not commonly occur in civil litigation. Indeed, French civil procedure is marked by a strong distrust of oral evidence." Kent A. Lambert, Comment, *The Suffocation of a Legal Heritage: A Comparative Analysis of Civil Procedure in Louisiana and France—The Corruption of Louisiana's Civilian Tradition*, 67 TUL. L. REV. 231, 242 & n.48 (1992). Lambert relies upon, *inter alia*, James Beardsley, *Proof of Fact in French Civil Procedure*, 34 AM. J. COMP. L. 459, 478 (1986), which cites a centuries-old French proverb, "*Qui mieux abreuve, mieux preuve*," meaning, in effect, "He who gives [the witness] more to drink gets the better proof." Beardsley provided the commonly-used translation of "a witness who is well wined and dined will testify well," *id.* at 478 n.85, with another translation being, "A well-plied witness will come up to proof," JOHN BELL ET AL., PRINCIPLES OF FRENCH LAW 90 (2d. 2008). *See also* CODE CIVIL [C. CIV.] arts. 1317–69 (Fr.) (concerning documentary evidence, oral evidence, presumptions, admissions of parties, and oaths); Louise Harmon, *Etchings on Glass: Reflections on the Science of Proof*, 40 S. TEX. L. REV. 483, 504 n.68 (1999) ("In France, the witnesses are examined outside of the proceedings of the trial itself, which means that the court cannot assess the 'integrity' of the witness, only the (literary) 'integrity' of a text." (citing BERNARD S. JACKSON, LAW, FACT AND NARRATIVE COHERENCE 173 (1988))).

the American tradition's rich history of equity.[14] Indeed, defining the nature of this disjunction between inquisitorial and adversarial legal systems is a semantic exercise of dramatic proportions.[15] One important aspect of most legal processes, the collection of data in preparation for litigation, is particularly marked by rhetorical differentiations and historical adaptations that reinforce a cross-cultural dissonance discouraging both harmonization and legal experimentation between the two great Western legal cultures.

This apparent discord between the two systems apparently leads courts and commentators routinely to overestimate the disparity between the use of a French-styled investigative magistrate as opposed to the U.S. adversarial trial method.[16] Despite the distinct nature of gathering evidence in the French and U.S. traditions, the *huissier* is a type of figure found in legal systems since the origin of the Western legal tradition.[17] Vestiges remain in most Western legal cultures, including the United States,[18] where bailiffs, trustees, receivers, and sheriffs, among others, serve in administrative and other subordinate roles as court officials or semi-private government adjuncts.[19]

While the investigative magistrate, or evolutions thereof, appears in the great majority of Western legal systems, U.S. scholars and practitioners often overlook the manifestations of that figure in current law and, furthermore, there is a dearth of discussion about

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14. Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1183 (2005); *see also* William T. Quillen & Michael Hanrahan, *A Short History of the Delaware Court of Chancery—1792–1992*, 18 DEL. J. CORP. L. 819, 821–22 (1993).

15. *See* William Ewald, *Comparative Jurisprudence (I): What Was it Like to Try a Rat?*, 143 U. PA. L. REV. 1889 (1995) [hereinafter Ewald, *Comparative Jurisprudence (I)*] (discussing the relevance of legal philosophy to comparative law); William Ewald, *The Jurisprudential Approach to Comparative Law: A Field Guide to "Rats"*, 46 AM. J. COMP. L. 701 (1998) (clarifying the former article); *see also* Anne Peters & Heiner Schwenke, *Comparative Law Beyond Post-Modernism*, 49 INT'L & COMP. L.Q. 800, 813 (2000) (defining and challenging relativism in post-modern comparative legal scholarship: "[r]elativism is the position that neither universal knowledge exists (epistemic relativism), nor universally valid norms (moral relativism), because insights and values always depend on the standpoint of the epistemic or moral subject").

16. Yet, the importance of inquiry into the differences and similarities between the continental and American systems cannot be underestimated. Professor Kessler argues, for instance, that "we [in the United States] have failed to be self-conscious about the fact that we are adopting inquisitorial procedure, and as a result, our use of such procedure has been minimal, conflicted, and, at times, troubling." Kessler, *supra* note 14, at 1274.

17. *See* Pedro A. Malavet, *Counsel for the Situation: The Latin Notary, a Historical and Comparative Model*, 19 HASTINGS INT'L & COMP. L. REV. 389, 416 n.120, 450 (1996).

18. *Id.* at 406–27, 450–52; *see also* Kessler, *supra* note 14, at 1198–1210.

19. *See infra* Part III; *infra* Part II.B.

Latinate institutions in America's legal literature.[20] All the while, the increasing complexity of commercial litigation, the harmonization of international civil procedure outside the United States,[21] a growing corpus of international privacy standards,[22] and a concern for the competitiveness of U.S. courts in attracting and inducing business development[23] are significant pressures toward reexamination of federal rules regarding discovery, particularly in the use of masters and investigative magistrates.[24]

Thus, examining the manner in which the French system is reflected in U.S. law reveals the inherent connection between U.S. procedure and its foundation in Continental methods.[25] This can serve many useful purposes,[26] among which is to function as a paradigm from which particular administrative functions in U.S. courts

20. *See, e.g.*, Malavet, *supra* note 17, at 392 ("[T]his profession has never been thoroughly studied in our legal scholarship.").

21. Consider, for instance, the ALI/UNIDROIT Principles of Transnational Civil Procedure, which, while "not intended to unify existing national laws, but rather to enunciate common principles and rules . . . and to select the solutions that are best adapted to the special requirements of international commercial contracts," M.J. Bonell, *Unification of Law by Non-Legislative Means: The UNIDROIT Draft Principles for International Commercial Contracts*, 40 AM. J. COMP. L. 617, 622 (1992), nonetheless, in their limited jurisdictional context, may provide an opportunity for experimentation in the law and a working basis by which harmonization might overcome the traditional associations of procedural law with state sovereignty. *See, e.g.*, Geoffrey C. Hazard, Jr., *A Drafter's Reflections on the Principles of Transnational Civil Procedure*, *in* ALI/UNIDROIT PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE, at xlvii (2006) [hereinafter ALI/UNIDROIT PRINCIPLES]; Marcel Storme, *Procedural Law and the Reform of Justice: From Regional to Universal Harmonisation*, 6 UNIF. L. REV. 763, 765 (2001) (discussing the philosophical underpinnings of procedural law as a state sovereignty prerogative); George A. Zaphiriou, *Harmonization of Private Rules Between Civil and Common Law Jurisdictions*, 38 AM. J. COMP. L. SUPP. 71, 71 (1990) (defining harmonization as "short of unification and only an approximation (*rapprochement* or *Angleichung*) of rules or a coordination of policies").

22. *See, e.g.*, Jennifer Toole et al., *International Litigation*, 41 INT'L LAW. 329, 355 (2007) (finding that amendments to the Federal Rules of Civil Procedure will come into conflict with long-standing European privacy concerns); *see also* Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Marseille, Feb. 20, 1974, Gaz. Pal. 1974, Jurispr. 544, M. Candas (Fr.) (forbidding U.S. style 'fishing expeditions' through French courts).

23. *See* Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 162–63 (2008) (justifying relaxation of securities regulation due to concerns about deterring foreign businesses from investing in the United States).

24. Kessler, *supra* note 14, at 1251–52.

25. *Id.* at 1274–75; *see also id.* at 1183 ("[T]he truth is that inquisitorial procedure is neither alien to our traditions nor inherently unfair. As late as the nineteenth century, Anglo-American courts of equity (from which, in fact, masters originally emerged) employed a mode of procedure, which like that used in the courts of continental Europe, derived from the Roman-canon tradition and thus was significantly inquisitorial." (footnotes omitted)).

26. For example, it could aid in the resolution of disputes where both French and U.S. courts might claim jurisdiction, and where issues of transnational discovery often become key to resolving conflicts of law. The focus of this Article, however, is American usage of the *huissier* in domestic proceedings.

may be reformed and harmonized with international standards and with the principles of efficiency.[27]

B. Comparative Law in Theoretical Context

This Article examines the contemporary context in which the *huissier audiencier* operates. It endeavors to understand how the discovery process can be made more efficient by using neutral third parties, such as special masters, to bring about the just resolution of disputes in a more predictable and non-intrusive manner than current U.S. procedure permits. We also should come to appreciate how the *huissier audiencier* is already a functional figure in American litigation. As scholars have opined concerning sociological and comparative legal analysis:

> [C]ontemporary legal systems in the economically developed world have much more in common with each other than with their past histories, as can be seen by comparing the extent to which law in present day societies deals with essentially modern institutions and problems such as corporations and transport and the rights of individuals and consumers.[28]

In comparing two modern legal doctrines—the French *Nouveau Code de Procédure Civile*'s ("N.C.P.C.") use of third parties and written evidence and the U.S. Federal Rules of Civil Procedure's ("FRCP") rules for special masters,[29] discovery,[30] and the gathering of testimony[31]—one can identify the similarities between these re-

27. Kessler, *supra* note 14, at 1251 ("[A]dversarial procedure can lead to great inefficiencies and unfairness." (citing Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 640–41 (1985))). Of course, an irony is that sometimes American commentators who strongly oppose numerous characteristics of American adversarialism are *not* enamored of any U.S. court's turning to foreign law for sources to underlie a judicial opinion. *See, e.g.*, Daveed Gartenstein-Ross, *Not So Friendly Amici: Look Who's Filing Supreme Court Briefs Now*, WKLY. STANDARD, Apr. 24, 2006, at 11; Jeremy Rabkin, *Courting Abroad: The Use and Abuse of Foreign Law by the U.S. Supreme Court*, WKLY. STANDARD, Apr. 10, 2006, at 29.

28. David Nelken, *Towards a Sociology of Legal Adaptation*, *in* ADAPTING LEGAL CULTURES 7, 8 (David Nelken & Johannes Feest eds., 2001) (citing Lawrence Friedman, *Some Comments on Cotterrell and Legal Transplants*, *in* ADAPTING LEGAL CULTURES, *supra*, at 93); *cf.* William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489, 510 (1995) ("The study [of comparative law] can not confine itself to an investigation of a single, present-day legal system, but must also contain a substantial historical and comparative component. For in attempting to limit the link between law and society, one must consider how laws originate, how they evolve, and how they differ from society to society; and this can only be done by detailed comparative studies.").

29. *See* FED. R. CIV. P. 53.

30. *See* FED. R. CIV. P. 26.

31. *See* FED. R. CIV. P. 43.

gimes and understand how current U.S. practice unnecessarily diminishes the potential of the special master. Ultimately, this Article makes plain that greater efficiency is possible in keeping with American legal values through the adaptation of particular aspects of the *huissier*.[32]

Of course, we must not ignore the historical developments that gave rise to the current regimes, nor the reality that the adjustment and evolution of courtroom methods is a process fraught with any number of policy considerations. Policymakers must tailor potential legal "transplants" to the unique conditions of domestic litigation.[33] By limiting this Article's scope to commercial litigation—that which, *inter alia*, affects corporations and contracts and brings into play complex civil matters such as product liability—its analysis, with some exceptions,[34] is not generally subject to the constraints found in criminal procedure and discovery.[35] Moreover, this circumscribed, practical federal approach allows for future legal experimentation, with greater sensitivity to local legal cultures. Consider, for instance, Justice Louis Brandeis' "laboratories of democracy" pronouncement,[36] perhaps one of the most clichéd

32. *See, e.g.*, Robert F. Taylor, *A Comparative Study of Expert Testimony in France and the United States: Philosophical Underpinnings, History, Practice, and Procedure*, 31 TEX. INT'L L.J. 181, 182 (1996) ("Historically, those who have sought to transform or modernize their own legal culture have looked to the tools used by other legal cultures to deal with similar problems."); *see also* 1 KONRAD ZWEIGERT & HEIN KÖLZ, AN INTRODUCTION TO COMPARATIVE LAW: THE FRAMEWORK 19–20 (1977).

33. *See, e.g.*, Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 150 (2006) ("[F]or those who are committed to cultural relativism, consultation of comparative law will make little sense.").

34. *See* Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679, 717–21 (1999) (on the theory that courts imbue traditionally civil hearings with criminal aspects in order to incorporate criminal law protections for defendants). Another law review article suggests some constitutionalizing of civil proceedings (e.g., juvenile courts) to include criminal procedural rights: "The Court has constitutionalized juvenile court procedures related to more adversarial facets of the fact-finding process (juveniles' rights to protection from coerced confessions; procedural due process in certification hearings; notice, counsel, and confrontation on cross-examination; and protection from self-incrimination) . . . ." Michael L. Skoglund, Note, *Private Threats, Public Stigma? Avoiding False Dichotomies in the Application of Megan's Law to the Juvenile Justice System*, 84 MINN. L. REV. 1805, 1825 n.93 (2000).

35. *See* 21A AM. JUR. 2D *Criminal Law* § 1073 (2008) (describing constitutional rights to confrontation of witnesses in U.S. criminal cases); *see also* Crawford v. Washington, 541 U.S. 36, 51 (2004) (same); Miranda v. Arizona, 384 U.S. 436, 495–96 (1966) (holding that, unlike civil trials where party admissions are generally admissible, a defendant's confession to law enforcement was inadmissible because defendant had not waived his Fifth and Sixth Amendment rights to remain silent and have counsel, respectively). *Compare* Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (incorporating the right to a jury trial for all felony criminal case to the states), *with* Charles A. Rees, *Preserved or Pickled?: The Right to Trial by Jury After the Merger of Law and Equity in Maryland*, 26 U. BALT. L. REV. 301, 348 (1997) (noting no such incorporation of the Seventh Amendment right in civil jury trials).

36. New States Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

phrases on federalism and definitely one of the most cited:[37] "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[38]

By following Brandeis' basic tenet, that federalism presents the opportunity for legal experimentation in limited jurisdictional contexts, one may show that the use of the *huissier* is possible in U.S. law, and how such a use will lead to desirable gains in efficiency and competitiveness in the international markets.

C. The Huissier *as Model: Complications and Possibilities*

This Article is divided into sections to clearly explain the *huissier* to the U.S. practitioner, and to explore the potential uses of the *huissier* under current law and as a proxy for reexamining U.S. discovery. First, this Article traces the historical development of the U.S. system of discovery, especially regarding nineteenth century equitable jurisdiction and the growth of commercial law and the emergence of the French *huissier de justice* in the Civilian tradition. Second, it examines the uses of the *huissier audiencier* in current litigation by reviewing *huissier* practices in modern France, and by looking at the use of *huissier* reports and testimony in U.S. cases. Next, it offers an economic analysis of the *huissier audiencier*, showing how procedural costs in U.S. litigation can be reduced by providing masters with greater powers. Finally, this Article considers the changing legal environment and the pressures on U.S. civil discovery to adapt itself to new international standards, both through the civil rulemaking procedure, as in the 2003 amend-

37. As of May 24, 2010, Brandeis' maxim on federalism was cited in 24 different U.S. Supreme Court opinions since 1980. Of course, dozens of other courts have also invoked the Justice's adage.

38. *New States Ice Co.*, 285 U.S. at 311. *But see* Michael S. Greve, *Laboratories of Democracy: Anatomy of a Metaphor*, FEDERALIST OUTLOOK (Am. Enter. Inst. for Pub. Pol'y Research, Washington, D.C.), Mar. 2001, at 1, 1 (on file with the University of Michigan Journal of Law Reform), *available at* http://www.aei.org/docLib/Laboratories%20of%20Democracy%20Anatomy%20of%20a%20Metaphor.pdf (arguing that Brandeis' metaphor reflected not a commitment to federalism but his favoring of "scientific socialism" and that Brandeis' actual views, not the hackneyed phrase, continue to dominate judicial discourse and to inhibit "experimental, federalist politics"); G. Alan Tarr, *Laboratories of Democracy? Brandeis, Federalism, and Scientific Management*, 31 PUBLIUS: J. FEDERALISM 37, 37 (2001) (agreeing that Brandeis was a champion of federalism, but contending that abandonment of his "laboratories of democracy" metaphor would actually help states innovate; Brandeis' axiom actually rested on a public policy concept "inimical to federal diversity" and favoring scientific management).

ments to the FRCP, and also by external pressures, such as revised notions of privacy rights. These influences, when viewed in perspective, explain the growth of the special master with the increase in complex litigation toward the close of the twentieth century; furthermore, they demonstrate the potential for the *huissier* to serve as a model for U.S. civil procedure reform within the preexisting framework of the master.

II. HISTORY

The codification of law in ancient Rome served as the progenitor of the legal institutions of the major Western powers in the modern era. Thus, the customs, traditions, and juridical concepts that form the basis of the Continental and French procedural systems emerged out of Rome. Indeed, the development of these systems is directly traceable to the ancient Roman codes.[39] These codes affected the English system, too; while the common law's history was complicated by its separate origins, the transplantation and adaptation of legal cultures due to political upheaval[40] or more subtle shifts in social and economic pressure have provided it with distinct, Latinate qualities that continue to influence its adversarial approach to procedure. A genuine "American exceptionalism"[41] thus may be an exaggeration, but also is certainly a recent phenomenon to be distinguished from the English as well as Continental legal formats.[42]

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39. *See* JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 11–13 (1969); CHARLES M. RADDING, THE ORIGINS OF MEDIEVAL JURISPRUDENCE 23–30 (1988); STIG STRÖMHOLM, A SHORT HISTORY OF LEGAL THINKING IN THE WEST 53 (1985); Malavet, *supra* note 17, at 408–11.

40. The Norman Conquest of 1066, for example.

41. ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LIFE 6–9 (2001). American exceptionalism is defined by:

> (1) more complex bodies of legal rules; (2) more formal, adversarial procedures for resolving political and scientific disputes; (3) more costly forms of legal contestation; (4) stronger, more punitive legal sanctions; (5) more frequent judicial review of and intervention into administrative decision and processes; (6) more political controversy about legal rules and institutions; (7) more politically fragmented, less closely coordinated decisionmaking systems; and (8) more legal uncertainty and instability.

Id. at 7 (footnotes omitted).

42. Kessler, *supra* note 14, at 1199 ("[I]t is clear that [the English Court of Chancery] had deep roots in the Roman-canon tradition."). *See generally* R.H. Helmholz, *Magna Carta and the* ius commune, 66 U. CHI. L. REV. 297 (1999) (tracing the development of the Magna Carta to Roman and canon laws of Medieval continental Europe).

A. Equity, Masters, and U.S. Discovery in Historical Context

The emergence of an American exceptionalism to Continental legal standards might be traced to Medieval England and the various political developments from the thirteenth century onward, after which a constitutional system was erected seeking to protect life, liberty, and property by due process of law.[43] Yet, the common law courts, relatively empowered under a new compromise between the English Parliament and Crown embodied in the Magna Carta (which restrained monarchical authority by establishing due process rights[44]), were insufficient and indeed inefficient.[45] By the reign of Edward III,[46] chancery[47] jurisdiction had already departed from the constitutional orthodoxy of the Magna Carta and had begun to incorporate principles of the Civil Law into the common law system, advancing William of Normandy and his progeny's taste for strong government.[48] English chancery, a body of law reflecting Continental procedure, was the model for the equity and chancery courts in the United States.[49] Those early American courts' dramatic influence on the development of modern discovery and civil procedure remains evident.

1. The American Courts of Equity Before 1938

The year 1938 was a watershed in American legal tradition. In *Erie Railroad Co. v. Tompkins*,[50] the U.S. Supreme Court abandoned

43. Due Process of Law Act, 1368, 42 Edw. 3, c. 3; Due Process of Law Act, 1354, 28 Edw. 3, c. 3 (the statutory rendition of Magna Carta, in which the phrase "due process of law" was first used); J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 97 (4th ed. 2002).

44. Magna Carta, cl. 24.

45. For instance, the Magna Carta brought with it new provisions that fit awkwardly with preexisting practices of the courts, many of which were retained, such as the awarding of dower only in lands the husband held on the day of marriage. Helmholz, *supra* note 42, at 315 & n.66 (citing Janet Senderowitz Loengard, Rationabilis Dos*: Magna Carta and the Widow's "Fair Share" in the Early Thirteenth Century, in* WIFE AND WIDOW IN MEDIEVAL ENGLAND 59 (Sue Sheridan Walker ed., 1993)).

46. Edward III lived from 1312 to 1377 and reigned as king of England from 1327 to 1377. BAKER, *supra* note 43, at 97–99.

47. *Id.* at 99 n.14.

48. *Id.* at 98–99 & n.12; *see also* SAMUEL MAXWELL, A TREATISE ON THE LAW OF PLEADING UNDER THE CODE OF CIVIL PROCEDURE: DESIGNED FOR ALL THE CODE STATES 3 (Chicago, Callaghan & Co. 1892) (on file with the University of Michigan Journal of Law Reform), *available at* http://books.google.com/books/download/A_treatise_on_the_law_of_pleading_under_.pdf?id=n_I9AAAAIAAJ&output=pdf (noting that pleadings in English courts of equity were based upon the Civil Law, abandoning the technicality driven emphasis in the common law).

49. *See* Kessler, *supra* note 14, at 1198–99.

50. 304 U.S. 64 (1938).

Justice Joseph Story's century-old aspiration for the creation of general federal common law.[51] On another front, while the adoption of the FRCP in 1938 resulted from an evolution in U.S. law, the FRCP's merger of law and equity[52] dispensed with numerous anachronisms that continue to plague foreign—especially Civil Law—jurisdictions.[53] This streamlining and updating process, though, eliminated or weakened valuable procedural mechanisms that could provide greater effectiveness in adjudication in the twenty-first century.[54]

Equity was already established in North America by the seventeenth century and by 1776 some kind of equity system existed in each of the thirteen colonies.[55] However, as with ecclesiastical courts during the English Civil War[56] and later that same century

51. *Id.* at 78–80 (overruling Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) and stating that "there is no federal general common law"); *see also* TONY A. FREYER, HARMONY AND DISCOURSE: THE SWIFT AND ERIE CASES IN AMERICAN FEDERALISM (1981); John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 702–06 (1974).

52. Kessler, *supra* note 14, at 1184 (citing FED. R. CIV. P. 1). The Federal Rules of Civil Procedure are not a product of direct congressional legislation; instead Congress enacted the Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2006)), authorizing the Supreme Court to promulgate rules of procedure. 2005 FEDERAL RULES OF CIVIL PROCEDURE, at xi-xii (Stephen C. Yeazell ed., 2005).

53. Consider, for instance, the comments of a French practitioner, renowned international lawyer Elie Kleiman. He noted that French jurists have tried to reform their legal system and remove anachronisms to a much greater extent than their Italian counterparts, but with only limited success:

> Actually, the French and the Italians share the same inheritance from the Roman times, although in France we have had several reforms that culminated in a new set of rules in the mid-'70s and also in the '80s, and rules are regularly kept up to date so that we don't have to struggle every time we go to court with remnants from the Roman times. Which might lead some of you to think that it's better to litigate in France than in Italy. [sic] I don't know, it depends on the stakes, of course, and it depends on many things. *We still have strange remnants from the past in France, too.*

Elie Kleiman, Address at the International Law Practicum of the International Law and Practice Section of the New York State Bar Association: France (Jan. 27, 1999), *in Hot Tips for the Practitioner With Clients Involved in International Business, Trade and Finance*, 12 INT'L L. PRACTICUM 64, 71–72 (1999) (emphasis added).

54. *See* Kessler, *supra* note 14, at 1251; *infra* Part V.

55. Kessler, *supra* note 14, at 1202.

56. 16 Car., c. 10–11 (Eng.) (the Long Parliament, in 1642, struck against the powers of ecclesiastical courts by abolishing the commission for ecclesiastical causes, the regional councils, and the Star Chamber). Indeed, James I (ruler from 1603 to 1625) has been faulted for ignoring the festering problems that led to rebellion, war, and ultimately the execution of his son and successor Charles I. Furthermore, James' most serious "breach with his first parliament was his refusal to restrict the authority or to reform the abuses of the ecclesiastical courts." CHARLES HARDING FIRTH, OLIVER CROMWELL AND THE RULE OF THE PURITANS IN ENGLAND 11 (Oxford Univ. Press 1953) (1900).

during the Glorious Revolution,[57] chancery courts in the American colonies came under particular pressure during the American Revolution:

> Such distrust of equity manifested itself in section 30 of the Judiciary Act of 1789, where Congress declared that federal courts must adopt the common-law method of presenting testimony orally in the courtroom, thus eschewing the equitable tradition of gathering testimony through pre-prepared, written interrogatories and then concealing it from the parties . . . .[58]

This evisceration was only temporary, however, as equitable practice returned after the Revolution, perhaps as a result of the limited remedies available at common law.[59] Nonetheless, it was plain that equity lacked the common law's positivist and political conception of due process and, as before the Revolution, it became increasingly viewed as furtive,[60] inflexible,[61] and a vestige of oppressive imperial power.[62] At that time, the equity courts gathered testimony *ex parte* by a court official[63]—the commissioner or master[64]—who was not unlike the *huissier audiencier*.[65] Although the parties drafted, or at least had some editorial control over inter-

57. Tim Harris, *The People, the Law, and the Constitution in Scotland and England: A Comparative Approach to the Glorious Revolution*, 38 J. BRITISH STUD. 28, 43 (1999) (detailing acts of English hostility toward ecclesiastical courts, including the Declaration of Rights naming some of those bodies as "illegal and pernicious" (quoting LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS, 1689, at 296 (1981))).

58. Kessler, *supra* note 14, at 1204 (footnote omitted).

59. *Id.*

60. *Id.* at 1223–24.

61. Quillen & Hanrahan, *supra* note 14, at 821–22; *see also* David Ferleger, *Special Masters Under Rule 53: A Welcome Evolution*, *in* ALI-ABA COURSE OF STUDY: THE ART AND SCIENCE OF SERVING AS A SPECIAL MASTER IN FEDERAL AND STATE COURTS 1, 4 (2007) (quoting *Ex parte* Peterson, 253 U.S. 300, 312 (1920)). Appointment of a special master comes from the court's "inherent power to provide themselves with appropriate instruments required for the performance of their duties." *Ex parte Peterson*, 253 U.S. at 312.

62. Quillen & Hanrahan, *supra* note 14, at 826; *see also* G. Glenn & K. Redden, *Equity: A Visit to the Founding Fathers*, 31 VA. L. REV. 753, 753 (1945) (describing "equity" as a "thing of continuous growth").

63. Kessler, *supra* note 14, at 1224.

64. Since the middle nineteenth century the term has steadily been supplanted by "Special Master." Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625, 644 (2002) (citing Mississippi v. Arkansas, 415 U.S. 289, 297 n.1 (1974) (Douglas, J., dissenting)).

65. MICHAEL R.T. MACNAIR, THE LAW OF PROOF IN EARLY MODERN EQUITY 167–77 (1999); Kessler, *supra* note 14, at 1267; *see also* Carstens, *supra* note 64, at 644, 648 (finding that masters served as fact-finders and for specific, substantive expertise in cases involving disputes in areas such as water appointment and diversion); Ferleger, *supra* note 61, at 6 (stating that contemporary masters serve in post-trial enforcement capacities).

rogatories, oral testimony slowly began to replace the equitable mode of witness interrogation, partly as a result of the master's own practices.[66] For instance, masters had begun as much fact-finding as possible in court for the sake of efficiency, thus forsaking the traditions of clandestine chancery procedure and conduct—methods more akin to the *huissier*'s or other third parties' out-of-court fact gathering.[67] The masters' informal experimentation was later recognized in case law,[68] and it eventually developed as the stated preference in a majority of jurisdictions.[69] This shunning of traditional, out-of-court gathering of testimony was key to the divergence between the Civilian tradition, where the method was retained through investigative magistrates, and the American adversarial system, where oral testimony became increasingly viewed as a means of gathering evidence in a demonstrably more efficient and accurate manner.[70]

Indeed, by the early twentieth century, masters were still found in American courts, albeit marginalized to a formal role at trial, as common law judges increasingly invoked equitable powers on their own. These rising judicial efficiencies of practice almost necessarily meant a steadily attenuated function for the masters.[71] As Professor Amalia Kessler traces in her historiographical account of the lessening of American equity, by 1912 the Supreme Court had already shown a marked preference for oral testimony in the Federal Rules of Equity, standardizing its use in United States courts, at law and now equity.[72] Thus, the master's role became increasingly murky as the twentieth century began. At once, the master was of an inquisitorial heritage, not unlike the *huissier*, with vestiges of secrecy, the dossier method of evidence gathering, and limited opportunities for parties to challenge evidence.[73] As one U.S. federal judge wrote:

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66. JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 18–19 (2003); Kessler, *supra* note 14, at 1224.

67. Kessler, *supra* note 14, at 1224.

68. Remsen v. Remsen, 2 Johns. Ch. 495 (N.Y. Ch. 1817).

69. Kessler, *supra* note 14, at 1225–26.

70. *See infra* Part V.B. (discussing the American preference for oral testimony).

71. *See* Ferleger, *supra* note 61, at 5 ("[B]y the late nineteenth century, masters routinely were authorized to take evidence and make non-binding recommendations to courts. The federal equity rules in 1912 restrained the use of masters, with Equity Rule 59 establishing the requirement, now in Federal Rule of Civil Procedure 53(b), that references to masters be justified by an 'exceptional condition.'" (footnotes omitted)).

72. Kessler, *supra* note 14, at 1233.

73. *See, e.g., id.* at 1238–41. *See generally* JOHN G. HENDERSON, CHANCERY PRACTICE WITH ESPECIAL REFERENCE TO THE OFFICE AND DUTIES OF MASTERS IN CHANCERY, REGISTERS, AUDITORS, COMMISSIONERS IN CHANCERY, COURT COMMISSIONERS, MASTER

> Special Masters, it is said—and I agree—can and do by and large establish closer, more informal relationships with the two sides than could a judge. In the context of a massive case, with many pretrial contacts, this is an extremely valuable asset in terms of the success of the process. It must also be recognized, however, that informality and the maintenance of close working relationships with the parties exact a price: the special masters will almost invariably come to identify some of the parties' logistical and other problems as their own.[74]

In American jurisprudence, these inquisitorial and emotive concepts were increasingly at odds with common law rules of evidence, and their role seemed to supplant that of the jury, much as it does in modern French civil litigation.[75] The master became inhibited by prohibitions on producing dossiers, and the ascendance of the jury and confrontation created a disjunction between the master's inquisitorial heritage and the contemporary adversarial system of law. The master retained the same autonomy and discretionary authority as found in equity, but the new model for litigation failed to reconcile this history by delimiting the master's ultimate powers in a system that prizes in-court testimony.[76]

Indeed, the movement toward greater recognition of the jury in American litigation indicated that, so far as the New Deal courts were concerned, in-court testimony was more credible than and hence preferable to written testimony.[77] Furthermore, the jury was

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COMMISSIONERS, REFEREES, ETC. (1904) (arguing for reform of the master's role so as to conform with a standardized common law evidentiary system).

74. Harold H. Greene, *Introduction* to MANAGING COMPLEX LITIGATION: A PRACTICAL GUIDE TO THE USE OF SPECIAL MASTERS, at ix, xi (1983) [hereinafter MANAGING COMPLEX LITIGATION].

75. HENDERSON, *supra* note 73, at 719 ("[A] number of the courts of this country have taken the stand that a master's findings of fact, where the evidence is conflicting and he had the advantage of seeing the witnesses upon the stand and of hearing them testify, is as binding upon the chancellor as the verdict of a jury is upon the trial judge in a common-law court.").

76. Kessler, *supra* note 14, at 1247 (citing Cobell v. Norton, 310 F. Supp. 2d 102, 110 (D.C. Cir. 2004)).

77. This process started years earlier with the Federal Rules of Evidence amendments in 1912, which reflected the judicial preference for oral testimony. *Id.* at 1244. Then it came to a head with the nearly complete evisceration of any remaining traditional equity, inquisitorial powers of masters and simply left the master as equated to, and merely an alternative to, the jury. *Id.* at 1242 (discussing Rule 53 of the 1938 Federal Rules of Civil Procedure).

The evidence is clear that New Deal court reform was intended to reduce judicial power by giving more power to other decision-makers, namely administrative agencies and juries. Ann Woolhandler & Michael G. Collins, *Article III Juries*, 87 VA. L. REV. 587, 593 (2001) ("[T]he New Deal Court largely abandoned earlier notions of defined rationality that the Court had used to police legislatures, agencies, and juries. It did so in favor of a less legalis-

believed to be superior in evaluating the accuracy of live oral evidence rather than written statements.[78] At issue was, and is, the accuracy of witness recollection in the differing forms of evidence gathering, or the ability to "test" the witness.[79] The difference is likely negligible, as recent studies have shown that there is no statistically significant decrease in witness credibility to the observer when statements are presented by written transcript as opposed to in person.[80] Increasingly complex litigation, coupled with the limited use of juries in corporate cases, demonstrates that for particular litigants it may be better to further isolate the potential for jury error by having a third party professional fact-finder serve as an additional, professionally trained guard against inaccuracy.[81]

Despite the devaluation of equity in 1938 (through the integration of law and equity), the drafters of the FRCP provided for special masters and thereby maintained the opportunity for their future use and reform. The original rule limited masters to the performance of trial functions,[82] but over time, and especially in

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tic, more common sense notion of rationality that was highly deferential to these nonjudicial decisionmakers."). Thus, the jury was actually more tightly circumscribed by court supervision earlier in American history, and reform in the 1930s gave the jury more power, not less. *Id.* at 683 (describing a judicial retreat in which "federal juries had significantly gained power by the mid-twentieth century in many important respects, at the expense of judicial control").

78. *But see* E-mail from Torun Lindholm, Professor of Psychology, Stockholm University, to Robert W. Emerson, Chair, Department of Management, University of Florida, Warrington College of Business Administration (Feb. 19, 2008, 05:17:00 EST) (on file with the University of Michigan Journal of Law Reform) (noting several recent studies in which "witness responses to specific detail questions" were no less credible when presented as transcript rather than video; indeed, the experiment's participants "were better at judging the accuracy of written than videotaped statements"); *infra* notes 526–529 and accompanying text (discussing Torun Lindholm, *Who Can Judge the Accuracy of Eyewitness Statements? A Comparison of Professional and Lay-Persons*, 22 APPLIED COGNITIVE PSYCHOL. 1301, 1310 (2008), which indicates that factfinders perform better evaluating the evidence from written transcripts than from oral testimony); *see also* Kessler, *supra* note 14, at 1224 ("In the equity tradition, however, these [quasi-inquisitorial] rights [aided by masters] were viewed as a check on arbitrary state action and, deployed within a framework of prepublication secrecy, as an aid in truth-seeking.").

79. *See supra* note 78 and accompanying text.

80. *See supra* note 78 and accompanying text; *see also* Torun Lindholm, *Who Can Judge the Accuracy of Eyewitness Statements? A Comparison of Professional and Lay-Persons*, 22 APPLIED COGNITIVE PSYCHOL. 1301, 1310 (2008) (undertaking to understand the differing abilities of professional fact-finders and laypersons to estimate the reliability of an eyewitness' memory).

81. *See infra* Part IV.B.

82. FED. R. CIV. P. 53 advisory committee's note (2003); *see also* FED. R. CIV. P. 53 advisory committee's note (1937) (substantially adopting, or adopting with some modification, Federal Rules of Equity 49, 51–53, 59–63, 65–68); Kessler, *supra* note 14, at 1249 ("Brazil . . . assumes that, because 'Rule 53 was intended to preserve practices developed under the Federal Equity Rules[,] it was not designed to radically alter the adversary system.'" (quoting Wayne D. Brazil, *Authority to Refer Discovery Tasks to Special Masters: Limitations on Existing*

the past decade, courts have again gained experience with masters appointed to perform both pre- and post-trial functions.[83] The 2003 revisions to the rule recognize the master's potential broader purposes as well as clarify provisions regarding enforcement and appointment.[84] Today, the reconfiguration of the master, widely sought since before 1938, has at last commenced, and with it a need to explore the differing potentialities for the master in the contemporary legal environment.

2. Delaware and the Effects of the American Revolution on U.S. Corporate Law

In 1938, law and equity merged at the federal level, an occurrence that reflected equity's slow demise in the states during the nineteenth century.[85] That state governments sought to consolidate equitable jurisdiction with the courts at law echoes the early Americans' distrust of chancery jurisdiction.[86] However, this was not the case in Delaware, the preeminent locus for incorporation in the United States.[87] Instead, in its unique historical and social context, the Delaware Court of Chancery developed into a legal institution of remarkable flexibility, using its equitable origins and proximity to local government in attracting corporate litigants.[88] Indeed,

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Sources and the Need for a New Federal Rule, *in* MANAGING COMPLEX LITIGATION, *supra* note 74, at 305, 335)).

83. THOMAS E. WILLGING ET AL., SPECIAL MASTERS' INCIDENCE AND ACTIVITY: REPORT TO THE JUDICIAL CONFERENCE'S ADVISORY COMMITTEE ON CIVIL RULES AND ITS SUBCOMMITTEE ON SPECIAL MASTERS 1–12 (2000).

84. FED. R. CIV. P. 53 advisory committee's note (2003).

85. *See* William M. Wiecek, *The Debut of Modern Constitutional Procedure*, 26 REV. LITIG. 641, 643–44 (2007) (discussing the Federal Rules of Civil Procedure and the New York "Field Code" of the nineteenth-century); *see also* W. Hamilton Bryson, *The Merger of Common-Law and Equity Pleading in Virginia*, 41 U. RICH. L. REV. 77, 77–79 (2006) (discussing same at state level).

86. Quillen & Hanrahan, *supra* note 14, at 826 ("Early colonists in Delaware and elsewhere had a philosophical prejudice against arbitrary and concentrated power that naturally made them suspicious of an institutionalized chancery tied to the royal prerogative. Unlike other colonies, however, Delaware never had an institutionalized chancery during the colonial period. . . . As a result, Delaware developed no long lasting prejudices against equity and chancery courts." (citing Michael Hanrahan, The Delaware Court of Chancery: Delaware's Peculiar Institution (May 2, 1974) (unpublished manuscript, on file with the University of Michigan Journal of Law Reform))).

87. *See, e.g.*, Michael W. Ott, *Delaware Strikes Back: Newcastle Partners and the Fight for State Corporate Autonomy*, 82 IND. L.J. 159, 163 (2007).

88. Kurt M. Heyman discusses this phenomenon:

> The Delaware Court of Chancery is widely regarded as the nation's preeminent state court forum for resolving corporate disputes. This reputation stems, in large part, from the fact that many of the nation's largest corporations have chosen to incorpo-

"Delaware has preserved the essence" of equity as "the flexible application of broad moral principles (maxims) to fact specific situations for the sake of justice."[89] By exploring Delaware's fortuitous use of equity, one sees the benefits of the flexibility underlying equity's procedural heritage.

Prior to 1701,[90] equity in the English tradition was largely corrective in nature and related to the common law, with three means of administration in colonial New York and Pennsylvania:[91] "through the . . . Court of Assizes in New York and . . . the Provincial Council in Philadelphia";[92] by the Governor of New York, who was able to correct erroneous jury results from county courts;[93] and via a *de novo* appeal from jury judgments in a nonjury court

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rate in Delaware. Perhaps not coincidentally, the Delaware Court of Chancery is also one of the few remaining equity courts in the nation, with its subject matter jurisdiction limited to matters seeking equitable relief—including injunctive relief—and to several other statutorily-specified areas.

Kurt M. Heyman, *Expedited Proceedings in the Delaware Court of Chancery: Things of the Past?*, 23 DEL. J. CORP. L. 145, 145 (1998) (footnotes omitted); *see also* Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885, 919 (1990) ("Delaware dominates the charter market because it is the state best able to reduce agency costs."); William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351, 354 (1992) ("The Delaware state court system has established its national preeminence in the field of corporation law due in large measure to its Court of Chancery."); Donald J. Wolfe, Jr. et al., *Corporate and Commercial Practice in the Delaware Court of Chancery: Procedures in Equity*, 54 BUS. LAW. 757, 757 (1999) ("[F]or over 200 years practitioners in [the Delaware Court of Chancery] had no reference to consult as a practice guide. Rather, the 'rules' of practice in the Court of Chancery were largely passed down by word of mouth or by resort to yellowing subject matter files . . . ."); Michael Hanrahan & Paul A. Fioravanti, Jr., The Delaware Court of Chancery Developments from 1994–2009, at 6–7 (2010) (unpublished article, on file with author) (discussing the Chancery Court's flexibility in responding to market demand for corporate and other business disputes and its expansion into mediation and commercial matters).

89. Quillen & Hanrahan, *supra* note 14, at 821–22 (discussing the English High Court of Chancery, which ultimately was dismantled by Parliament in 1875); *see also* Ryan v. Wiener, 610 A.2d 1377, 1387 (Del. Ch. 1992) (providing an example of the Chancery court applying a broad view of fairness to find that a transaction could not, in equity, be allowed to stand); The Earl of Oxford's Case, 21 Eng. Rep. 485, 486 (Ch. 1615) (Ellesmere, C.) ("The Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances.").

90. In 1701, equitable jurisdiction was altered by a "general court reform statute that included . . . examination of witnesses by deposition as had developed in England." Quillen & Hanrahan, *supra* note 14, at 823 & n.13 ("An earlier 1665 ruling of the Court of Assizes during the Duke of York period had attempted to introduce Chancery practice with no evident effect."). The statute was later repealed, but Delaware courts continued to accept its structure after legislative separation from Pennsylvania. *Id.* at 824; *see also* THE COLLECTED ESSAYS OF RICHARD S. RODNEY ON EARLY DELAWARE 241–43 (George H. Gibson ed., 1975).

91. Quillen & Hanrahan, *supra* note 14, at 822–23.

92. *Id.*; WILLIAM H. LOYD, THE EARLY COURTS OF PENNSYLVANIA 49–58 (1910).

93. Quillen & Hanrahan, *supra* note 14, at 823.

codified under William Penn.[94] Hence, equity was used in both Pennsylvania and Delaware[95] as a proxy for imperial power, meting out natural justice and favoring control over the jury.[96] In other colonies, too, equity was a significant source of law, demonstrating how well-rooted it was in the colonists' legal tradition.[97]

By the 1720s, however, the courts of equity had moved toward greater codification. With the statutory creation of original jurisdiction in the English Chancery, American colonists gained a more accessible route of appeal.[98] In Delaware, the post-Revolution state constitution continued the practice, but without the crown.[99] The most notable change to equity in the Delaware Constitution of 1776 established an appeal from the state supreme court in matters of law and equity to a court of seven persons, the Court of Appeals, with the authority and powers previously vested in England's King in Council (the monarchial executive authority).[100] Additionally, Delaware maintained a three-

94. *Id.*

95. Delaware was part of Pennsylvania from 1682 until the early 1700s. In 1701, though, delegates from the Three Lower Counties (Delaware) successfully petitioned Pennsylvania Governor William Penn to have a separate legislature, which first convened in 1704. But the Delaware colony still did not have its own executive (Pennsylvania's governor also governed Delaware) until the American Revolution. *Id.* at 822–24.

96. *Id.* at 823 ("Thus, primitive equity was used in colonial Delaware as a means of royal power to reflect natural justice as seen by the Governor and as a means to control both at the appeal level and at the local level the erratic swings of the jury. . . . In Pennsylvania the nonjury corrective role of equity was creating the first wave of anti-chancery political ripples. But in Delaware there was little complaint. . . .").

97. John R. Kroger, *Supreme Court Equity, 1789–1835, and the History of American Judging*, 34 HOUS. L. REV. 1425, 1438 (1998). In Connecticut, Maryland, and Virginia, for instance, the chancellors and advocates routinely invoked natural law rights and "good conscience." *Id.* at 1439 & nn.83–88 (citing 1777 Va. Acts ch. 15; Chapman v. Allen, 1 Kirby 399, 400–01 (Conn. Super. Ct. 1788); Dulany *ex rel.* Lord Proprietary v. Jenings, 1 H. & McH. 92, 105 (Md. Ch. Ct. 1738); Digges's Lessee v. Beale, 1 H. & McH. 67, 73, 76 (Md. Provincial Ct. 1726)). These are, of course, the historical cornerstones of equitable practice. 2 JOHN J. KIRCHER & CHRISTINE M. WISEMAN, PUNITIVE DAMAGES: LAW & PRACTICE § 20:01, at 20–1 to 20–2 (2000) ("Early Roman lawmakers employed two sources that were eventually regarded as undifferentiated to create laws: from jus gentium (the law of nations), meaning rules of law which appeared to have a universal character which arose from principles common to human nature, and without regard to the location of a person within any particular country; and, from lex naturae (the law of nature) which focused on moral order." (footnotes omitted)).

98. Quillen & Hanrahan, *supra* note 14, at 824.

99. *Id.* at 825 (citing cases discussed in William Tatem Quillen, A Historical Sketch of the Equity Jurisdiction in Delaware (Apr. 1, 1982) (unpublished L.L.M. thesis, University of Virginia) (on file with the University of Michigan Journal of Law Reform)).

100. IGNATIUS C. GRUBB, PAPERS OF THE HISTORICAL SOCIETY OF DELAWARE, XVII: THE COLONIAL AND STATE JUDICIARY OF DELAWARE 22 (Phila., J.B. Lippincott Co. 1897). "The courts of Delaware, both of law and equity, have in most respects, doubtless, in their organization and proceedings, and especially in matters of pleading, practice, and evidence, adhered more closely to the old English precedents than those of any of her sister States." *Id.* at 30.

judge trial court, something widespread in Civil Law nations, in order to guard against a single judge becoming "despotic, dissolute, dishonest, or disabled by physical or mental infirmity."[101]

Nonetheless, colonial Delaware had never experienced an institutionalized chancery, and it had no familiarity with the prejudices against what was in many colonies viewed as an arbitrary concentration of power.[102] This was evident, for instance in the 1868 revision to the Rules of Equity Practice; the Delaware chancery system, as it existed since colonial days, was faulted for "the inadequacy of written interrogatories . . . [as] cross-examination; the difficulty . . . [of] assessing ex parte affidavits during the preliminary injunction stage; and . . . [the problems with bringing] causes [of action] to a hearing."[103] These were similar to the criticisms leveled against the vestiges of English chancery and equity in Revolution-era America.[104]

Plainly, the Delaware Court of Chancery was able to overcome these criticisms. Partly due to the pioneering work of Chancellor Nicholas Ridgely,[105] to the Court's extraordinary equitable

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For information on colonial appeals to the King in Council, see ELMER BEECHER RUSSELL, THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL (1915).

101. GRUBB, *supra* note 100, at 49.

102. Quillen & Hanrahan, *supra* note 14, at 826 (citing Michael Hanrahan, The Delaware Court of Chancery: Delaware's Peculiar Institution (May 2, 1974) (unpublished manuscript, on file with the University of Michigan Journal of Law Reform)).

103. *Id.* at 831–32.

104. *See supra* notes 60–62 and accompanying text; *see also* Kroger, *supra* note 97, at 1439 & n.87 ("In Vermont, [for instance,] the state legislature complained that the Council of Censors, which exercised chancery powers, was deciding cases on a purely discretionary basis, guided only by 'their sovereign will and pleasure.'" (citing GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 407 (1969) (quoting INCREASE MOSELEY, COUNCIL OF CENSORS, ADDRESS OF THE COUNCIL OF CENSORS, *reprinted in* VERMONT STATE PAPERS 537 (1823) (address given Feb. 14, 1786)))).

The invocation of equitable and natural rights was significantly rarer in America than in English equitable jurisprudence, Kroger, *supra* note 97, at 1439, demonstrating distrust beyond the merely political, one reaching into the practice of early American litigators.

105. GRUBB, *supra* note 100, at 64.

> In December, 1801, Chancellor Killen resigned his office and Mr. Ridgely was appointed to succeed him. Prior to his appointment there had been very little business in the Court of Chancery, and there were but few precedents for his guidance. The entire course of equity procedure and practice was yet to be regulated and established under the newly-created Court of Chancery.
>
> To this task he devoted himself in his methodical way with untiring vigor and industry. The rules of court, forms of practice, and general principles adopted by him are still in use, and he is justly considered the founder of chancery jurisprudence in Delaware.

powers,[106] and to the general corporations law enacted in 1899,[107] Delaware Chancery became increasingly relevant during the nineteenth and early twentieth centuries.[108] Between 1910 and 1920, major, modern corporate litigation emerged, with a transformed Court of Chancery given extended powers to appoint a receiver,[109] deem a director not an employee,[110] pierce the corporate veil in cases of fraud,[111] regulate some share purchases[112] and dissolutions,[113] and uphold the validity of out-of-state directors' meetings.[114]

Delaware was unique among the states of the early Republic in maintaining a dual jurisdictional system after the Revolution. The preservation of equity procedure particularly helped to make Delaware predominant in American corporate law. This in turn has given the state lasting advantages in attracting business and capital, alongside the admiration of other states, such as California, New York, and Pennsylvania, that are now interested in adopting equitable courts modeled after those in Delaware.[115] For example, many

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> During the entire thirty years that he was Chancellor he [unlike his predecessors] carefully took notes and preserved his opinions in all the important cases adjudicated by him, and these have been published by Chancellor Bates in Volume I., "Delaware Chancery Reports."

Id.

106. Quillen & Hanrahan, *supra* note 14, at 832 & n.37 (citing Wilds v. Attix, 4 Del. Ch. 253 (Ch. 1871) (estoppel); Houston v. Hurley, 2 Del. Ch. 247 (Ch. 1860) (rescission); Burton v. Adkins, 2 Del. Ch. 125 (Ch. 1846) (specific performance); Kinney v. Redden, 2 Del. Ch. 46 (Ch. 1838) (specific performance of parol contract); Farmers' & Mechs.' Bank of Del. v. Polk, 1 Del. Ch. 167 (Ch. 1821) (accounting); Warner v. Allee, 1 Del. Ch. 49 (Ch. 1818) (laches)).

107. RUSSELL CARPENTER LARCOM, THE DELAWARE CORPORATION 9 (1937).

108. The statute triggered immediate criticisms of Delaware participating in a race to the bottom. Quillen & Hanrahan, *supra* note 14, at 835 ("Delaware was promptly criticized as a 'little community . . . determined to get her little, tiny, sweet, round, baby hand into the grab-bag of sweet things . . . .'" (quoting Note, *Little Delaware Makes a Bid for the Organization of Trusts*, 33 AM. L. REV. 418, 418–19 (1899))).

109. Harned v. Beacon Hill Real Estate Co., 80 A. 805, 808 (Del. Ch. 1911), *aff'd*, 84 A. 229 (Del. 1912).

110. *In re* Peninsula Cut Stone Co., 82 A. 689, 689 (Del. Ch. 1912).

111. Martin v. D.B. Martin Co., 88 A. 612, 613 (Del. Ch. 1913).

112. *In re* Int'l Radiator Co., 92 A. 255, 256 (Del. Ch. 1914).

113. Butler v. New Keystone Copper Co., 93 A. 380, 383 (Del. Ch. 1915).

114. Lippman v. Kehoe Stenograph Co., 98 A. 943, 948 (Del. Ch. 1916), *aff'd*, 102 A. 988 (Del. 1918).

115. Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1, 2–3 (1995). "Given Delaware's success in attracting incorporations, the esteem in which many commentators hold Delaware Corporate law, and that, in part, these successes are attributed to its special tribunal, other states have followed Delaware's propitious lead." *Id.* at 2 (footnotes omitted).

states have specialized business courts, and several others have considered or are considering that approach.[116] Of course, strictly speaking, the Court of Chancery is not a specialized court as it has broad jurisdiction.[117] However, in other jurisdictions, specialized courts based on Delaware's can be jurisdictionally confined to commercial disputes,[118] applying new procedural devices in limited, experimental settings not unlike the UNIDROIT-Civ Pro.[119]

3. The Special Case of Louisiana Before 1938

Another example of Civil Law principles operating in American states, that of Louisiana, serves as a demonstration of the major state procedural shifts after the federal merger of law and equity, but in a state where the Equitable and Civil traditions survived. While some have professed that Louisiana is a de facto common law regime, recent developments allude to the Civil Law's continuing presence.[120] However, the procedural aspects most relevant to

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In the same discussion, Dreyfuss cites to sources indicating the adoption of equitable courts in other states. *See, e.g.*, S.B. 1797 § 5, 137th Gen. Assem., Reg. Sess. (Cal. 1994) (calling for creation and evaluation of specialized commercial departments in Los Angeles County court system); S.B. 309, 178th Gen. Assem., Reg. Sess. (Pa. 1994) (bill to create a specialized court for commercial and corporate matters); Gary Spencer, *Cuomo Seeks State Commercial Court*, N.Y.L.J., Jan. 6, 1994, at 1 (state experiment with a commercial and corporate part to its courts).

116. *See* Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 BUS. LAW. 147 (2004) (showing that specialized business courts have been established in Delaware, Florida, Illinois, Maryland, Massachusetts, Michigan, Nevada, New York, North Carolina, Oklahoma, Pennsylvania, and Rhode Island; discussing efforts to establish specialized business courts in Colorado, Hawaii, Maine, Minnesota, Mississippi, Ohio, Virginia, and Wisconsin; discussing complex litigation programs in Arizona, California, Connecticut, and Pennsylvania); Hanrahan & Fioravanti, *supra* note 88, at 6 (noting that the Chancery Court receives competition from the business courts of other states and countries). *See generally* Am. Bar Ass'n, Ad Hoc Comm. of Bus. Courts, *Business Courts: Towards a More Efficient Judiciary*, 52 BUS. LAW. 947, 955–59 (1996–1997) (discussing existing specialized business courts in Delaware, Illinois, New Jersey, New York, North Carolina, Virginia, and Wisconsin and proposed specialized courts in California, Florida, Massachusetts, and Pennsylvania).

117. Dreyfuss, *supra* note 115, at 5.

118. *Id.* at 8.

119. Similar to the UNIDROIT method of standardizing civil procedure, the Delaware system may serve as the model for a uniform method for commercial cases. *Id.* at 23–35 (discussing the portability of the Delaware Court of Chancery to other states in the commercial context); *see also* S.B. 309, 178th Gen. Assem., Reg. Sess. (Pa. 1994) (proposing a specialized tribunal for commercial cases in Pennsylvania; excluding criminal and nonbusiness matters); *infra* Part IV.C. (discussing choice of law).

120. David Gruning, *Bayou State Bijuralism: Common Law and Civil Law in Louisiana*, 81 U. DET. MERCY L. REV. 437, 441 (2004) ("Louisiana is also offered as an example of bijuralism. As the term bijuralism implies a more than mere mixing but a sort of grafting or welding of disparate elements together, it seems to be the appropriate term. Whatever the

this Article, namely the gathering of witness testimony and the assembling of evidence by neutral third parties, were both supplanted by oral testimony via state law in 1938, just as was done federally that same year.[121]

Nonetheless, Louisiana's bijuralist tradition has preserved the use of notaries, the umbrella term for the branch of the Civilian legal profession under which the French *huissier de justice* is found.[122] Further, the maintenance of the Civilian tradition is important for use as a model within the federal system, particularly regarding harmonization and adaptation of law through globalization—the influence of quasi-supranational entities such as the World Trade Organization ("WTO") and the North American Free Trade Agreement ("NAFTA") on domestic legal practices.[123]

Between 1825 and 1870, the law of Louisiana was dramatically redefined. A Louisiana Supreme Court decision in 1827 found that much of the Civil Law had survived an attempted 1825 legislative repeal, which prompted further statutes aimed at limiting the use of Spanish, Roman, and French law.[124] For the next 43 years, the state's supreme court continued to oppose the other branches' efforts to repeal the Civil Law.[125] In fact, it was not until 1870 that the Louisiana Civil Code was published solely in English.[126] While these endeavors to impose common law procedure failed, many principles of the Civil Law had eroded through a piecemeal process.[127] For example, in 1937, the year before the Louisiana notary lost its status as a separately classified legal profession, Professor Gordon

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characterization, given its economic and political position within the United States, it is remarkable that Louisiana's legal system came into existence at all. . . . Most surprising of all, it shows many signs of continuing . . . for the foreseeable future despite the absence of cultural barriers . . . ." (footnote omitted)).

121. 1938 La. Acts 203 (codified at LA. REV. STAT. § 35:322 (2006)) (repeal effective Jan. 1, 2009); D. Barlow Burke, Jr. & Jefferson K. Fox, *The* Notaire *in North America: A Short Study of the Adaptation of a Civil Law Institution*, 50 TUL. L. REV. 318, 321–22 (1976) ("In the United States, the scrivener-notarial tradition never had much influence. In those areas with Civilian backgrounds, the dominance of common law conveyancing was delayed, but ultimately its dominance was virtually total."); Lambert, *supra* note 13 (discussing the procedural differences between the Louisiana system and the French system).

122. Malavet, *supra* note 17, at 450. "[T]he Commonwealth of Puerto Rico [also] maintains . . . [the] Latin notary . . . modeled after the Spanish *notario*," *id.* at 451, although in Spain the *huissier* is known as the *oficial de sala* (court official), Layton B. Register, *Spanish Courts*, 27 YALE L.J. 769, 773 & n.28 (1917–1918).

123. *See* Gruning, *supra* note 120, at 438 ("[B]oth NAFTA's influence on legal systems and this older relationship between the two legal traditions can be viewed as part of the larger subjects of legal harmonization and legal transformation . . . .").

124. Gruning, *supra* note 120, at 444 (citing Flower v. Griffith, 6 Mart. (n.s.) 89, 91–93 (La. 1827)).

125. *Id.* at 444–45 & nn.32, 33 & 35.

126. *Id.* at 445.

127. *Id.* at 445–46.

Ireland wrote that Louisiana had become a common law state.[128] Ireland's article, however, engendered a renaissance of the Civil Law in Louisiana.[129]

In 2003, when extensive reform of the Civil Code occurred, the basic French *Code Civil* structure of the 1870 Code was maintained, although modernized to reflect greater uniformity between states in some fields of law and the evolution of legal institutions during the twentieth century.[130] By continuing with the Civil Code system, Louisiana has shown the compatibility of Civil Law traditions with the American common law in the contemporary context, and that such a mixed-law system can arguably be as efficient as more "traditional" American common law methods:

> [T]he civilian character of the law is visible in the articulated exposition of the law. Book II on property has this characteristic, "tight" form of drafting. And whereas the 1825 Code incorporated numerous didactic or doctrinal articles, the Revision eliminated a great number of them. Many such provisions appeared among the rules on contract; their elimination presents the substance of the law in a more economical fashion, perhaps also somewhat daunting.[131]

Nevertheless, in dispensing with the notary as a separate legal profession, in 1938, Louisiana had moved away from the use of third parties (i.e., non-lawyers) in evidence gathering.[132] Vestiges of the process remain,[133] and in any event their historical presence further demonstrates the compatibility of evidence gathered by an

128. Gordon Ireland, *Louisiana's Legal System Reappraised*, 11 TUL. L. REV. 585, 589–90 (1937).

129. *Id.* at 598; *see also* Mack E. Barham, *A Renaissance of the Civilian Tradition in Louisiana*, *in* THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND MIXED JURISDICTIONS 38–40 (Joseph Dainow ed., 1974) (citing Daggett as the progenitor of the renaissance of Louisiana's Civilian tradition); Gruning, *supra* note 120, at 446–47. *Compare* Ireland, *supra* note 128 (arguing that Louisiana had moved away from its Civil Law system), *with* Harriet Spiller Daggett et al., *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*, 12 TUL. L. REV. 12 (1938) (defending the claim that Louisiana was a Civilian system).

130. Gruning, *supra* note 120, at 449–50.

131. *Id.* at 455.

132. Burke & Fox, *supra*, note 121, at 321–22. In effect, Louisiana got rid of notaries as a separate legal profession, because the state required notaries to be lawyers. The notarial and the legal professions fused by legislative action in 1938. *Id.* at 328–29.

133. *See generally* Alison V. Nunez, *A Testament to Inefficacy: Louisiana's New Legislation Allowing for the Admissibility of Videotape Evidence in the Probate Process*, 67 LA. L. REV. 871, 880 (2007) (discussing the use of a notary when executing a will); Bertrand V. Tibbels, *Ancient Nebraska Jurisprudence and Institutions*, 6 NEB. L. BULL. 207 (1927) (discussing the use of the *huissier* in pre-statehood Nebraska).

investigative magistrate with the United States Constitution, as well as showing a means toward the adaptability of American law.

B. The Development of the Huissier de Justice

While the emerging federal system in the United States became increasingly uncertain regarding the role for third parties in the collection of evidence for trial, in France and other Civil Law jurisdictions the role was preserved, evolved, and at least in the case of France, transformed. This developed into a legal system infused with a number of professional legal roles beyond the judge and advocate, including the *notaire* (notary) and its cousin, the *huissier.*[134] The schism in the use of adjunct legal professionals such as the *huissier* or *notaire* between the French and U.S. systems is demonstrated through the demise of the special master in the early twentieth century. However, as the role of the special master is given new attention, understanding how the *huissier* operates can illustrate the potential problems, and benefits, of the reemergence of the master. Discussion of the Civil Law, and how the profession of *notaire* came to play such a significant role in the Western legal tradition, illuminates the essential characteristics of the *huissier* that differentiates it from the more modern American legal tradition. In some cases, these differences may render potential roles for the special master impossible under principles of U.S. jurisprudence. In other contexts, however, it provides examples of the broad scope for legal adaptation of special masters through experimentation with broader powers in discovery, akin to those more commonly associated with the *huissier.*

1. The Notarial Professions

The profession of the *huissier* can be definitively traced to the Roman legal code,[135] which invested certain official powers of the state in professional persons.[136] This innovation, which greatly reduced cumbersome bureaucratic processes in Ancient Rome, related to official seals

134. *See* Malavet, *supra* note 17, at 450 & n.297.

135. *Id.* at 408.

136. *Id.* The use of royal scribes, law scribes, popular scribes, and state scribes also existed in the Hebrew Codes. *Id.* at 408–11. Similarly, in Ancient Greece, there were public officials charged with drafting. *Id.*; *see also* STRÖMHOLM, *supra* note 39, at 22; Michael L. Closen & G. Grant Dixon III, *Notaries Public From the Time of the Roman Empire to the United States Today, and Tomorrow,* 68 N.D. L. REV. 873, 873–96 (1992).

and gave rise to the profession of the notary,[137] through the *scriba*[138] and *notarius*,[139] who could authenticate private acts and operate in the capacity of legal advisor to private parties.[140] More specifically, *apparitores* served in a similar capacity to a modern bailiff, or *huissier audiencier*, as they summoned persons to hear verdicts, handled some aspects of evidentiary presentation, and generally policed hearings.[141] A related profession, *executores*, was more akin to modern, semi-private *huissiers* and county sheriffs, who were empowered to enforce judgments and debts.[142]

While the actual functions may have been vague,[143] the ancient professional notaries[144] made authenticated legal documents accessible to a wide variety of persons, and greatly eased the development of the contract and the rule of law.[145] Indeed, the presence of the

137. *See* Malavet, *supra* note 17, at 408–09.

138. "[C]lerk in a court or in an office." ADOLF BERGER, ENCYCLOPEDIC DICTIONARY OF ROMAN LAW 692 (1953) (pl.: *scribae*).

139. "A person, usually a freedman or slave, skilled in shorthand writing; in the later Empire *notarius* is [synonymous with] *scriba*." *Id.* at 599 (pl.: *notarii*); *see also* 2 MARCEL PLANIOL, CIVIL LAW TREATISE § 134 n.1 (La. State Law Inst. trans., 1959); EDUARDO BAUTISTA PONDÉ, ORIGEN E HISTORIA DEL NOTARIADO 24–30 (1967) (discussing the Hellenic influences of the notary).

140. *See* Malavet, *supra* note 17, at 408–19.

141. Chambre Nationale des Huissiers de Justice, Son Histoire, http://www.huissier-justice.fr/MsgByReg.aspx?id=148 [hereinafter Chambre Nationale des Huissiers de Justice] (author's translation) (on file with the University of Michigan Journal of Law Reform).

142. *Id.*

143. Even as notaries continued to serve important roles in maintaining law and order in Medieval Europe, the scope of their activities became less clear. RADDING, *supra* note 39, at 23–30. Nonetheless, it is likely the notary during this period served in a more limited capacity due to high rates of illiteracy and the highly localized nature of legal rules, customs, and superstitions before the emergence of the nation state. *Id.*; *see also* Ewald, *Comparative Jurisprudence (I)*, *supra* note 15, at 1898–905 (discussing the role of belief in the rationality of animals in Medieval European jurisprudence and the concomitant influence of highly localized beliefs and customs).

144. HEIKKI E.S. MATTILA, COMPARATIVE LEGAL LINGUISTICS 4 (Christopher Goddard trans., 2006).

> [I]n continental Europe one can refer to *notarial language* . . . . In these countries—notably Latin countries—private-law documents have been drawn up, for a thousand years, by a separate body: the notarial profession. A notary is a lawyer who can be styled part official, part advocate. The long traditions of the notarial college explain the specific characteristics of their language.

Id.

145. *See* Closen & Dixon, *supra* note 136, at 874–75. *See generally* Mario Ascheri, *Turning Point in the Civil-Law Tradition: From* Ius Commune *to* Code Napoléon, 70 TUL. L. REV. 1041 (1996) (arguing that nineteenth century legal science and codification created greater equality in the law and enhanced the development of the contemporary unified national legal regime).

notary, and of viable economies, was coupled with the rule of law and may continue to be so related.[146]

The notary continued to evolve on the Continent,[147] and its powers grew continuously with the passage of time as well as other independent developments in European laws between the thirteenth and nineteenth centuries.[148] By contrast, in the common law, the notary never obtained such prominence;[149] instead, the notary gradually evolved into a clerical position, particularly in the United States, where contracts were made binding if concluded in open court under judicial authority.[150] In the United States, the preference for use of open court would eventually come to correspond to a preference for oral evidence. Conversely, in France, a strong preference for written proof and avoiding determinations on complex grounds beyond the judge's professional understanding emerged, particularly as a result of investigative magistrates, such as the *huissier*.[151]

Indeed, this preference may have been emblematic of the advancement of the notarial profession in France, particularly after the *Loi Ventôse* of 1803,[152] which extensively reformed notarial practice:

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146. Furthermore, other undeveloped societies also dispensed with notaries where transactions were limited. *See, e.g.*, Closen & Dixon, *supra* note 136, at 876 ("In the New World, colonists had little need for the services of a notary. At first, there were so few transactions that they often were performed in the presence of the court and on a court record." (footnote omitted)).

147. For instance, during the thirteenth century, as the European economy began to revive and trade routes extended, there was simultaneously a marked return to legal science and codification. Malavet, *supra* note 17, at 416–18. Indeed, in 1228 the Scula di Notariato was formed, engendering greater professionalization of the notarial profession in the early Modern West's most prestigious city of learning, Bologna. *Id.* at 418.

148. *See* PONDÉ, *supra* note 139, at 1–30.

149. *See* N.P. READY, BROOKE'S NOTARY 1 (11th ed. 1992) ("The importance of the English Notary resides not in the functions which he performs within his own legal system, but rather in the link he provides between the institutions of the common law and those of the civil law."); Malavet, *supra* note 17, at 426–27.

150. In the United States, the key aspects of notarial function, namely legal advice and quality control, were lost. Malavet, *supra* note 17, at 427.

151. Beardsley, *supra* note 13, at 459; *see* J.A. Jolowicz, *Civil Procedure in the Common and Civil Law*, *in* LAW AND LEGAL CULTURE IN COMPARATIVE PERSPECTIVE 26, 40 (Guenther Doeker-Mach & Klaus A. Ziegert eds., 2004). Also consider that the law of evidence developed to a large extent as a by-product of the preference for jury trial, and Civil Law nations' evidentiary rules lack the systematic nature of the American system, which frequently excludes evidence. Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 174 & n.42 (2006); *see also* RENÉ DAVID & HENRY P. DE VRIES, THE FRENCH LEGAL SYSTEM: AN INTRODUCTION TO CIVIL LAW SYSTEMS 74–75 (1958).

152. Malavet, *supra* note 17, at 422, 429–30. Its counterparts were the Spanish Notarial Law of 1862 and the Italian Notarial Law of 1913, both substantially in effect today. *Id.* at 429–30. These laws lead to the following characteristics of the modern notary: (1) the notary is "[a] private, liberal profession . . . [where] [l]egal education and/or apprenticeship [is]

> The most important characteristics of this law were that it thoroughly legislated notarial work, incorporating long-established practice and eliminating unregulated areas, and [that it] was immediately applied and implemented as written. The French law defined notaries as "*public functionaries* designated to receive all acts and contracts to which the parties must or wish to impart the authentic character of a public act and to guarantee the date, keep it deposited and issue copies and testimonies."[153]

As the notary became increasingly codified and reliable and its functions delimited, the profession was able to distinguish itself from other legal professions.[154] Under this umbrella, the *huissier* was able to be viewed as a neutral, if not independent, functionary in a system prizing neutrality over the adversarial trial.[155]

With the entrenchment of the notarial profession in the Latinate legal tradition, the Civil Law sits in opposition to much of the United States' procedural heritage. Nonetheless, both *notaire* and *huissier* are historical figures that aided and continue to enhance American law through the notary and special master. Indeed, the emergence of the *huissier* as a separate profession under the *notaire* in France is illustrative of the similarities between special masters, who are typically lawyers and once served, generally, as a separate legal profession, and their historical counterpart, the *huissiers*, who are also legally trained professionals but who do not advocate on behalf of any party (though they may do so, in some circumstances, where they do not also serve as a neutral fact-finder).

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required"; (2) the passage of an examination and "[m]embership in a professional" organization; (3) exclusive jurisdiction; (4) the keeping of a "permanent register of all public documents subscribed before h[er]"; (5) the notary may serve as "a legal advisor to . . . [private] parties and is . . . supervised" by the government. *Id.* at 430. These developments made the notary's function incompatible with service in a judicial capacity. PONDÉ, *supra* note 139, at 550.

153. Malavet, *supra* note 17, at 422 (quoting PONDÉ, *supra* note 139, at 267 (Malavet trans., unofficial)).

154. *Id.*

155. *See* Beardsley, *supra* note 13, at 462–65 (discussing the rationale for restricted rights of proof). *See generally* Stephen J. Spurr, *The Duration of Litigation*, 19 LAW & POL'Y 285 (1997) (suggesting a number of variables in the length of a lawsuit).

2. Emergence of the Contemporary *Huissier*

Nevertheless, the French notary was never fully the ministerial official the *huissier* has come to be.[156] Indeed, the notary's functions are generally incompatible with such officials.[157] The key "difference is that the notary has a jurisdiction: [his act] receives its authority from his signature alone; . . . [whereas a *huissier*, or like ministerial official, derives her] authority from the signature of the judge."[158]

Not unlike the word chancery, *huissier* itself derives from a phrase for secret; instead of lattice or screen, *huissier* once indicated door (as in a doorkeeper).[159] Initially, *huissier* indicated a person who was responsible for the (physical) assurance of the

156. Although notaries do qualify as an *officier ministerial* under a strict definition—a lawyer appointed by the State, limited in number, and with monopoly in certain matters, *see* Pierre Georges Lepaulle, *Law Practice in France*, 50 COLUM. L. REV. 945, 950 (1950)—the *huissier* (bailiff) is the subject of much French legislative authority. Here are a few of these numerous laws: NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C.] arts. 640–94 (Fr.), *translated in* THE FRENCH CODE OF CIVIL PROCEDURE IN ENGLISH 121–35 (Christian Dodd trans., 2006) [hereinafter "FRENCH CODE IN ENGLISH"] (New Code of Civil Procedure rules on, *inter alia*, *huissiers*); Law of Dec. 27, 1923, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Dec. 29, 1923, p. 12132 (temporary replacement of injured huissiers); Ordinance No. 45-2692, of Nov. 2, 1945, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Nov. 3, 1945, p. 7163 (status of bailiffs); Decree No. 75-770 of Aug. 17, 1975, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Aug. 22, 1975, p. 8588 (fitness for the office of huissier); Order of Feb. 9, 1987, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Feb. 18, 1987, p. 1852 (list of degrees and diplomas equivalent to a law license for the exercise of the profession of huissier); Decree No. 92-1448 of Dec. 30, 1992, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Jan. 1, 1993, p. 40 (implementing Law No. 90-1258 of Dec. 31, 1990, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Jan. 5, 1991, p. 216, and subjecting huissier companies to statutes and regulations); Decree No. 2004-365 of April 22, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], April 25, 2004, p. 7556 (modifying an earlier decree (Decree No. 69-1274 of Dec. 31, 1969, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Jan. 11, 1970, p. 432) and implementing a law concerning the status of professional societies (Law No. 66-879 of Nov. 29, 1966, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Nov. 30, 1966, p. 10451), so that the law applies to huissiers' companies).

157. L. Neville Brown, *The Office of the Notary in France*, 2 INT'L & COMP. L.Q. 60, 61 (1953). The notary's "decree of nomination by the President of the Council of Ministers designates him as *officier public*, while that of an *avoué*, *huissier* or *greffier* speaks of *officier ministériel*." *Id.* at 61 n.6. "There are also certain *incompatibilités* or occupations deemed incompatible with [the notary's] office; these include *avoué*, *huissier*, *greffier*, estate agent, insurance agent, *juge de paix*; but not mayor or *deputé*." *Id.* at 64 n.19.

158. *Id.* at 61 n.6 (citation omitted).

159. The use should not be confused with the keeper of the gate, or *porta*, a separate role in the keeping of medieval palaces. J.H. Round, *The Staff of a Castel in the Twelfth Century*, 35 ENG. HIST. REV. 90, 97 (1920); *see also* Chambre Nationale des Huissiers de Justice, *supra* note 141; JuriTravail.com, http://www.juritravail.com/lexique/Huissier.html [hereinafter JuriTravail.com] (author's translation) (on file with the University of Michigan Journal of Law Reform).

proceeding's tranquility, in much the same sense a modern American bailiff ensures the routine and non-violent presentation of evidence at trial.[160] With time, as the codification of the law as well as a preference for closed and secret hearings emerged on the Continent, this definition grew to encompass the role of the modern *huissier audiencier.*[161]

In the Pre-Modern societies, in what now comprises France and to some extent Belgium and Switzerland, the *huissier audiencier* had not yet fully emerged in its contemporary form. Following the rise of Christianity in the West, the collapse of social order rendered the ancient Roman scribnatorial professions, such as the *apparitores, executores,* the *audientiarius,* and the *secretarius* and *notarius* (among others), inadequate or too distant for direct continuance of their procedural duties and terminology. However, the general structure of the law was retained, though greatly localized without the unifying forces of the Roman Emperor. In the emerging Francophone world, the aforementioned professions evolved, or reemerged, in new guises which represented the contemporary legal order.[162]

For instance, prior to the fourteenth century, *sergeants* were employed in a role that shared aspects with both the contemporary advocates and the *huissier audiencier.*[163] These persons put together litigants' claims, executed the decisions of the judges, and took on more particular roles in manorial jurisdictions.[164] This epoch, where the term *huissier* also came to signify the contemporary notion of bailiff as the protector of order in a court, greatly expanded

160. JuriTravail.com, *supra* note 159.

161. *See* Beardsley, *supra* note 13, at 459 (noting that the "distrust of oral evidence and the unwillingness of the [French] judge to compel the parties to produce evidence" normally leads to the appointment of an expert to pursue fact-finding investigations); *see also* JEAN-MICHEL DARROIS, RAPPORT SUR LES PROFESSIONS DU DROIT 21 (2009) (on file with the University of Michigan Journal of Law Reform), *available at* http://www.scribd.com/doc/14082396/Rapport-Commission-Darrois-8-avril-2009 (a French government commission's report noting that judges can commit *huissiers* to make fact-findings—to be *huissiers audienciers*); SERGE BRAUDO & ALEXIS BAUMANN, DICTIONNAIRE DU DROIT PRIVÉ, http://www.dictionnaire-juridique.com/definition/constat.php (on file with the University of Michigan Journal of Law Reform) (defining the *constat* as a document prepared by a public official, such as a *huissier;* noting that a civil magistrate can commit the *huissier* to determining the facts of a case).

162. The breadth of the French world caused a number of variations of the *huissier* to emerge in separate territories. From Nebraska to the Low Countries, *huissiers* were either brought with settlers or imposed upon native populations. *See generally* E. Lameere, *The Origins and Functions of the Audiencier in the Low Countries,* REV. UNIV. BRUXELLES 1, 8–10 (July–Sep. 1896) (tracing the office of the French Chancery to the Dukes of Burgundy, who introduced it to the Low Countries where it continued until 1744); Tibbels, *supra* note 133 (describing *huissier*-sheriffs).

163. Chambre Nationale des Huissiers de Justice, *supra* note 141.

164. *See id.*

the competence of the *huissier* by encouraging the reintroduction of, or at least greater professionalization of, multiple subordinate legal professions such as the *huissier, greffier,* or *notaire.*[165]

Such positions were attained through the sale of monarchical powers to wealthy subjects. This method of distributing legal powers emerged in the context of the Burgundian invasion of the Low Countries, when it became imperative to sell such titles as a revenue source.[166] The evolution remained long after the invasion, and so the professional legal offices of France—not entirely unlike American bars or the licensing agencies of private professions—emerged.[167]

By the 1500s, at least in the major urban areas of France, the *huissier* had taken on increased significance and came under further—though to the modern eye perhaps superficial—regulation, particularly as government became more highly structured and hierarchical, with increased emphasis on unity and standardization between the divergent jurisdictions of early Modern France. For instance, *huissiers* were ordered to wear a particular costume and to carry with them a staff with special significations; it was a style so distinctive as to be found frequently in contemporary popular culture, such as on the decks of the popular *tarocchi* card games of Medieval Europe.[168] There were also rules on religious adherence, familial status, and certain oaths and allegiances to justice and superiors in order for a person to qualify to serve in the role of *huissier.*[169]

Thus, the *huissier* was one of the venal professions, "the product of a time when it was easier for kings to sell rich men powers and privileges than to tax them."[170] As such, any number of subdivisions emerged before the French Revolution. In Paris there

165. *See* William Doyle, *The Sale of Offices in French History,* 46 HIST. TODAY 39, 39–40 (1996); Chambre Nationale des Huissiers de Justice, *supra* note 141.

166. *See* Doyle, *supra* note 165, at 44; Lameere, *supra* note 162.

167. *See* Doyle, *supra* note 165, at 44.

168. *See, e.g., Tarot de Jean Noblet* (*ca.* 1650) (on file with Bibliothèque Nationale, Paris, France). The uniform demonstrates its later resonance in pre-twentieth century popular culture in a number of forms, perhaps in light of its elaborate detail: the staff, the feathered cap, and the symbolic imagery on the sleeves and torso. *See, e.g.,* 2 EDMUND YATES, TWO, BY TRICKS 57 (1874) (describing an Englishman's foray into Parisian society and a "magnificent" *huissier* who was hired to call him to a house on particular, unofficial business); Zizi Sues, *Foreign News—Roumania,* TIME, Mar. 15, 1926, at 15, 15 (describing the *huissier*'s service of process, and his "impressive uniform," in a Paris hotel regarding a widely followed divorce among the Romanian royalty). For a contemporary use of the *huissier* costume, see Gail Mangold-Vine, *Being Geneva,* SWISS NEWS, Mar. 2005, at 14, 14 (discussing the baton and other particulars of the traditional costume and detailing the daily life of a high-ranking government *huissier* in Switzerland).

169. Chambre Nationale des Huissiers de Justice, *supra* note 141.

170. Doyle, *supra* note 165, at 40.

were five separate forms of *huissier* alone,[171] and specialized *huissiers* were employed in a number of services, from royal or bureaucratic functionaries[172] to service as official witnesses at important events.[173] Of course, a great deal of time passed between the 1500s, when the role of the *huissier* was thoroughly venal, and the Revolutionary period, when *huissiers* continued in a professional capacity, amazingly enough, despite their historical tie with monarchial authority.[174]

In pre-Revolutionary France, offices such as the *notaire* or *huissier*, which originally indicated powers given to a person by the King, gradually became a revenue, in lieu of a formal taxation regime.[175] The greater the power, privileges,[176] and especially profits associated with a particular office, the greater the revenue potential. Thus, tenures were extended to lifetime appointments, and offices were made alienable through testamentary devices and public sales, which also generated further fees and revenue.[177] As financial crises emerged, many new offices were created, and by 1598, the entire French judicial system was venal.[178] Hence, prior to the 1700s, the multiplicity of forms of *huissiers*, from street patrollers to debt enforcers to court reporters and process servers, emerged and sustained itself.[179]

The bestowing of privilege based upon merit—rather than a legal regime based on wealth and venal elitism—was, of course, a

171. *Huissier audiencier*, *huissier à cheval* (on horseback serving rural areas); *huissier à pied* (walker of the city center); *huissier priseur* (auctioneer); *huissier a la douzaine* (provost guards). Chambre Nationale des Huissiers de Justice, *supra* note 141. In 1705, the various forms other than huissier *audiencier* were consolidated under the umbrella term *huissier de justice*. *Id.*; *see also infra* notes 201–205 and accompanying text (discussing the *huissier audiencier* and the other forms of *huissier*).

172. *See, e.g.*, Nancy L. Roelker, *French News of Great Britain, 1574–1603*, 8 WM. & MARY Q. 90, 91 (1955) (describing a well connected *huissier* of the *Parlement de Paris*).

173. *See, e.g.*, J.L. Boone Atkinson, *Memoir of a Balloon Ascension and an Interview with Gambetta, January 1871*, 1 FRENCH HIST. STUD. 357, 358–59 (1960) (describing the attendance of a *huissier* at a balloon flight).

174. *See, e.g.*, William Doyle, *The Price of Offices in Pre-Revolutionary France*, 27 HIST. J. 831, 858–59 (1984).

175. Doyle, *supra* note 165, at 40 ("Before the advent of bureaucrats and bank accounts, it was almost impossible for states to tap the wealth of anyone with liquid or invisible assets; especially where, as in medieval France, the authority of the monarch was weak.").

176. *See, e.g., id.* ("Many offices brought exemptions from common burdens, such as the salt monopoly . . . or billeting soldiers. More prestigious offices conferred tax-exemptions of varying sorts. The most sought-after privilege of all—ennoblement—brought a whole range of others in its wake.").

177. *Id.*

178. *Id.* ("[I]t was not long before the entire judiciary had been venalised, in spite of a rule which required all judges to swear on appointment that they had not paid for their office. The oath was finally abandoned in 1598.").

179. *See supra* note 171 and accompanying text.

backbone of Revolutionary ideology in both France and America. Nevertheless, the venal/notarial professions survived the French Revolution, and Napoleon co-opted the basic revenue-generating premise when he later fully reintroduced those professional markers, which had been eliminated during the Revolution, into the new French bureaucratic system of the early nineteenth century; and those professions further survived the Revolutions of 1848.[180] Indeed, despite the ideological fervor, before Napoleon's rise to power, the concerted efforts to abolish these quasi-private state officials (the notarial professions) failed for a number of practical reasons.[181]

For instance, the Enlightenment thinking that underpinned both the America Revolution and French Revolution dictated that the professions most closely associated with archaic patriarchy, such as the master and the notarial professions, be emasculated.[182] However, like the masters in the early nineteenth century, late eighteenth century France also found that removal of entire professional classes only created voids in the law.[183]

Other technical issues ensued as well. The debts of the venal professions, such as the costs for investigations, had been assumed by the prior government; hence, the new government was forced to assume them as well.[184] Then, there was the issue of compensating the professional classes for the restructuring of professional offices. Some groups were defter at navigating this change than others. Notaries, for instance, were "[a]mong the most vocal . . . protesters"[185] and in the end gained not only compensation for

180. *See* Doyle, *supra* note 165, at 44.

181. *Id.* at 41–42 (noting that venality was sustained because "[a]bove all, [it] was an extremely flexible financial resource"); Doyle, *supra* note 174, at 848.

182. Doyle, *supra* note 165, at 43. In any event, office holders were the largest group in the National Assembly, and the professions had already become increasingly alienable and deregulated before the French Revolution, making them among the leading groups in the bourgeois class that the Revolutionaries depended upon for power. *Id.* As in the American colonies shortly after the American Revolution, the French government instituted programs designed to simplify the legal profession, and a large scale buy-out of the venal professions was attempted. *Id.*

183. *See* David A. Bell, *Lawyers into Demagogues: Chancellor Maupeou and the Transformation of Legal Practice in France 1771–1789*, PAST & PRESENT, Feb. 1991, at 107, 113, 120–25 (noting that the expulsion of the Order of Barristers—a self-governing association that initially had a monopoly on the practice of law—and lifting of pleading restrictions precipitated an explosion of scandalous cases where advocates perverted trials to self-promote and settle old scores). *Compare* Kessler, *supra* note 14, at 1203–04, *with* Doyle, *supra* note 165, at 43.

184. Doyle, *supra* note 165, at 43.

185. Doyle, *supra* note 174, at 848.

their title and practice but were maintained as a functioning profession after the reform.[186]

The emergence of Napoleon, out of the midst of the chaotic Revolutionary era, brought with it greater regulation, standardization, and bureaucratization of French government.[187] Unlike the United States, where the change in legal form was not as far reaching,[188] France quickly reinstated a, albeit modernized, version of monarchy.[189] Napoleon quickly reinstituted the methodology of office holding used before the Revolution, finally making the offices freely alienable, limited in number, and later subject to taxation.[190] This system essentially remains in place today:

> Throughout the nineteenth and twentieth centuries radicals and reformers denounced this as a betrayal of the Revolution's work, but they were met with arguments as old as venality itself. Even the much diminished ranks of revived venality were simply too expensive for the state to buy out. To this day, important French public monopolies remain privately owned. Anyone familiar with France will have noticed the oval gilt plaques over doorways in professional districts, proclaiming the presence of a *notaire*, a *huissier de justice*, or a *commissaire-priseur*, all holding office on terms first devised four centuries ago to help warrior kings fight the Habsburgs.[191]

Thus, as post-Revolutionary American and French legal styles diverged, with the United States hewing away from many of the remaining monarchical professions, France continued to adhere to the traditions of the *ancient régime*. The reasons for this are manifold, but nonetheless common elements remained in both

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186. Doyle, *supra* note 165, at 44. Even those professions effectively discontinued in the early years of the Revolution, such as attorneys and auctioneers, were able to reinvent their professions in the first few years after the implementation of an unregulated market: "[T]he chaos of an unregulated market in [attorneys' and auctioneers'] services produced new demands for state control." *Id.*

187. *Id.*

188. *See* U.S. DEPARTMENT OF STATE, BUREAU OF INTERNATIONAL INFORMATION PROGRAMS, OUTLINE OF U.S. HISTORY 68 (2005) (on file with the University of Michigan Journal of Law Reform), *available at* http://www.america.gov/media/pdf/books/historyIn.pdf# popup. In America, the monarchical authorities were simply replaced by an array of new legislatures, by both appointed and elected individuals.

189. *See* Doyle, *supra* note 165, at 44.

190. *Id.* The positions remained, in effect, *plum sinecures*. *Cf.*, Bennett Schiff, *Georges Seurat and the Color of Brilliance*, SMITHSONIAN, Oct. 1991, at 100, 104 (discussing the fact that Seurat's career was funded by his father, who got his start as a *huissier*).

191. Doyle, *supra* note 165, at 44.

countries throughout the nineteenth century as the notary, special master, and *huissier*, each survived the American or French Revolutionary attempts to eradicate them. By the early twentieth century, the United States once again attempted to have its lawyer class assume these notarial tasks, when other nations, including France, left these legal tasks to their non-lawyer professional classes.[192]

III. USES OF THE *HUISSIER AUDIENCIER* IN CIVIL LITIGATION

Despite the divergence between French and American procedure during the twentieth century, the *huissier* remains relevant to American lawyers for a number of reasons, both theoretical and practical. In the global economy it has become plain that any number of legal matters will need, at the very least, to be concluded through, or evidenced by, foreign procedural mechanisms. Further, where American courts hold jurisdiction over incidents in foreign nations, particularly nations without a broad notion of discovery, a third party fact-finder may be crucial, not only to the foreign aspect of the litigation, but also in assembling evidence for use in the American trial.

One result is purely practical: it is necessary to recognize foreign legal systems in order for the United States to meet treaty obligations and address cross-border issues.[193] Another result is theoretical: understanding the operation of the *huissier* can serve as a catalyst for comparison and reform of domestic institutions,[194] and *huissiers* may assist in overcoming foreign legal barriers to discovery.[195] In any event, understanding the current status of the *huissier audiencier* in French law is a necessary predicate to understanding the functions similar institutions (i.e., the special master) have played in U.S. litigation, and it also provides a basic understanding of the *huissier* for those instances where it is used in Civil Law jurisdictions.

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192. The greater flexibility in the United States stemmed from its not having an entrenched, venal professional class in the American economy or political regime.

193. Zehnder, *supra* note 4, at 1772 (noting that despite controversy over the use of international sources in the domestic context, "[t]here is little dispute whether comparative inquiry is a desirable practice in issues involving treaties or matters bearing cross-border consequences").

194. *Cf.* Lee, *supra* note 4, at 119 (discussing the possibility of the Supreme Court looking for a "universal consensus on a moral question").

195. *See* M. Neil Browne et al., *The Perspectival Nature of Expert Testimony in the United States, England, Korea, and France*, 18 CONN. J. INT'L L. 55, 97 n.286 (2002) (discussing Dayan v. McDonald's Corp. (*Dayan I*), 466 N.E.2d 958 (Ill. App. Ct. 1984)). For further discussion on *Dayan I*, see *infra* Part III.B.

A. The Huissier *Under the Nouveau Code de Procédure Civile*

The New French Code of Civil Procedure (*Nouveau Code de Procédure Civile* ("N.C.P.C.")),[196] introduced in 1974, never makes specific reference to the status of *huissiers.* Nonetheless, the N.C.P.C. furnishes the French judge a number of opportunities with which to appoint third parties for special functions under Title VII, "*L'administration judiciaire de la preuve*" ("The Taking of Evidence"), where provision is made for consultants,[197] technical experts,[198] surveyors,[199] and the investigation of witnesses by the judge,[200] among others.[201]

In addition to the fact-finding functions of the *huissier audiencier,* the *huissier de justice* also serves in capacities more commonly associated with bailiffs, sheriffs, or social workers in the United States. These responsibilities include international service of process;[202] the enforcement of court judgments; service of process; debt collection; providing legal advice, as representative in the commercial court, in the sub-district court concerning wage garnishment, and in the agricultural rent tribunal; and, the most common function, inspecting households in dissolution of marriage and custody

196. *See generally* N.C.P.C., *translated in* FRENCH CODE IN ENGLISH, *supra* note 156.

197. *Id.* art. 256, *translated in* FRENCH CODE IN ENGLISH, *supra* note 156, at 49.

198. *Id.* arts. 232, 263, *translated in* FRENCH CODE IN ENGLISH, *supra* note 156, at 46, 50.

199. *Id.* art. 264, *translated in* FRENCH CODE IN ENGLISH, *supra* note 156, at 51.

200. *Id.* art. 204, *translated in* FRENCH CODE IN ENGLISH, *supra* note 156, at 40.

201. For instance, Article 232 of the *Nouveau Code de Procédure Civile* states that "[t]he judge may appoint any person of his/her choice to provide him/her with guidance in the form of observations, written advice or by way of a report on a question of fact which calls for such technical guidance." *Id.* art. 232, *translated in* FRENCH CODE IN ENGLISH, *supra* note 156, at 46. Further, such appointments may be made at a party's request, to preserve evidence for pending litigation, through the *référé probatoire. Id.* art. 145, *translated in* FRENCH CODE IN ENGLISH, *supra* note 156, at 31 ("If, before any proceedings have commenced, there is a legitimate reason to preserve, or to establish the method of proving, the facts upon which the outcome of the of the [sic] dispute shall turn, legally permissible directions may be given at the request of any party, pursuant to an application or by way of a summary application."); *see also* Wendy Kennett, *The Production of Evidence Within the European Community,* 56 MOD. L. REV. 342, 349–50 & n.44 (1993) ("In situations where it is essential that the application for protective measures be kept secret, Article 145 also permits such measures to be sought via *ex parte* proceedings (*requête*). For example, a *huissier* may be appointed to enter a potential defendant's business premises and compile an official statement of certain categories of documents or other items to be found there." (footnotes omitted)). Further, even where a *huissier* is not permitted access to enter a potential defendant's business of to compile a dossier, access to the evidence is nonetheless permitted under free evaluation of evidence principles, typically prejudicial to defendants. *Id.* at 350.

202. If a U.S. litigant does not wish to use the service offered by the French government pursuant to the Hague Convention, service may be made by a *huissier* or American or French attorney. *Judicial Assistance in France, in* 1 INTERNATIONAL BUSINESS LITIGATION & ARBITRATION 2006, at 1341, 1344 (PLI Litig. & Admin. Practice, Course Handbook Series No. H-739, 2006) (on file with the University of Michigan Journal of Law Reform), *available at* http://travel.state.gov/law/info/judicial/judicial_647.html.

battles.[203] Nonetheless, in these aspects, the *huissier* is typically or effectively employed by private parties, and thus lacks the distinction of *audiencier* status (i.e., of being appointed by the court).

1. Introduction to the Contemporary *Huissier Audiencier*

The distinction between the two forms of *huissier* is crucial, as one—the *audiencier*—serves a role more akin to the special master, whereas the other, "non-*audiencier*," operates in a private capacity that is already accounted for in the American system through sheriffs, notaries public, and others. The *huissier audiencier* is the primary focus of this Article, and it is distinguished by serving principally as usher during court settings and as a fact gatherer or investigative magistrate.[204] Indeed, *audiencier* itself indicates "listener" or "hearing," and derives from the Latin *audientiarius*,[205] a person that is or gives an official audience.[206]

Essentially, the *huissier audiencier* performs three roles for or on behalf of the court, based upon the nature of the testimony and evidence deemed necessary under N.C.P.C. Title VII, Chapter V. The first is the *constatation*,[207] in which the *huissier* creates an oral or written dossier based on technical questions and does not provide opinion regarding the consequences of the findings. The second is the *consultation*,[208] a typically oral statement of expert facts that does not require a highly structured analysis. Finally, there is the *expertise*,[209] which, as explored below, may be further subdivided and serves a number of procedural functions.[210] The French court will usually avoid the *expertise*, where possible, as a result of its complexity.[211]

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203. *See* UIHJ, *supra* note 10.

204. *See* WESTON, *supra* note 9 and accompanying text.

205. ÉMILE LITTRÉ, 1 DICTIONNAIRE DE LA LANGUE FRANÇAISE 714 (Gallimard Hachette 1961) (1877) (author's translation); *see also* Definition of "Audiencier," http://www.mediadico.com/dictionnaire/definition/audiencier/lexique (on file with the University of Michigan Journal of Law Reform).

206. W.H. MAIGNE D'ARNIS, LEXICON MANUALE AD SCRIPTORES MEDIÆ ET INFIMÆ LATINITATIS 241 (Paris, M. l'Abbé Migne 1866). *Audientiarius* was typically also associated with two other Latin words of legal significance whose English descendants are unmistakable, *secretarius* and *notarius*. *See id.*; *supra* notes 138–139 and accompanying text.

207. N.C.P.C. arts. 249–55, *translated in* FRENCH CODE IN ENGLISH, *supra* note 156, at 48–49.

208. *Id.* arts. 256–62, *translated in* FRENCH CODE IN ENGLISH, *supra* note 156, at 49–50.

209. *Id.* arts. 263 to 284-1, *translated in* FRENCH CODE IN ENGLISH, *supra* note 156, at 50–56.

210. The general organizational scheme of this sub-section is extrapolated from Taylor, *supra* note 32, at 197–203.

211. *See id.* at 199.

a. The Constatation

The *constatation* is, simply, the compilation of an official report, the *constat*, on factual situations, excluding opinion on matters of fact or law.[212] The *constatation* is produced by a *huissier audiencier* or other investigative magistrate (stylized the *constatant*), who verifies technical questions.[213] The judge may order a *constatation* at any time during the proceedings and may order those findings to be delivered in court, though this is typically reserved for simple cases.[214]

In essence, the *constat* supplants much of the discovery and presentation of eye-witness testimony that occurs in the United States.[215] For instance, in civil litigation, witnesses are often interrogated by the *huissier* rather than the Judge Delegate (hereinafter, judge or French judge) and a *constat* is prepared summarizing the statements provided by the witness. Additionally, where the production of documents or investigation of office conditions is required, for example, *huissiers* may perform tasks necessary to both and draw upon relevant documents and industry, legal, or contractual standards, drafting notes later used in the creation of the *constat*

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212. Loretta Nelms-Reyes, Comment, *Deal-Making on French Terms: How France's Legislative Crusade to Purge American Terminology from French Affects Business Transactions*, 26 CAL. W. INT'L L.J. 273, 308 n.232 (1996) (citing CHRISTIAN DADOMO & SUSAN FARRAN, THE FRENCH LEGAL SYSTEM 125 (1993)); *see also* Taylor, *supra* note 32, at 197 n.148 ("*Constations* are derived from a very old practice in French law, known as the *constat d'audience.* Certain jurisdictions made a practice of designating the *huissier* or court clerk to make a finding of fact for the benefit of the court. Being purely factual in nature, the exercise did not require the clerk to make any opinions. This practice presented certain dangers, however, in that the clerk could be tempted to present a de facto *expertise* without respecting the contradictory atmosphere which has been acknowledged to be the basis for a fair trial in France. The N.C.P.C. revived this old procedure, being careful to provide certain safeguards to protect the philosophy of 'due process.' Provisions governing *constatations* are found in N.C.P.C. arts. 249–55. These sections provide specific regulations for both the judge and for the expert technician." (citation omitted)).

As matters of law are considered to always be within the competence of the judge, they may not be delegated. Examples of matters of law include the following: assessing the legal ramifications of the litigants' claims, assessing the soundness of legal theories, assessing parties' notarial acts, and assessing private agreements (those concluded without a *notaire*). *Id.* at 202–03.

213. *See, e.g.*, Taylor, *supra* note 32, at 197–98 ("The Judge Delegate may require simple fact verification, in which case she would turn to a specialist, the *technicien constatant*. . . . Opinion evidence is left to the more complex procedures of *consultation* and *expertise*."); *see also* N.C.P.C. arts. 234, 249, *translated in* FRENCH CODE IN ENGLISH, *supra* note 156, at 46, 48.

214. N.C.P.C. arts. 238, 249 para. 1, 253, *translated in* FRENCH CODE IN ENGLISH, *supra* note 156, at 47–49.

215. Although, the French judge retains considerable leeway to interrogate witnesses *sua sponte*. *See id.* art. 231, *translated in* FRENCH CODE IN ENGLISH, *supra* note 156, at 45.

summarizing relevant documents, witness statements, or other factual conditions.[216]

b. The Consultation

The *consultation* serves as a middle ground between the *constatation*, which is only useful in relatively simple fact-finding matters, and the *expertise*, which requires complex formalities: "When a purely technical question does not require complex investigation, the judge may instruct the person he/she shall appoint to provide him/her with a simple opinion."[217]

Neither fish nor fowl, the *consultation* is "one of the most remarkable innovations in the N.C.P.C."[218] Like the *constat*, the order may be made at any point; though with *consultation*, the order is not subject to interlocutory appeal.[219] Further, the mode of presentation is the inverse of the *constat*, with the preference for in-court oral opinion, though the judge may order a written report.[220]

c. Expertise

Finally, the *expertise* is another task with which investigative magistrates, third party fact-finders, and *huissiers* assist in the French system. This most complex aspect of gathering evidence under the N.C.P.C. is also the one with the greatest breadth.[221] Pursued as a matter of last resort,[222] an *expertise* requires one or more persons (*experts*) to research and draft a discussion on a specific issue.[223]

There are three general forms of *expertise*: *expertise aimable* (friendly expertise), *expertise officieuse* (informal expertise), and *expertise judiciaire* (judicial expertise).[224] *Expertise judiciaire* may be

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216. *Cf.* Browne et al., *supra* note 195, at 97 n.286.

217. N.C.P.C. art. 256, *translated in* FRENCH CODE IN ENGLISH, *supra* note 156, at 49.

218. Taylor, *supra* note 32, at 198.

219. *Id.* (citing N.C.P.C. arts. 257, 272).

220. *Id.* at 199 & n.160. *Compare* N.C.P.C. art. 257 para. 2, *translated in* FRENCH CODE IN ENGLISH, *supra* note 156, at 50 (*consultation*), *with id.* art. 250 para. 2, *translated in* FRENCH CODE IN ENGLISH, *supra* note 156, at 48 (*constatation*).

221. *Cf.* Taylor, *supra* note 32, at 199.

222. *See* N.C.P.C. art. 263, *translated in* FRENCH CODE IN ENGLISH, *supra* note 156, at 50 ("An expert opinion shall only be ordered in cases where a finding of fact or independent advice would not be sufficient to provide the judge with guidance."); *see also id.* art. 265, *translated in* FRENCH CODE IN ENGLISH, *supra* note 156, at 51 (requiring a showing of why an *expertise* was necessary).

223. Taylor, *supra* note 32, at 199.

224. *Id.* at 199–201.

further subdivided between *expertise demandée à titre principale* (expertise demanded for preservation of evidence) and *expertise demandée à titre incident* (collateral expert investigation).[225]

"*[E]xpertise aimable* only arises as a result of a contract between the parties," and thus the *experts* in this situation are not officers of the court, but are agents of the parties.[226] Accordingly, the *huissiers* are governed by *Code Civil* provisions for *mandataires* (agents).[227] *Experts* appointed in an *expertise aimable* therefore lack *audiencier* status. Further, the *expertise officieuse* is similar to Article 145 N.C.P.C.[228] in that it provides a potential litigant with an opportunity to adduce relevant facts prior to filing a lawsuit.[229]

Expertise judiciaire, however, is particularly relevant, as here officials appointed by the judge compile reports and therefore have the status of *audiencier.*[230] In its two basic forms, it permits a potential litigant to bring an adversary before the court so that evidence may be preserved for subsequent litigation (*expertise demandée à titre principale*),[231] and it also allows the judge to acquire aid for the finding of facts, relying on *constats, consultations,* and other forms of *expertise* (*expertise demandée à titre incident*).[232]

The *expertise demandée à titre incident* serves a similar purpose to expert testimony in the United States, namely the enlightenment of the fact-finder in areas which are beyond their typical knowledge or

225. *Id.* at 200, 201.

226. *Id.* at 200.

227. *Id.*

228. N.C.P.C. art. 145, *translated in* FRENCH CODE IN ENGLISH, *supra* note 156, at 31.

229. *Compare id., with* Taylor, *supra* note 32, at 201.

230. Taylor, *supra* note 32, at 200 ("*[E]xpertise judiciaire* is directed by the court at the request of one or more of the parties or by the court's own motion . . . ."). Taylor goes on to state:

> [T]he expert's report is filed with the court. . . . There are no specific statutory requirements as to the style or form of the written report, although custom dictates that it contain certain information. The preamble usually contains names and addresses of all involved with the operation of the expertise and a copy of the court's directions to the expert. Records of the various meetings of the parties, together with a record of their attendance, is included, as well as copies of their requests and observations throughout the course of the exercise. The second section of the report provides a detailed account of the actual operations of the expertise. The third [and final] section is a discussion of the results with answers to all questions presented during the procedure. Reasons must be given if specific questions in the mandate were not answered.

Id. at 207 (footnotes omitted).

231. It thus has similarities to pre-litigation depositions under Rule 27(a) of the Federal Rules of Civil Procedure, which are rare, but permissible. FED. R. CIV. P. 27(a).

232. Taylor, *supra* note 32, at 201.

competence.[233] In the American system, dual approaches are permitted, with multiple experts often presented by both parties, typically with contradictory conclusions.[234] The Civil Law, however, eschews this method. In its place, the judge appoints a select group of persons to compile a comprehensive and neutral report summarizing the relevant facts and providing an opinion as to those facts, though not the law.[235] This is the most common form of *expertise* in the French system.[236]

2. The *Huissier's* Report

Huissiers do not act in isolation. The parties can challenge and inform the *huissier's* report. During the compilation of any expert report the parties have the right to "know the ends and chosen means of the expert's mission,"[237] "be present during some of the expert's activities,"[238] "suggest alternative approaches" to the judge,[239]

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233. *Id.* ("*À titre incident* indicates that the Judge Delegate uses expert instruction during the litigation as an aid to him in his judicial duty to find facts."); *see also id.* at 202 ("*Expertise judiciaire* [including its most common form, *expertise demandée à titre incident,*] is a method of judicial education directed to enlightening the judge on points outside his realm of competence.").

234. Ted Dunkelberger & Stephen C. Curren, *Debating Court-Appointed Experts*, N.Y.L.J., Feb. 13, 2001, at S8 ("[I]t is natural that the plaintiff will choose an expert from one polar end of the spectrum of scientific opinions, and the defense will choose an expert from the other.").

Rule 702 of the Federal Rules of Evidence provides for expert witnesses. FED. R. EVID. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise . . . ."). However, an extremely partisan approach remains in practice. David E. Bernstein, *Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the* Daubert *Revolution*, 93 IOWA L. REV. 451, 489 (2008) ("Rule 702 attempts to solve the problem of adversarial bias through a reliability test, but it leaves intact the general adversarial structure that creates the underlying reliability problem."); *see also* Joseph Sanders, *Expert Witness Ethics*, 76 FORDHAM L. REV. 1539 (2007) (describing how the American adversarial system and its use of expert witnesses undermines the trial goal of assisting the factfinder's search for the truth).

235. *Cf.* Taylor, *supra* note 32, at 202–03.

236. *Id.* at 201 (noting that "[t]he most common form of expert testimony is *expertise a titre incident* ('collateral expert investigations')").

> An action, the object of which was to have the court nominate experts has been held to be without legal foundation (*irrecevable*). By the same token, a judge delegate may not direct expert instruction when no controversy has been alleged. This has been recognized in a preponderance of doctrine and case law on the subject.

Id. at 201 n.189.

237. *Id.* at 203.

238. *Id.*

239. N.C.P.C. art. 276 para. 1, *translated in* FRENCH CODE IN ENGLISH, *supra* note 156, at 53; *see also* Taylor, *supra* note 32, at 204 ("After an expert has been appointed by the court

and "dispute the . . . findings before the judge."[240] The contents of the report are partly dictated by custom and partly by the circumstances of each case, and are typically composed of a preamble with all relevant names and addresses, followed by records of meetings and attendance.[241] A second section typically provides a detailed account of the actual operations, and a third discusses the results and conclusions of the appointed third party, with variations in opinion attached and explained.[242]

The final report, which is subject to amendment at the judge's discretion, is confidential.[243] Once finalized, however, it can still be nullified on procedural or policy grounds established by statute: the "report was prepared in violation of a statute, . . . an error violate[s] a substantive or procedural right of . . . [a] part[y], or . . . public policy was compromised" in the compilation of the report.[244] Remedies are, however, solely within the court's competence and can include anything from purging of the tainted sections to a new *expertise.*[245]

Judges are not bound by any expert's opinion since the ultimate conclusions of law are solely within their competence.[246] Further, the *Cour de Cassation* has ruled that a judge need not indicate any reason for rejecting an expert's opinion, though typically it is difficult for a judge to contradict an expert without contradictory reports or a dissenting opinion within a single report, since conclusions therein are typically beyond the competence of the Judge Delegate.[247]

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and assigned the mission, the parties may request a hearing to make comments about the expert's mission. If the Judge Delegate agrees, the expert may make a statement about the research, including a description of his chosen methods. The parties then have a right to make verbal or written statements to the expert about the mission. . . . This right of 'communication' also confers a right to be informed when an expert schedules events in the investigation potentially worthy of observation by the parties. It should be recognized, however, that an expert is entitled to carry out purely technical activities in private." (citing Judgment of Mar. 14, 1978, Cass. Civ. 3e, 1978 J.C.P. IV 160 (Fr.))).

240. Judgment of Feb. 15, 1977, Cass. Civ. 3e, 1977 J.C.P. IV 96.

241. Taylor, *supra* note 32, at 207–08.

242. *Id.*

243. *Id.* at 208.

244. *Id.* (footnotes omitted); *accord* N.C.P.C art. 114, *translated in* FRENCH CODE IN ENGLISH, *supra* note 156, at 23. Examples of public policy being compromised include "investigations by one expert instead of the three required," "investigation by an expert not appointed by the court," investigations "by a legally incapacitated expert," and "failure of the expert to sign the report." Taylor, *supra* note 32, at 208–09.

245. Taylor, *supra* note 32, at 209; *cf.* N.C.P.C. art. 177, *translated in* FRENCH CODE IN ENGLISH, *supra* note 156, at 36.

246. N.C.P.C. art. 246, *translated in* FRENCH CODE IN ENGLISH, *supra* note 156, at 48 ("The judge shall not be bound by the observations of conclusions of the expert."); Taylor, *supra* note 32, at 209.

247. Taylor, *supra* note 32, at 209–10.

3. Conclusion

Plainly, the powers vested in the French courts to appoint third persons in the collection of evidence and drafting of expert opinions exceed those of the common law judge. *Huissiers* enable the court to obtain testimony and technical data, to gain opinions on relevant items that are beyond the judge's competence, and to preserve evidence; all but the last being available without motion by the parties.

"The further question is whether the evidence obtained by these means can be used in proceedings in another jurisdiction."[248] This, of course, turns on the law of that jurisdiction. In Civil Law jurisdictions, free evaluation of the evidence will likely render the report admissible and subject to some level of deference, particularly in intra-European Union affairs.[249] Under the common law, however, including England, drafters of reports in the French style are likely to be subject to in-court direct examination and then in-court cross-examination before admission of any of their findings.[250] Thus, in the common law system, which lacks a substantially equivalent profession,[251] *huissier* reports are inevitably challenged as hearsay, and exceptions are necessary for their use at trial.[252]

B. The Dayan and Société Civile Cases: Use of the Huissier in Contemporary U.S. Civil Litigation

While the *huissier* is not a part of contemporary U.S. litigation, and its relationship with the special master is attenuated by shifts in legal theory, it is nonetheless clear that U.S. courts have and continue to recognize the *huissier*'s reports and authentications of documents where transnational elements or concurrent jurisdiction so necessitate. In their capacity as sheriffs, as *huissiers de justice*, the *huissiers* are recognized through their ability to authenticate documents, provide service of process, and enforce judgments and debts where they have jurisdiction. It is, perhaps surprisingly, also the case that in civil litigation the reports, or at least the testimony,

248. Kennett, *supra* note 201, at 351.

249. *See id.*

250. *See id.* at 352.

251. *But see id.* at 350 (discussing English court use of Anton Piller Orders, which "are narrower in scope than the measures that can be ordered under French law, but they are extensively and effectively used" (footnotes omitted)). Recently, English courts have moved toward enforcement of Anton Piller orders through use of a neutral official, rather than a solicitor. *Id.*

252. *See id.* at 352; *see also infra* Part III.B.2.

of French *huissiers audienciers* can be permitted in American trials despite potential hearsay issues.[253] While none of these practices have been addressed by the United States Supreme Court, all relevant American case law discussing the *huissier* has recognized this profession as authoritative, with certain rights and privileges under the domestic laws of other nations.[254] Hence, U.S. courts may recognize or admit evidence of *huissiers'* acts where the authenticity of reports and documents generated by a *huissier* may be tested preliminarily by the court.[255] While uniformly accepted, the *huissier's* place in American case law remains sparse, doubtless due to its only arising in the limited context of litigation involving a relatively narrow set of legal or factual issues (e.g., discovery or other procedure) and a particular class of foreign legal functionaries. Since 1815, twenty-six American cases have at least mentioned the *huissier* in passing, whether in its French, Belgian, or Canadian context.[256] Of these, only four (three of which related to the case of Raymond Dayan, discussed below) directly address the American courts' use of official huissier reports.[257] The remaining twenty-two cases can be divided into separate groups according to time frame and the reason for mention of the *huissier*.[258]

In the nineteenth century, the *huissier* was mentioned in cases relating to the legal protest of bills of exchange between American and French merchants and the authentication and legal registration of related documents[259] for comparative purposes in the field

253. *See* cases cited *infra* note 269.

254. *See* cases cited *infra* note 269.

255. *See* cases cited *infra* notes 259–269 and accompanying text.

256. *See* cases cited *infra* notes 259–269 and accompanying text.

257. *See* cases cited *infra* note 269.

258. *See* cases cited *infra* notes 259–269 and accompanying text.

259. *See, e.g.*, Caune v. Sagory, 4 Mart. (o.s.) 81, 86–87 (La. 1815) (finding that two documents to the court purporting to be signed by a *huissier* and by two witnesses were appropriate to signify the protest of a bill of exchange because authentication by *huissier* was recognized by the French Code of Commerce); Tuttle v. Jackson, 6 Wend. 213, 221 n.a (N.Y. 1830) ("A protest of a bill of exchange by a huissier . . . will not be received in evidence without proof of the code." (citing Chanoine v. Fowler, 3 Wend. 173 (N.Y. Sup. Ct. 1829))); *Chanoine*, 3 Wend. at 178 (discussing the authenticity of a *huissier*-authenticated document on similar facts to *Caune*, and remanding for insufficiency of proof of the French Code of Commerce and of the protest of the bill).

> It would be an innovation, perhaps a dangerous one, to give to the acts of any person who might be authorized to protest foreign bills by a law or regulation of any particular country, the same faith and credit that is given those of a notary public, whose functions . . . are not created by the laws of any particular state, but by the custom of merchants, which is in fact the commercial law of nations.

Id. at 179. Federal courts also permitted introduction of French law into evidence. *See, e.g.*, Neederer v. Barber, 17 F. Cas. 1273 (C.C.S.D.N.Y. 1843) (No. 10,079) ("The court does not

of enforcement of debt obligations.[260] This suggests the ease with which notice can be used to evade liability in a property dispute,[261] in a discussion of the inability to sell a right to litigate,[262] in discussing the perfection of a fraudulent indebtedness against the United States government by a French estate,[263] and in determining the right of foreigners to sue the United States government.[264] Between 1871 and 1976, not a single case mentioned the *huissier*, but during the closing years of the twentieth century and the beginning of the twenty-first, over sixteen cases mentioned or discussed the *huissier* in the following areas: French service of process,[265] Canadian service of process,[266] service of process under the Hague Convention,[267] French

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intend to intimate any opinion that the French law may not be received in evidence in commercial questions, as the English is by the books supplying that proof in their own courts. The question of the sufficiency of the protest does not become material in this case . . . .").

260. *See, e.g.*, Hawley v. Cramer, 4 Cow. 717, 736 (N.Y. Ct. Eq. 1825) (citing Hall v. Hallet, (1784) 1 Cox 134, 140 (Ch.) (Eng.)) (considering whether an attorney may become a purchaser without consent of the client and finding *huissiers* may not; also finding that the French code, so far as it relates to attorneys, has been sustained). Further, consider that in modern French litigation, Article 145 of the Nouveau Code de Procédure Civile (*référé probatoire*) is partly premised on the idea that by "having an official record of the state of the site and adjoining buildings at the time the building commenced, it is hoped to avoid later litigation." Kennett, *supra* note 201, at 350.

261. *See, e.g.*, Pierce v. Musson, 17 La. 389 (1841) (citing a French treatise as authority that notice by a *huissier* might relieve a party of liability for some inconveniences and costs incurred when reconstructing common walls).

262. *See, e.g.*, New Orleans Gas Light Co. v. Webb, 7 La. Ann. 164, 168 (1852) (heavily relying on French legal scholarship and law to find that the sale of a right to sue nullifies that right).

263. *See, e.g.*, H.R. REP. CT. CL. No. 157 (1858); S. MISC. DOC. No. 190 (1858). Both of these congressional documents contain a report from the Court of Claims on the case of *Bigelow v. United States*, 1858 WL 4630 (Ct. Cl. 1858), regarding the administration of Francis Cazeau, a Canadian and French agent of the American Revolutionary forces, and the authentication of a transfer of indebtedness by a *huissier*.

264. *See, e.g.*, De Give v. United States, 7 Ct. Cl. 517, 518–21 (1871) (mentioning that the Belgian *huissier* serves process and may enforce judgments).

265. *See, e.g.*, Hanes Corp. v. Millard, 531 F.2d 585, 590 (D.C. Cir. 1976) (process served by French "Hussier [sic] de Justice"); Vinten v. Jeantot Marine Alliances, S.A., 191 F. Supp. 2d 642, 644 (D.S.C. 2002) (same); Alfadda v. Fenn, Nos. 89 Civ. 6217 (LMM), 90 Civ. 4470 (LMM), 1993 WL 526065, at *2 & n.4 (S.D.N.Y. Dec. 16, 1993) (same); Sec. Exch. Comm'n v. Kimmes, No. 89 C 5942, 1992 WL 122818, at *2 (N.D. Ill. May 18, 1992) (same); Perfumer's Workshop, Ltd. v. Roure Bertrand du Pont, Inc., 737 F. Supp. 785, 789 (S.D.N.Y. 1990) (service by *huissier* would be proper).

266. *See, e.g.*, United States v. Islip, 22 Ct. Int'l Trade 852, 861 (1998) (quoting a Canadian declaration that mentions *huissiers*); Goodstein v. Bombardier Capital Inc., 167 F.R.D. 662, 665–66 (D. Vt. 1996) (describing personal service by *huissier* in Quebec); O'Keefe v. St. Lawrence & Atl. R.R. Co., 167 F.R.D. 30, 32 (D. Vt. 1996) (same);

267. *See, e.g.*, Dimensional Commc'ns, Inc. v. Oz Optics Ltd., 218 F. Supp. 2d 653, 659 (D.N.J. 2002) (service by *huissier* under the Hague Convention); Suzuki Motor Co. v. Superior Court (Armenta), 249 Cal. Rptr. 376, 389–90 (Ct. App. 1988) (same).

depositions,[268] and the uses of *huissier audiencier* reports and testimony in evidence.[269]

With such breadth of potential application, the *huissier* could be a figure of some, albeit minor, significance in American courts. While many of these cases mention the *huissier* solely in passing, and only occasionally discuss *huissiers* acting in an official, court appointed capacity as the *huissier audiencier*, it is nevertheless symbolic of the historical and contemporary similarities between the adversarial and inquisitorial traditions even though the notion of the *huissier*, taking evidence without confrontation, is antithetical to American legal values. Furthermore, more insight can be gained into this new approach to litigation, with concurrent jurisdiction, by increasing the admissibility of *huissier audiencier* reports in American courts, as well as showing how the role of the special master can be enhanced.

1. Introduction to Using *Huissiers'* Reports in U.S. Courts

The *huissier audiencier*'s report is an official document, created by the *huissier* on the basis of notes taken during initial investigations, in field visits, or through interrogatories.[270] In France, emphasis falls primarily on the finished report, an official court document that must be preserved by the *huissier* for a number of years; the notes and other materials used in its creation are of little or no interest to the French judge.[271]

During the collection of data and creation of the report, parties are allowed to submit interrogatories through the *huissier*, and to challenge and attempt to direct the *huissier*'s scope and method.[272] Further, after the report is submitted, an opportunity to challenge its findings is provided, though this opportunity is not commensurate with the American notion of live testimony

268. *See, e.g.*, Denman v. Terrien, No. B148080, 2002 WL 1824941, at *3 (Cal. Ct. App. Aug. 8, 2002) (describing presence of a "Huissier de Justice" at a deposition).

269. *See, e.g.*, Société Civile Succession Richard Guino v. Redstar Corp., 63 Cal. Rptr. 3d 224, 228–29 (Ct. App. 2007); Dayan v. McDonald's Corp. (*Dayan I*), 466 N.E.2d 958, 968–71 (Ill. App. Ct. 1984) (discussing use of *huissier audiencier* reports); Dayan v. McDonald's Corp., 466 N.E.2d 945, 955–56 (Ill. App. Ct. 1984) (apportioning costs and fees and discussing a separate, private *huissier* employed by McDonald's); Dayan v. McDonald's Corp., 382 N.E.2d 55, 57 (Ill. App. Ct. 1978) (granting preliminary injunction).

270. *See Dayan I*, 466 N.E.2d at 970; *see also supra* Part III.A.

271. *See Dayan I*, 466 N.E.2d at 970 n.3.

272. *Id.*

and cross-examination.[273] It would seem, then, that the report is classic hearsay under the federal rules.[274]

Thus, in order to use advantageous *huissier's* reports, or at least their findings, in an American court, some type of concurrent jurisdiction must be present.[275] Once the report is available, however, the work of the advocate is not complete. An adequate hearsay exception must be found under which the report can be submitted into evidence, and the reliability of those reports demonstrated.[276] Thus, the persuasion of the court, the ability to subpoena the *huissiers*, and the availability of likely discarded original notes may be determinative where a hearsay objection is raised.[277]

2. The *Dayan* Case: An Opportunity for the Transnational Litigator?

McDonald's Corporation is the quintessential example of the modern global franchise company, if not its progenitor. McDonald's forays into numerous, often culturally dissimilar markets, have made it a favorite of corporate scholars and school-aged children,

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273. *See* N.C.P.C. art. 242, *translated in* FRENCH CODE IN ENGLISH, *supra* note 156, at 47 (stating that the technician can collect oral or written information of all persons and further noting that the parties may request that they be heard by the judge, who carries out a hearing if the judge sees fit); Taylor, *supra* note 32, at 206 & n.237. Of course, French litigation is premised on the notion of due process rights through contradictoire (contradiction), whereby parties may challenge one another's assessment of the findings, but this is not fully analogous, nor as rigorous in application, as American cross-examination. *See generally id.* at 206 nn.237–41 (citing sources).

274. *See* FED. R. EVID. 801(c).

275. *See, e.g.*, Dayan v. McDonald's Corp., 466 N.E.2d 945, 951–52 (Ill. App. Ct. 1984) (dismissing as manifestly false the content of *huissier* report); *infra* note 291 and accompanying text.

276. *See* FED. R. EVID. 803(8) (stating an exception to the hearsay rule for "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness"). This rule is underutilized. Fred Warren Bennett, *Federal Rule of Evidence 803(8): The Use of Public Records in Civil and Criminal Cases*, 21 AM. J. TRIAL ADVOC. 229, 267 (1997).

277. *See also* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 170 (1988) (noting that public investigatory reports containing factual findings, opinions, and conclusions are admissible under the public records exception to the hearsay rule under Rule 803(8)(C)). Indeed, reports that are ministerial in nature and prepared under nonadversarial circumstances are not inadmissible hearsay; only adversarial, evaluative reports, such as crime scene reports are proscribed because of the risk of fabrication. United States v. Orozco, 590 F.2d 789, 793–94 (9th Cir. 1979) (finding that customs records of border crossings were admissible as nonadversarial and ministerial under Rule 803(8) of the Federal Rules of Evidence); United States v. Grady, 544 F.2d 598, 604 (2d Cir. 1976) (finding that reports about firearms' serial numbers were admissible records of routine factual matters prepared in nonadversarial circumstances).

while also drawing the ire of its discontents. However, McDonald's was not always a ubiquitous symbol cutting across global boundaries with hamburgers, and its operations were just beginning in the France of the early 1970s, long before it became a totem of anti-American sentiment there. These early international franchise operations ultimately led to the first American cases that examined and admitted the findings of *huissier audienciers* into evidence. In this sense, *Dayan v. McDonald's Corp.*[278] represents an amalgamation of the procedural histories of the United States and France.

Raymond Dayan was an early franchisor of McDonald's in Paris,[279] and had selected a method of apportioning earnings and services between McDonald's Corporation and himself whereby Dayan paid 1% of earnings to McDonald's for the name and brand rights, but McDonald's would only provide limited services to Dayan in terms of finding and concluding leases with suppliers and land holders, construction of restaurants, and assistance in maintaining quality, service, and cleanliness ("QSC")[280] in accordance with the master licensing agreement.[281] Dayan had previously been warned that this particular arrangement was disfavored by management and difficult to manage, as it later proved to be for Dayan.[282] Dayan's treatment by McDonald's was ultimately characterized as "a unique and stylized franchise"[283] that differed from the method typically encountered in a McDonald's franchise arrangement where, for a 3% fee, McDonalds provided extensive services aimed at guaranteeing compliance with the QSC and other provisions of the licensing agreement.[284]

It was these QSC provisions that Dayan was ultimately unable to meet, despite a concerted effort by McDonald's to critique Dayan and allow opportunity for conforming performance and treatment beyond that required by the 1% fee arrangement scheme.[285] As the filth and disorderliness of Dayan's restaurants became apparent,[286]

278. Dayan v. McDonald's Corp. (*Dayan I*), 466 N.E.2d 958 (Ill. App. Ct. 1984).

279. *McDonald's in a License Fight in Paris*, N.Y. TIMES, Aug. 28, 1981, at D3 (discussing how McDonald's sought to protect the integrity of its brand by ejecting Dayan despite the current costs of doing so).

280. *Dayan I*, 466 N.E.2d at 963–64; *see also* Dayan v. McDonald's, Corp., 485 N.E.2d 1188, 1189–90 (Ill. App. Ct. 1985).

281. *Dayan I*, 466 N.E.2d at 962–65.

282. *Id.* at 963.

283. *Id.* at 964 (internal quotation marks omitted).

284. *Id.* at 962–63.

285. *Id.* at 964–65.

286. *Id.* at 965.

> In particular, [McDonald's witnesses'] testimony revealed that Dayan was not using approved products, he refused to delay the opening of his first restaurant even

McDonald's patience wore through, and it moved to terminate the licensing agreement,[287] provoking extended litigation with concurrent French and American jurisdiction.[288]

As the restaurants under Dayan's control were located in Paris, the litigation began there with a motion for the appointment of *huissiers* to investigate Dayan's compliance with the licensing agreement for possible use in potential court proceedings.[289] "Based on findings by the Huissiers on April 14, 1978, McDonald's gave notice to Dayan of default . . . ."[290] In his responsive pleadings, Dayan then retained a private, and plainly biased, *huissier* to contradict the findings of the court appointed *huissier audienciers.*[291]

In France, Dayan was unlikely to succeed in having a *huissier audiencier*'s report declared inadmissible by a court.[292] Hence, he invoked the jurisdiction of the Chicago Chancery Court, before the same judge who had previously upheld the validity of Dayan and McDonald's Chief Executive Officer Ray Kroc's franchise agreement,[293] which had been made over drinks one evening on a

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> though McDonald's personnel had declared it unfinished and unsuitable for opening, he used no pickles, he charged extra for catsup or mustard, he hid straws and napkins under the counter, he responded to complaints from McDonald's personnel with "If they don't like it, they can buy me out" . . . .

Id.

287. Dayan v. McDonald's Corp. (*Dayan II*), 382 N.E.2d 55, 57–58 (Ill. App. Ct. 1978).

288. *See Dayan I*, 466 N.E.2d at 961.

289. *See Dayan II*, 382 N.E.2d at 57; *cf.* N.C.P.C. art. 145, *translated in* FRENCH CODE IN ENGLISH, *supra* note 156, at 31.

290. *Dayan II*, 382 N.E.2d at 57. Dayan's motion to quash the order appointing the *huissiers* was denied. *Id.* A further report by another *huissier audiencier* was provided in September 1978. *Dayan I*, 466 N.E.2d at 968. The inspections lasted between 10 and 12 hours, during which detailed notes were taken concerning cleanliness, cooking procedure, service procedure, finished products, specific equipment, temperatures, cooking times, product holding times, customer service, and like personal observations alongside photographs. *Id.* at 969.

291. *See* Dayan v. McDonald's Corp, 466 N.E.2d 945, 951–52 (Ill. App. Ct. 1984).

> Additional evidence that plaintiff knew his pleadings were false is revealed by his resort to testimony that was clearly perjured. . . . Dayan presented photographs and testimony from . . . a privately retained *huissier* . . . . The trial court found that . . . "[t]he one fact that [the privately retained *huissier*] did testify to with unwavering certainty (i.e. [sic] the time and circumstances of certain photographs) was later exposed as a complete and total fabrication—that fact was presented here by this French court official with knowledge that it was false. [The private *huissier*] discredited himself and disgraced his office" . . . .

Id. at 951.

292. That would perhaps necessitate the submission of the contradictory report to try to show that McDonald's lacked good cause to terminate Dayan's license.

293. Telephone Interview with Richard G. Schultz, Attorney for Respondent McDonald's Corp., Principal, Schwartz Cooper Chartered (Feb. 28, 2008) [hereinafter Schultz Interview].

napkin, and later questioned by McDonald's board.[294] In the United States, as one theory arguing for retrial, Dayan objected to the admission of the *huissier audiencier* reports into evidence under the hearsay doctrine.[295]

Arguing "that the testimony and reports of the court-appointed *huissiers* were biased and insufficiently credible and should have been rejected by the trial court,"[296] Dayan first objected on the grounds that the *huissiers* were not credible witnesses and hence the trial judge should have rejected their testimony,[297] and second, that the reports were hearsay and erroneously admitted into evidence as past recollection recorded.[298]

The court quickly dismissed the objection to the credibility of the *huissiers* as witnesses by deferring to the trial court's findings:

The franchisee must have believed that the American judge would be more likely to rule in his favor than would a French judge. *Id.*

294. *Id.* (commenting that when confronted with a *huissier* in American litigation, the court should treat that person as any other testifying or deposed witness); *see also* James R. Figliulo, *Breaking the Language Barrier*, LITIGATION, Winter 1984, at 32.

The tale of the napkin and the Dayan-Kroc contract may be apocryphal, although mentioned by counsel for the franchisor on both sides of the Atlantic. *See* Interview with Claire Ayer, Partner, Hughes, Hubbard & Reed, in Paris, France (June 18, 2008); Schultz Interview, *supra* note 293.

295. *Dayan I*, 466 N.E.2d at 968 ("Dayan attacks the credibility, competence and admissibility of the testimony and reports of these French court officials."). In identifying the *huissier*, the Court stated:

> The record reveals that five *huissiers de audiencier*, Delatre, Lachkar, Adam, Petit, and Linee, were specifically appointed and ordered by the Paris court to conduct inspections of Dayan's restaurants in April and September of 1978. Under the French legal system, the court determines facts from reports submitted by *huissiers* and not from oral testimony. All five of these French court officials held the special title of "*Huissier de Justice Audiencier*" which indicates that they work for the court system and receive their assignments directly from the court. *Huissiers* that are not "*audiencier*" receive their assignments from and work at the request of a private party.
>
> The record further reveals that the mission of any *huissier* is to relate to the court the facts in dispute with objectivity and with the highest regard for the truth by making the observations directed and preparing an official report. However, a *huissier*'s report prepared at the instance of a private party is limited by the specific requests and instructions of the retaining individual. In contrast, a court-appointed *huissier de audiencier* receives his instructions from the judge . . . . [T]he *huissiers de audiencier* testified at trial that they enjoy the "utmost confidence" of the court . . . .

Id. at 968–69.

296. *Id.* at 969.

297. *Id.* at 968–70. In effect, Dayan objected to the reports' admission "into evidence," whether as a matter of fact to be determined by the trier of fact or as an outside statement of French law, or both. *Id.* However, the reports were admitted, and the appeals court upheld the trial court's use of the reports. *Id.* at 970; *see also infra* note 299 and accompanying text.

298. *Dayan I*, 466 N.E.2d at 970 ("[E]ach court-appointed *huissier* testified at length from their present recollection or from their present recollection as refreshed by their reports and photographs . . . .").

> [T]he trial court made specific findings that the five *huissiers* were objective, impartial, honest, and worthy of high credibility .... The *huissiers* were not privately retained by McDonald's but were appointed by the French court to obtain information the court had requested. The fact that McDonald's had petitioned the French court resulted in McDonald's having to bear the cost of the *huissier* inspections and reports by paying a fee to each *huissier* for his work .... [T]his arrangement does not render the *huissiers'* testimony or reports incapable of belief.[299]

The Court then shifted its focus to Dayan's hearsay objection.[300] Dayan contended that the reports did not fit the relevant hearsay exception used by the trial court—past recollection recorded—which requires that the witness have firsthand knowledge of a recorded event, a written statement must be made at or near the time of the event, the witness lacks any present recollection of the event, and the witness vouches for the accuracy of the memorandum.[301] *Huissier* reports are, of course, not made concurrently with the inspection or interrogatory, but are instead made a brief time later based upon original notes.[302] Dayan argued this was insufficient to meet the second element for past recollection recorded, namely that the statement be original and made at or near the time of the event.[303]

The Trial Court did not admit the *huissiers'* reports in full.[304] Instead, a bifurcated approach was taken to determine the admissibility of the findings. First, and crucially, the *huissiers* had appeared as witnesses in the American trial.[305] Secondly, those portions of the report admitted under the past recollections recorded hearsay exception were limited to the numerical findings and quantitative data copied directly from field notes into the reports.[306]

Admissibility under the past recollection recorded doctrine is premised on:

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299. *Id.* at 969.
300. *Id.*
301. *Id.* at 970 (citing Johnson v. City of Chi., 431 N.E.2d 1105, 1106 (Ill. App. Ct. 1981)).
302. *Id.* at 971.
303. *Id.* at 970.
304. *Id.*
305. *Id.* at 971.
306. *Id.* at 969–71.

> sufficient circumstantial guarantees of trustworthiness and reliability because the recorded recollection was prepared at or near the time of the event while the witness had a clear and accurate memory of it. Under these circumstances, the reliability of the evidence is perceived to outweigh the inherent testimonial infirmities of hearsay occasioned by the inability of the opposing party to effectively cross-examine.[307]

The best-evidence rule establishes a preference for original documents, as they tend to be freer of the inaccuracies that may occur in the process of transcription.[308] However, copies of the original document may be used—as, in this case, the *huissier* reports in place of the original field notes—where the original is unavailable.[309] The Court further conditioned its finding on the fact that the notes had not been destroyed in bad faith, but rather as a matter of custom, and that they alone served as the best evidence of service times, temperatures, and other numerical data.[310]

It is unclear what value the *Dayan* Court may have accorded to the *huissier* reports without live in-court *huissier* testimony (or at least depositions thereof).[311] Thus, while *huissier* reports might be used by an American litigant, the extent to which these reports may be allowed is uncertain in a case where corroborating evidence and other indicia of reliability is less readily available than in *Dayan*.[312] For instance, if a *huissier* is unavailable to testify, it seems unlikely that his/her findings could be admitted into evidence, as the appropriate testing for reliability could not be performed by the court.[313]

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307. *Id.* at 970 (citation omitted). For a discussion of confrontation and hearsay, see Ralph Ruebner & Timothy Scahill, Crawford v. Washington, *the Confrontation Clause, and Hearsay: A New Paradigm for Illinois Evidence Law*, 36 LOY. U. CHI. L.J. 703, 777 & n.577 (2005).

308. *Dayan I*, 466 N.E.2d at 970–71; *see also* MCCORMICK ON EVIDENCE §§ 229–30 (John W. Strong et al. eds., 5th ed. 1999).

309. *Dayan I*, 466 N.E.2d at 970–71 (citing MCCORMICK ON EVIDENCE § 301 (Edward W. Cleary et al. eds., 2d ed. 1977)).

310. *Id.* at 971.

311. *Id.*

312. *Id.*

313. *But see* FED. R. EVID. 803–04 (describing exceptions to the general rule against hearsay).

In *Dayan*, the *huissiers* had been deposed through evidence depositions in France where both parties were represented by counsel, ensuring against the outright loss of the findings had any *huissier* not been able to attend the American trial. Schultz Interview, *supra* note 293. This might, in other words, be classified as "legal tourism":

> [A]n American lawyer who installs himself in a deluxe hotel room for as little as one day or as long as six weeks, with a degree of circumspection which demonstrates great

3. *Société Civile*: Extending the *Dayan* Theory

Plainly, the circumstances that give rise to a *huissier*'s report being used in an American trial are rare. Yet, Dayan's case, while for many years the only such use of a *huissier*'s report as evidence in a U.S. trial, recently demonstrated its continuing relevance and usefulness in easing the resolution of disputes with transnational elements in a predictable and coherent fashion; this new case was a foreign judgment enforcement proceeding under the Uniform Foreign Money-Judgments Recognition Act ("Money-Judgments Act").[314]

The enforcement proceeding in *Société Civile Succession Richard Guino v. Redstar Corp.* was in itself unremarkable.[315] While it followed the lead of *Dayan* by admitting the findings of a French *huissier*,[316]

> deference to the principle of professional confidentiality. Once installed, legal tourists use their best efforts to obtain, primarily by means of depositions, the testimony of witnesses and the documents with which they hope successfully to represent the interests of their clients in a United States court. Citizens of France, the United States and third countries are invited unceremoniously to testify in what might irreverently be described as a three-star chamber.

Jacques Borel & Stephen M. Boyd, *Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States*, 13 INT'L LAW. 35, 35 (1979).

It should be noted that "[t]he power to compel a witness to appear for a deposition taken for pre-trial discovery . . . does not exist in France" as a result of general limitations on discovery rights. Figliulo, *supra* note 294, at 33; *see also* Steven J. Stein, *Depositions in Foreign Jurisdictions: "Innocence Abroad,"* LITIGATION, Spring 1981, at 14 (providing an overview of procedures for compelling the attendance of witnesses at evidence depositions in foreign nations and describing the difficulties of translation in the *Dayan* case and the importance of a reputable translator), *cited in* Figliulo, *supra* note 294, at 33.

314. The Uniform Foreign Money-Judgments Recognition Act is adopted in several states as the U.S. Constitution does not provide for the enforcement of foreign judgments. Montré D. Carodine, *Political Judging: When Due Process Goes International*, 48 WM. & MARY L. REV. 1159, 1165–66 (2007). The Act's due process provision is nearly identical to that of the Restatement (Third) of Foreign Relations. *Id.*; *see also* Mark D. Rosen, *Should "Un-American" Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783, 792 (2004) (discussing the Restatement (Second) of Conflict of Laws' instructions for enforcing valid foreign judgments). *Compare* UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(1)(a), 13 U.L.A. 58–59 (2002), *with* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(1)(a) (1987).

315. 63 Cal. Rptr. 3d 224 (Ct. App. 2007). This case had been the product of ongoing litigation in France over certain counterfeit castings of statues, the intellectual property rights of which laid with Richard Guino, a twentieth century artist and assistant to Pierre Auguste Renoir. Petition for Entry of a California Court Judgment Under the Uniform Foreign-Judgment Recognition Act, Société Civile Succession Richard Guino v. Red Star Corp., No. BS059900 (Cal. Super. Ct. Oct. 4, 1999). The statues were entitled: "Head of Little Venus," "Medium Washwoman," "Head of 'Venus Vetrix,'" "Bust of Mrs. Renoir," "Large Maternity," "Bust of Paris," "Little Standing Venus and Base of the Judgment of Paris," and "The Blacksmith." *Id.* at 2.

316. *Société Civile*, 63 Cal. Rptr. 3d at 229 ("Plaintiffs submitted uncontradicted material from an official in the French Ministry of Justice and from a French 'huissier de justice'

the *Société Civile* court's reasoning can be understood to reflect a longstanding tradition of respect, even in common law America, *for the huissier and for huissier reports.*

In *Société Civile,* the defendants had forged sculptures, and the plaintiffs sought money damages, which were awarded by the French court in distinct allocations.[317] One allocation was provided as a reserve (*titre de provision*), which the defendants argued was not "final and conclusive and enforceable" since the French judgment contained the terms "temporary payment" and "temporary amount" in its disposition regarding this allocation but not the other, and much smaller, amount.[318] The trial court had concluded that the "[p]laintiff has failed to establish that any portion of the French Judgment is for a fixed sum."[319]

In concluding that the judgment was in fact final and enforceable, the appellate court examined various possible interpretations of the French judgment, including the conclusions of a French *huissier* on the finality and enforceability of the French judgment under French law.[320] The key findings related to whether the provision of the French Code, under which the judgment was made, indicated a specified sum of money.[321]

In relevant part, the *huissier de justice*'s uncontradicted report, submitted by the Plaintiffs, indicated that "the order in the French judgment for 'provisional execution' allows a prevailing party 'to immediately seek the execution of a court decision, despite the staying effect of the ordinary review process constituted by the appeal.' "[322] In any event, the French appeal had been dismissed as untimely in the case, rendering the judgment conclusive: "The proof of its . . . enforceable nature appears on the [judgment] itself where the latter is not subject to a review capable of staying its execution."[323]

(one who has certain judicial and legal functions) . . . ." (citing *Dayan I,* 466 N.E.2d at 968–69; BLACK'S LAW DICTIONARY 757 (8th ed. 2004))).

317. *Id.* at 226.

318. *Id.* at 226, 229 (internal quotation marks omitted).

319. *Id.* at 227 (internal quotation marks omitted).

320. *Id.* at 229.

321. *Id.* at 228 nn.7–9.

322. *Id.* at 229 n.10; *see also* Xavier Vahramian & Eric Wallenbrock, *France, in* INTERNATIONAL CIVIL PROCEDURE 233 (2003).

As for the uncontradicted nature of the report, see Brief for Appellant at 22, *Société Civile,* 63 Cal. Rptr. 3d 224 (No. B192862) [hereinafter *Société Civile* Appellant Brief] (citing Brewer v. Reliable Auto. Co., 49 Cal. Rptr. 498 (1966) (finding that failure to provide counter-affidavits is tantamount to an admission of truth)).

323. *Société Civile,* 63 Cal. Rptr. 3d at 228 n.8 (quoting an internet translation of Article 504 of the Nouveau Code de Procédure Civile) (alteration in original) (internal quotation

Essentially, the court read the *huissier*'s report as being authoritative, with the report effectively concluding that the French judgment was final and enforceable, even had an appeal been available.[324] The French judge had decided that the judgment was final, conclusive, and enforceable, and hence, the California Court of Appeals determined it was enforceable—mainly relying on the *huissier*'s finding—under the Money-Judgments Act;[325] he reached this determination despite a French legal classification that, when literally translated, indicated an *unconcluded* judgment[326] because, in operation, the judgment was enforceable in France.[327]

The Court in *Société Civile* was confronted with a situation different from that in *Caune v. Sagory*[328] or *Chanoine v. Fowler*,[329] where the issue primarily related to the authenticity—the conclusiveness—of documents originally produced by a *huissier* for French procedural purposes but now presented in an American court.[330] Still, in choosing to recognize a *huissier*'s findings, the *Société Civile* Court continued long-standing precedent beginning with *Caune* and *F. & H. Chanoine* that *huissier* documents are authentic and reliable.[331]

Yet, the *Société Civile* court breaks with tradition by taking the factual situation beyond mere authentication. Indeed, the court apparently could take the opinions of the *huissier*,[332] and a similar

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marks omitted); *accord* N.C.P.C. art. 504, *translated in* FRENCH CODE IN ENGLISH, *supra* note 156, at 96.

324. *Société Civile*, 63 Cal. Rptr. 3d at 229.

325. *Id.* at 231.

326. *Id.* at 225 n.3 ("Different translators, equally competent, will use different language, and give a different gloss, or shade to the meaning in transferring the idea intended to be conveyed from one language to another . . . ." (quoting Mulford v. LeFranc, 26 Cal. 88, 100 (1864)).

327. *Id.* at 229 ("By virtue of the express language of the judgment, under French law discussed above, plaintiffs could immediately enforce that measure providing for such advance payment. Thus, the trial court erred in concluding that the 3–million-franc award was not a judgment 'granting . . . recovery of a sum of money' under the [Money-Judgments] Act." (omission in original) (quoting CAL. CIV. PROC. CODE § 1713.1(2))); *see also* N.C.P.C. art. 515, *translated in* FRENCH CODE IN ENGLISH, *supra* note 156, at 99 ("In addition to cases where provisional enforcement is obtainable as of right, it may be ordered at the request of the parties, or of his/her own initiative whenever the judge shall deem it proper and appropriate to the subject matter, provided that it is not prohibited by law. It may be ordered for all or part of the judgment.").

328. 4 Mart. (o.s.) 81 (La. 1815).

329. 3 Wend. 173 (N.Y. Sup. Ct. 1829).

330 The timing was different. In *Société Civile*, *huissier* Yann Jezequel's statement was prepared for the U.S. litigation, *after the French judgment had been rendered,* per the request of plaintiff Société Civile's attorney, Richard W. Morris. E-mail from Richard W. Morris, Attorney, Morris Law Firm, to Dwayne A. Robinson, Research Assistant to Professor Robert W. Emerson, University of Florida (Oct. 8, 2009, 10:26:02 EST) [hereinafter Morris E-mail] (on file with the University of Michigan Journal of Law Reform).

331. *See Société Civile*, 63 Cal. Rptr. 3d at 229–30.

332. *Id.* at 229.

opinion issued by the French Ministry of Justice,[333] as being advantageous for any further liability disputes or enforcement actions.[334] The choice of the California court to follow that understanding is tantamount to attribution of the findings of the *huissier* to the Judge Delegate. Thus, the Court takes the *huissier*'s findings, as commissioned by the plaintiff's American lawyer, and gives it equal weight to that of a French judge's holding itself in determining whether the French judgment would be conclusive and enforceable.[335]

Société Civile extends the *Dayan* theory beyond its original scope, which was simply to allow the *huissiers*' testimony into evidence in an American trial where it could be challenged by the opposing party on the facts; the limited context of the *huissiers*' testimony was not meant to extend to the very meaning of the decisional language by a French Judge Delegate,[336] as it was in *Société Civile*.[337]

While it is true that the findings were similarly subject to controversion by being placed into evidence,[338] the *Société Civile* court in effect gives the findings even greater direct credence, dispensing with any hearsay analysis, for instance.[339] The California court also implicitly conceded the utility of the *huissier*'s office and functions by using his report while failing to undertake any extensive discussion of that report's role, or lack thereof, in an adversarial system.[340]

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333. *Id.*

334. *Id.* As mentioned previously, the *huissier*'s report in *Société Civile* was commissioned after the French court's judgment. Morris E-mail, *supra* note 330.

335. *Société Civile*, 63 Cal. Rptr. 3d at 230. One could argue that the *huissier*'s report should be treated as nothing more than the opinions of a layperson since his proposition that in the Civil Law a judgment was enforceable immediately regardless of appeal was not conclusively authoritative as it lacked precedential value. However, not only is this proposition independently verifiable but, along with further recommendation from the French Ministry of Justice, it underlies the Judge Delegate's final judgment. *Société Civile* Appellant Brief, *supra* note 322, at 21–23.

336. Dayan v. McDonald's Corp. (*Dayan I*), 466 N.E.2d 958, 971 (Ill. App. Ct. 1984).

337. *Société Civile*, 63 Cal. Rptr. 3d at 229.

338. *Id.* at 226–29.

339. As the hearsay issue apparently was not raised (even were it raised, the court never considered it), one could contend that the effect, by not even dealing with it in the U.S. court, was to put great stock in the *huissier*'s report.

340. In the appellate opinion, there was simply a very short discussion of the *huissier*'s role. *See Société Civile*, 63 Cal. Rptr. 3d at 229. The trial order is just one page, and does not mention *huissiers*. However, it may be argued that the court's adoption of the *huissier*'s report represents something other than the court's implicit recognition of the report's authoritativeness. For one, it can be said that the report is merely an analysis of French law. However, neither the respondent, whom the report detriments, nor the court treats it as such. In its brief, the respondent considers the *huissier*'s report to be an "affidavit" and "evidence." Respondents' Brief at 21, *Société Civile*, 63 Cal. Rptr. 3d 224 (No. B192862), 2007 WL 1406372. Moreover, the Court refers to the report as "uncontradicted material," which, arguably, is synonymous with uncontroverted evidence. *Société Civile*, 63 Cal. Rptr. 3d at 229. In the alternative, another interpretation of the court's wholesale adoption of the *huissier*'s

The court thus turned to a report without considering the overall evidentiary ramifications: how a third party's evidence-gathering challenges the role of the jury and repudiates the confrontational aspect of a trial.[341]

4. Conclusion

In the utilization of *huissiers'* reports in American litigation, one can see how dossiers gathered by third parties are compatible with the American adversarial system. The evisceration of the special master in 1938 was largely premised on its incompatibility with the jury, particularly as it appeared to supplant the role of the jury. However, particularly in corporate litigation, use of the jury has diminished, which demonstrates not only the "visceral negativity" with which juries are viewed in other nations, but also comes as a result of their reputation for unfavorable rulings against "deep pocket" defendants, and the concentrated "all-issues" trial (not a seriatim trial, featuring a number of hearings on parts of the case rather than one grand trial for which discovery occurs). The "all issues" trial necessarily results in extensive pre-trial discovery.[342]

This Article has shown how French *huissier* reports can be admitted in U.S. trials on transnational issues; such usage strongly suggests that *huissier*-like procedural tools can be of substantial

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report could be that the appeals court accepted the report as a true statement of fact because of its uncontested nature. The respondent failed to timely object to its introduction. Reply Brief for Appellant at App. I, *Société Civile*, 63 Cal. Rptr. 3d 224 (No. B192862), 2007 WL 1539179. Thus, it may be argued that the appeals court merely accepted it as fact, a procedural custom in the American adversarial system. *See id.* at 4. A rebuttal is (1) that the respondent challenges, in its brief, whether it conceded any points and (2) that another aspect of American system is to construe all facts in the light favorable to the non-moving party, which here is the respondent. As such, the California court, if this second alternative theory is to hold true, should have given little to no consideration of the *huissier's* report.

341. *See* Kessler, *supra* note 14, at 1240.

342. *See* Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 545, 549 n.156, 581 & nn.281–82 (2006). While the jury is certainly ingrained in the American legal mind as an essential, if not mandated, item at many trials,

> negative perceptions about the jury's unpredictability linger among foreigners, domestic business interests, and portions of the public. In terms of people's willingness to accept adjudicatory outcomes, perceptions matter. . . . Of course, the abolition of juries does not end the American system's commitment to decentralization; other, more significant manifestations remain . . . , [especially] private forms of ADR that place decision-making . . . into the hands of the disputants themselves.

Id. at 582–83.

value in a common law system.[343] As this Article turns to a reexamination of the special master's role after the 2003 amendments to the Federal Rules of Civil Procedure as well as to the effect of legal globalization on reforming American legal practices, *Dayan* and *Société Civile* are prescient examples of how American courts have already implemented inquisitorial procedural methods without compromising the integrity of the American civil trial system.

IV. THE *HUISSIER* AS A MODEL: REFORMING U.S. DISCOVERY THROUGH ADAPTATION

So why does the *huissier*, this apparent vestige of pre-Revolutionary ideology, have any potential application in an American system that has sought to answer to the legal principles of the Enlightenment philosophers?[344] American law has come under serious criticism for its costs in the last decade. Notable examples of these allegedly extreme legal expenses include, in general, greater risk of criminal liability and, in particular, the challenges faced by equity holders in enforcing derivative actions as well as meeting the numerous regulatory mandates emanating from the Sarbanes-Oxley Act.[345] In an increasingly de-harmonized federal system,[346] corporations and corporate equity holders have come to shy away from the United States and its legal regimes,[347] and the consequences in productivity and competitiveness will be far-reaching without change.

Underlying American regulations and the legal regime is a complex and highly detailed system in which costs easily come to exceed the benefits of participation, and, with the developments of

343. Admission into evidence of French *huissier* reports would, of course, have to meet the standard admissibility threshold: indicia of reliability, and an opportunity for the opposing party to submit contradictory evidence.

344. *See, e.g.*, Charles K. Rowley, *An Intellectual History of Law and Economics: 1739—2003*, *in* THE ORIGINS OF LAW AND ECONOMICS: ESSAYS BY THE FOUNDING FATHERS 3 (Francesco Parisi & Charles K. Rowley eds., 2005) [hereinafter ORIGINS OF LAW AND ECONOMICS] (showing how Revolutionary thinkers envisaged a legal framework favoring deregulated markets).

345. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

346. *See, e.g.*, A. Benjamin Spencer, *Anti-Federalist Procedure*, 64 WASH. & LEE L. REV. 233, 277 & n.222 (2007) ("The Supreme Court also has embraced states' rights, articulating in a string of cases over the past decade or so a robust view of constitutional federalism." (citing Stephen G. Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 25 (2001))).

347. A.C. Pritchard, *London as Delaware?* 20–21 (Univ. of Mich. Law Sch. John M. Olin Ctr. for Law & Econ., Working Paper No. 09-008, 2009), *available at* http://law.bepress.com/umichlwps/olin/art100 (on file with the University of Michigan Journal of Law Reform).

recent years, potential litigants and investors have come to regard the idiosyncrasies, expense, and attention to arcane detail of the U.S. system as undesirable. Thus, the American litigation process not only inhibits the efficient implementation of regulatory regimes, but it also sours international investors on the U.S. markets.[348] London's *The Times* ran one tagline in 2008 which stated: "US legal system 'worse than Russia' [:] A survey shows that European in-house lawyers would rather face litigation in China and Russia than in America."[349] America's legal reputation surely is in tatters when 29 percent of European businesses identify the United States as the worst nation in which to face a major dispute.[350]

And it is not corruption, nor a lack of funding (both pervade Russia and China),[351] that is to blame. By all means, America exhibits the key indicia of the ethical rule of law, and its lawyers and court system are comparatively well-paid and amply funded.[352] Instead, as one in-house counselor said, the American system is "filled with traps in which the inexperienced or uninformed may easily become caught."[353]

At the same time, as the jury becomes increasingly subject to scientific scrutiny, the issues that are used to strongly prefer oral, as opposed to transcribed, testimony have been shown to matter far less than once thought.[354] Through reforms providing the master with greater powers, such as some of those available to the *huissier audiencier*, the special master may be transformed into an institution that enhances the effectiveness of American litigation, the desirability of a U.S. forum, and stability as well as "rule of law" certainty underlying domestic investment. In the absence of such needed changes, the legal-economic analysis of comparative pro-

348. *See generally* Robert A. Kagan, *Adversarial Legalism and American Government*, 10 J. POL'Y ANALYSIS & MGMT. 369 (1991).

349. Michael Herman, *US Legal System 'Worse than Russia': A Survey Shows that European In-House Lawyers Would Rather Face Litigation in China and Russia than in America*, TIMES ONLINE, Mar. 18, 2008, http://business.timesonline.co.uk/tol/business/law/article3570695.ece (on file with the University of Michigan Journal of Law Reform).

350. *Id.*

351. *See, e.g.*, TRANSPARENCY INT'L, 2008 CORRUPTION PERCEPTIONS INDEX TABLE (2009), http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table (on file with the University of Michigan Journal of Law Reform) (showing China to be the 79th country in terms of corruption, with a lower number indicating a better posture for that country; although China's record was poor, Russia's was far worse—146th).

352. Kagan, *supra* note 348, at 375–76.

353. Herman, *supra* note 349 (internal quotation marks omitted).

354. *See infra* notes 526–529 and accompanying text (discussing Lindholm, *supra* note 80, at 1310, which indicates that factfinders perform better evaluating the evidence from written transcripts than from oral testimony).

cedure is, to put it mildly, poignant in the present environment; the American litigation system suffers by comparison to others.[355]

A. A Comparative Law and Economics Analysis of Procedure

In a comparative law and economic analysis of litigation, the trade-off between the costs of the procedure in question and the costs of error are strong factors in determining the overall cost and relative value of that procedure.[356] However, before an analysis is made regarding the choices of parties and the trade-offs between these costs, several issues must be addressed, including the European scholarly distrust of the law and economics trend,[357] and the distinctive nature of a comparative law and economics analysis in contrast to the traditional law and economics analysis applied to common law procedure.[358] Also, the general assumption that the American legal regime, or at least the common law, is effectively premised on efficiency and therefore superior in a cost-benefits analysis when compared with the Civil Law, will be challenged in part.[359]

The area of comparative law and economics, as opposed to its progenitor in traditional American-centered law and economics, is relatively new.[360] Of course, its underlying premise is the same: "More or less during the same period in which comparative lawyers have been working out their theory of legal change based on transplants and borrowings, Law and Economics scholars have been attempting their own explanation of why a change in legal institutions happens."[361] Thus, a combination of these principles will yield a more complex understanding of legal change and explain how the U.S. system stands to benefit from adopting procedural aspects from the Civil Law.

Certainly, the American legal system has many efficiency advantages and was instrumental in the development of law and

355. *See* Geoffrey P. Miller, *The Legal-Economic Analysis of Comparative Civil Procedure*, 45 AM. J. COMP. L. 905, 905 (1997).

356. *Id.* at 906.

357. Oren Gazal-Ayal, *Economic Analysis of "Law & Economics,"* 35 CAP. U. L. REV. 787, 788 (2007).

358. UGO MATTEI, COMPARATIVE LAW AND ECONOMICS 3 (1997).

359. *Compare* Frank B. Cross, *Identifying the Virtues of the Common Law*, 15 SUP. CT. ECON. REV. 21, 24 (2007), *and* Charles R. Epp, *Do Lawyers Impair Economic Growth?*, 17 LAW & SOC. INQUIRY 585 (1992), *with* Samar K. Datta & Jeffrey B. Nugent, *Adversary Activities and Per Capita Income Growth*, 14 WORLD DEV. 1457, 1457–61 (1986).

360. *See* MATTEI, *supra* note 358, at ix.

361. Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 INT'L REV. L. & ECON. 3, 4–5 (1994).

economics theory.[362] However, in the rush to extol the virtues of the flexible approach of the common law, especially in its approach to contractual interpretation,[363] procedural costs have been overlooked or, in any event, the cost of American procedure has been underestimated.[364]

Much of this, of course, has to do with Richard A. Posner's early work, drawing upon Friedrich Hayek, extolling the virtue of the common law, with its judge-made flexibility as opposed to the statutory, and therefore static, Civil Law.[365] Posner's models, which are over thirty years old, have failed to account for preference and utility functions: "[T]he law is not so efficient as Posner argued."[366] Nonetheless, it is certainly true that the American system has been rigorously analyzed by law and economics scholars, and that these early models, while flawed, have led to expansive literature that is much more empirical and accurate.[367] As a result, a number of scholars have either argued that the Civil Law is more efficient,[368] or that at least portions thereof reduce key costs.[369]

This Article's goal, however, is not to engage in a wholesale comparison between common law and Civil Law in the perspective of efficiency, but instead to take a "micro" approach[370] to understand how particular procedural rules can enhance the international competitiveness and efficiency of the United States and its legal system's procedural costs. Doing so requires an exploration of the principles of efficient adjudication, the challenges those principles face in an international legal context, and how the French meth-

362. *See* Cross, *supra* note 359, at 21–22.

363. *See, e.g.*, Ronald J. Scalise Jr., *Why No "Efficient Breach" in the Civil Law?: A Comparative Assessment of the Doctrine of Efficient Breach of Contract*, 55 AM. J. COMP. L. 721, 721 (2007).

364. *Compare* Daniel Soulez Larivière, *Overview of the Problems of French Civil Procedure*, 45 AM. J. COMP. L. 737, 738 (1997) (arguing that, in terms of procedural cost, the French system is the cheapest in the world), *with* Cross, *supra* note 359, at 42 (finding that while the United States has moved away from the common law and toward statutory based law, other nations have moved toward a common law-like system, challenging the theory of common law—that is, American—superiority in a law and economics analysis).

365. Paul H. Rubin, *Why Was the Common Law Efficient?*, *in* ORIGINS OF LAW AND ECONOMICS, *supra* note 344, at 383; *cf.* F.A. HAYEK, THE CONSTITUTION OF LIBERTY (1960); F.A. HAYEK, LAW, LEGISLATION AND LIBERTY (1973); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (7th ed. 2007).

366. Rubin, *supra* note 365, at 384; *see also* William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979) (admitting earlier models had erred).

367. Rubin, *supra* note 365, at 385.

368. *See, e.g.*, GORDON TULLOCK, THE CASE AGAINST THE COMMON LAW (1997).

369. *See, e.g.*, Larivière, *supra* note 364, at 738–40, 742–44 (discussing both efficient and inefficient aspects of the French judicial system).

370. Rubin, *supra* note 365, at 392.

odology employed by the *huissier* can serve those principles at less cost than the United States' current system.

> [I]n the moment in which a strong case is made for the rebirth of "legal process-style" comparison of alternative legal institutions, it seems that comparative law may offer to economic analysis a reservoir of institutional alternatives not merely theoretical but actually tested by legal history.[371]

This Article seeks exactly that, but what exactly does a comparative law and economics legal approach entail? The boundaries are certainly indefinite.[372] Nonetheless, key principles are apparent.

An economic analysis is generally premised on the Coase theorem, which, when applied to the legal context, is the idea that where transaction costs are high, legal remedies are efficient, and when transaction costs low, injunctions are more likely to be efficient.[373] Thus, parties should be protected from negative externalities in private law through injunction and in public law through compensatory damages.[374]

Ronald Coase's analytic model further draws upon nineteenth century theories of the capital market, which at the time were generally within the purview of economic thinkers including proponents of state control such as Vilfredo Pareto.[375] The principle of Pareto efficiency, stipulating that transaction costs and technology

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371. MATTEI, *supra* note 358, at ix (footnote omitted) (citing NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994); William N. Eskridge, Jr. & Philip P. Frickey, *The Making of* The Legal Process, 107 HARV. L. REV. 2031 (1994)).

372. MATTEI, *supra* note 358, at x.

373. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 7–8 (1960); *see also* TULLOCK, *supra* note 368, at 10.

374. TULLOCK, *supra* note 368, at 10 (citing ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 17 (1988)).

375. Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, *in* ORIGINS OF LAW AND ECONOMICS, *supra* note 344, at 168, 169. Indeed, some viewed Pareto as "the Karl Marx of Fascism." Max Millikan, *Pareto's Sociology*, 4 ECONOMETRICA 324, 324 (1936); *see also* John R. Commons, *Communism and Collective Democracy*, 25 AM. ECON. REV. 212 (1935) (noting that Mussolini acknowledged Pareto as the economic founder of fascism, supposedly in order to have governmental control of capital and thereby meet the interests of employees and farmers; concluding, however, that in practice Pareto's academic theory develops into state control, through military dictatorship, by the big financial, industrial and agricultural capitalists, both under Mussolini in Italy and Hitler in Germany).

Pareto's observations provide some understanding as to why transplanted democratic institutions have withered in many less developed countries, why communism took on totalitarian forms in spite of the dreams of many Marxist theorists, and why internal pressures for liberalization ultimately developed in Eastern Europe in the last decades of the 20th Century. Vincent J. Tarascio, *Vilfredo Pareto: On the Occasion of the Translation of His* Manuel, 6 CAN. J. ECON. 394 (1973).

define an outer boundary of current potential economic achievement in a given society, and that no move away from the status quo is possible without making another player disadvantaged or through shifting the boundary outward, is intertwined with the theory of an economic analysis of the law.[376]

Involved, however, are "Pareto superior changes," whereby exchanges can occur where no one is better or worse off,[377] such as the exchange of a commodity at its fair market value. At the end of the exchange the two parties still have something of equivalent market value, regardless of social or emotional enrichment.[378] This example, however, excludes the transaction costs. This key element is what Coase accounted for, that these costs are no different from any other costs; they may "at any given moment help define the Pareto possibility frontier."[379] Thus, by making efforts at reducing transaction costs, the Pareto boundary (which through inductive reasoning inhibits the outward expansion of markets, i.e., development) can be enlarged, a state can be reached where some are better off as a result of transactions occurring that would otherwise be impossible because of the transaction costs, and no one will be worse off.[380]

Underlying these arguments, however, are the principles of the American common law system and the concept that such a system was enhanced with latent or intuitive economic principles.[381] Indeed, the contemporary law and economics field emerged in the United States and until the mid-1990s was mostly focused on domestic systems.[382] The common law seemed a perfect fit, as one key premise of the law and economics theorists was to aim to give parties what they would have bargained for had they properly planned their contract.[383] This kind of redrafting of legal promises is anti-

376. *See* Calabresi, *supra* note 375, at 169.

377. *See id.* at 171.

378. *Id.*

379. *Id.* at 173.

380. *See id.* at 175 (citing Harold Demsetz, *The Exchange and Enforcement of Property Rights*, 7 J.L. & ECON. 11 (1964); Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979)).

381. Rowley, *supra* note 344, at 8–12.

382. MATTEI, *supra* note 358, at ix, 72; *see also* Gerrit De Geest, *Comparative Law and Economics and the Design of Optimal Legal Doctrines*, *in* 6 THE ECONOMICS OF LEGAL RELATIONSHIPS: LAW AND ECONOMICS IN CIVIL LAW COUNTRIES 107, 108 (Bruno Deffains & Thierry Kirat eds., 2001) [hereinafter ECONOMICS OF LEGAL RELATIONSHIPS] ("Posner . . . just tries to prove that the common law is efficient. Yet comparative lawyers know very well that continental law leads in many cases to the same final results, albeit on the basis of different doctrines. Posner does not attempt to determine what the optimal formulation is.").

383. *See* Robert D. Cooter, *The Confluence of Justice and Efficiency in the Economic Analysis of Law*, *in* ORIGINS OF LAW AND ECONOMICS, *supra* note 344, at 222, 236 ("Efficiency requires the allocation of legal entitlements to the parties who value them the most.").

thetical to European legal cultures,[384] where specific performance is still considered preferable in contracts suits.[385] Thus, any comparative law and economic analysis must be sensitive to the issues of the field's American birth, its tenuous application beyond that field, and the relative dearth of comparative law and economic literature.

Despite this caution, a comparative economic approach builds on other comparative approaches such as common core, legal transplants, and legal formants and provides a means toward the scientific measurement of differences among legal systems.[386] However, several differences in approach from the simple economic analysis must be taken.

For instance, efficiency in comparative law "maintains a clearly dynamic meaning, strictly linked with the notion of legal change," and a comparison is made between efficiency before and after a legal change.[387] Thus, the evaluation centers around determining whether the institutional arrangements in one nation are more or less efficient than those in another.[388] At its core, however, the comparative economic approach continues to develop law through non-positive notions of efficiency rather than justice or social engineering.[389] While the legal transplant theory is maintained, it is the explanation of the transplant, or the argument for or against a transplant, which is altered by the efficiency analysis.[390] Certainly, it continues to be the case that "most changes in most systems are the result of borrowing,"[391] but the economist seeks to answer why this is the case rather than mere compilation of data suggesting it is so.[392]

Therefore, applying the traditional economic axiom that inefficient rules or methods tend to become the subject of change, a transplanted rule is therefore a more efficient alternative if it was actually adopted in a competitive international legal arena.[393] Alternatively, a need for a legal change may be demonstrated, and a

384. *See* Scalise, *supra* note 363, at 722, 729.

385. *See id.* at 729–30. *But see id.* at 730–32 (discussing several exceptions to the preference for specific performance of contract obligations under French and German law).

386. *See* MATTEI, *supra* note 358, at xii-xiii.

387. *Id.* at 1–2.

388. *See id.* at 2.

389. *See id.* at 3.

390. *Id.* at 123–24.

391. *Id.* at 124 (quoting ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 95 (Univ. of Georgia Press 1993) (1974)); *see also* Ewald, *supra* note 28.

392. *See* MATTEI, *supra* note 358, at 124–26.

393. *Id.*; *see also* Rubin, *supra* note 365, at 384 ("[T]he process by which outcomes are generated is shown to lead to efficiency.").

potentially more efficient legal methodology scrutinized, as this Article attempts.

B. Efficiency of the French Procedural Method

Traditionally, it has been widely argued that an economic analysis of Civil Law would fail to yield functional results.[394] However, Civil Law countries including France have now been subjected to a number of studies addressing jurisprudential costs and competence.[395] In fact, despite the restrained role of a French judge in making a cost-benefit analysis as compared to her American counterpart, the French code has, since its inception during the Revolution, sought to make the judicial system "simpler, quicker and less costly."[396] Thus, much as the common law is impliedly premised on notions found in economics, the various French codes since the Revolution, including the N.C.P.C., have been underpinned by efficiency concerns.[397] French law is not purely positivist and can be subjected to economic analysis, though to a French legal professional or scholar the result will not appear as immediately useful as it does to a similarly situated U.S. party.[398]

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394. Kenneth G. Dau-Schmidt & Carmen L. Brun, *Lost in Translation: The Economic Analysis of Law in the United States and Europe*, 44 COLUM. J. TRANSNAT'L L. 602, 617–19 (2006) (noting that European legal systems, including the civil law society of France, "are less amenable to . . . economic analysis," partly due to a rejection of the need of the analysis in law).

395. *See, e.g.*, Thierry Kirat, *Legal Systems and Economic Analysis: How Relevant is American Law and Economics for the Understanding of French* Jurisprudence?, *in* 6 ECONOMICS OF LEGAL RELATIONSHIPS, *supra* note 382, at 61, 61–62.

396. Larivière, *supra* note 364, at 737 (citation and internal quotation marks omitted).

397. *See id.* at 737–38; *see also* Michael Faure, *Tort Liability in France: An Introductory Economic Analysis*, *in* 6 ECONOMICS OF LEGAL RELATIONSHIPS, *supra* note 382, at 169 (noting that the primary goal of the French system of tort law is "victim compensation").

398. Faure, *supra* note 397, at 171.

> It is certainly possible to incorporate the economic notions of fault (through weighing marginal costs versus marginal benefits) into article 1382 of the French Civil Code. This would mean that the French judge would examine whether it would have been possible for the injurer to avoid the accident by investing additionally in prevention whereas these additional investments would have substantially reduced the accident risk. Such an explicit weighing of costs and benefits can almost never be seen in French case law based on article 1382 CC. . . . [T]he French judge might implicitly have referred to economic criteria. . . .[but] the . . . American Learned Hand case can not be found in French case law.

Id. (citation omitted). Furthermore, a number of French concepts of risk-bearing, such as created risk and guarantee, serve as theoretical bases for civil liability and cannot be fit squarely in an economic model. *Id.* at 172; *see also* Kristoffel Grechenig & Martin Gelter, *The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism*, 31 HASTINGS INT'L & COMP. L. REV. 295 (2008) (exploring why the law and economics dis-

In the Fifth Republic, French legislators have taken great care to improve the simplicity, speed, and cost of proceedings.[399] While the reasoning behind this was initially to ensure post-war economic growth, it continues a lengthy trend of encouraging lower costs of procedure created shortly after the Revolution.[400] An example of this is the decision not to extend the right to a jury to civil proceedings.[401]

Contemporary analysis of legal or transactional costs in France has illuminated the benefits, as well as the key problems, underlying government efforts. For instance, France has far fewer potential procedural landmines in terms of deadlines, formalities, and the gathering of evidence; businesses do not require the same legions of attorneys; legal costs are comparatively low and settlement is widely encouraged.[402] While procedural costs are low, the cost of error is quite high in France, the inverse of the American

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course has failed to play a significant role in Germany and other Civil Law countries; arguing that Germany and other European countries are strongly anti-Utilitarian, Idealist, and therefore hostile to law and economics).

399. WALTER CAIRNS & ROBERT MCKEON, INTRODUCTION TO FRENCH LAW 177 (1995) (noting that civil procedure has been the subject of intense revision in the prior few decades, with the main focus of the Nouveau Code de Procédure Civile (1975, since amended) being to streamline and accelerate procedures); Marc Bruschi, *Procédure Commerciale, in* RÉPERTOIRE DE PROCÉDURE CIVILE 1 (Dalloz 2009) (focusing on commercial courts, while mentioning the objectives of simplicity, celerity, and frugality); Loïc Cadiet & Soraya Amrani-Mekki, *Civil Procedure, in* INTRODUCTION TO FRENCH LAW 307, 327 (George A. Bermann & Etienne Picard eds., 2008) (referring to French law's "development in the direction of simplification"); Edward A. Tomlinson, *Judicial Lawmaking in a Code Jurisdiction: A French Saga on Certainty of Price in Contract Law*, 58 LA. L. REV. 101, 121 n.110 (1997) (noting the high rate of commercial litigation in France, attributable at least in part to the low cost of litigation); *accord* Georges Wiederkehr, *L'accélération des Procédures et les Mesures Provisoires*, REVUE INTERNATIONALE DE DROIT COMPARÉ 449 (1998).

In the last two years, the modernization of the justice system has been a critical concern for the French government, which ordered (and received) two important reports from expert committees dealing directly with that matter: The *Guinchard* Report, *L'Ambition Raisonnée d'une Justice Apaisée*, COMMISSION SUR LA RÉPARTITION DES CONTENTIEUX PRÉSIDÉE PAR SERGE GUINCHARD (2008), http://lesrapports.ladocumentationfrancaise.fr/BRP/084000392/0000.pdf (on file with the University of Michigan Journal of Law Reform), and the *Magendie* Report on the Celerity and Quality of the Appellate Justice, *Célérité et Qualité de la Justice Devant la Cour D'appel*, RAPPORT AU GARDE DES SCEAUX, MINISTRE DE LA JUSTICE, May 24, 2008, http://www.justice.gouv.fr/art_pix/1_rapport_magendie_20080625.pdf (on file with the University of Michigan Journal of Law Reform).

400. Larivière, *supra* note 364, at 742–46.

401. *Id.* at 737–38.

402. *See* N.C.P.C. art. 21 & 127, *translated in* FRENCH CODE IN ENGLISH, *supra* note 156, 4 & 25 ("The judge has the duty to mediate between the parties"; "Parties may negotiate a settlement between themselves or a settlement may be engineered by the judge at any time during the proceedings"); TULLOCK, *supra* note 368, at 53–59; Larivière, *supra* note 364, at 738–43; Miller, *supra* note 355, at 907.

system.[403] Of course, these findings are debatable; one could find that the cost of error was also high in the United States considering the cost of correcting errors through appeal.

Concurrent with this concern is that of cultural differentiations: arguments over whether the common law is or is not "better" disregard concerns with the importance of certainty, as well as how multinational entities can make use of differing legal regimes in structuring favorable transnational business schemes, among others. Such a question "is like asking whether the French language is superior to the English language. Better for whom?"[404]

Further, a number of papers have examined the inefficiencies of the French legal system, even in the context of arguing that certain segments may be more efficient than common law methods.[405] The common law, in general, provides an efficient means of dispute resolution; it is the current American practice of common law that needs adjustment. Procedural costs are at a breaking point in the United States, and a procedural "surrogate" (i.e., an enhanced special master) would greatly reduce these burdens, such as the cost of discovery, compliance with securities laws, or expert investigation.[406] The market has already shown its preferences: even before Sarbanes-Oxley, U.S. corporate privatization had expanded, and foreign corporations limited their exposure to U.S. regulatory regimes, incidentally moving profits, stock ownership, jobs, and other benefits outside of the United States.[407]

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403. Miller, *supra* note 355, at 907–08. And the cost of error can be high, as claimants acting in bad faith can cause much trouble over a small investment, especially as damages for such abuse are low. *Id.* at 907 (citing Larivière, *supra* note 364, at 744).

404. Scalise, *supra* note 363, at 766; *see also* Oscar G. Chase, *Some Observations on the Cultural Dimension in Civil Procedure Reform*, 45 AM. J. COMP. L. 861, 863 (1997).

405. *See* Larivière, *supra* note 364. For an overview of the contemporary outlook on the efficiency of the common law, see Cross, *supra* note 359, at 24–44.

406. *See* Wayne D. Brazil, *Special Masters in the Pretrial Development of Big Cases: Potential and Problems*, *in* MANAGING COMPLEX LITIGATION, *supra* note 74, at 1, 3. For a brief overview of the effects of competitive pressures on American procedure, see Tidmarsh, *supra* note 342, at 540–52, 542 n.124.

407. Some examples discussing securities regulation reforms are: Steven M. Davidoff, *Regulating Listings in a Global Market*, 86 N.C. L. REV. 89 (2007) (arguing that non-U.S. companies began to spurn U.S. stock markets even before Sarbanes-Oxley); James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 BUS. LAW. 1233 (2007) (arguing that foreign corporations desire a codified, rather than case-by-case, regulatory regime); Cristie L. Ford, *New Governance, Compliance, and Principles-Based Securities Regulation*, 45 AM. BUS. L.J. 1 (2008) (discussing the adoption of "principles-based" securities regulations in foreign financial centers which compete directly with the United States and their comparative success in attracting listings); Edward F. Greene, *Resolving Regulatory Conflicts Between the Capital Markets of the United States and Europe*, 2 CAPITAL MARKETS L.J. 5 (2007) (discussing means to resolve the burdens of cross-border securities regulation between the European Union and the United States).

In such an environment, it is key to look to other ways to lessen procedural costs, where new regulation is likely to emerge[408] that would otherwise increase these costs and weaken overall economic productivity by slowing the rate at which the Pareto boundary can be expanded. France, with its historically low procedural costs, provides sources for legal adaptation that, when applied in the American adversarial system, may optimize domestic transaction costs.[409]

C. Giving Parties to Commercial Litigation the Right to Choose an Investigative Magistrate

Legal adaptation is a sensitive issue, though its ultimate end of convergence is beneficial to creating a competitive international legal market.[410] Thus, any legal transplant or adaptation will inevitably be a piecemeal effort, barring upheaval.[411] As a result, delineating jurisdiction and specific powers is essential, and here the proposal impacts commercial transactions.[412] Once the parameters have been defined (as a kind of prototype), the ability of American parties to have an investigative magistrate assume certain roles in the litigation and regulatory process will serve as a test of the effectiveness of the adaptation at providing greater efficiency.

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408. *See* Nelson D. Schwartz & Julie Creswell, *What Created This Monster?*, N.Y. TIMES, Mar. 23, 2008, at C1 (discussing potential regulatory responses to the 2007–2008, and potential future, financial crises); *U.S. is Reviewing Regulation of Investment Banks*, N.Y. TIMES, Mar. 26, 2008, http://www.nytimes.com/2008/03/26/business/worldbusiness/26iht-26regs.11443403.html (on file with the University of Michigan Journal of Law Reform).

409. *See supra* notes 373–374, 376, 378 and accompanying text.

410. MATTEI, *supra* note 358, at 124, 126. Convergence is "the phenomenon of similar solutions reached by different legal systems from different points of departure." *Id.* at 126.

411. *See* Nelken, *supra* note 28, at 37 ("Even within a society legal interventions can be considered 'too successful' when they 'colonise' or displace other established normative patterns of relating without the use of law (leading to juridification)."). One can look at broad reforms that ended in quagmire, such as the French Revolution or the "shock therapy" practiced in some Soviet Republics after 1991, as further demonstration of the virtue of gradualism. *Compare* Doyle, *supra* note 165, at 43, *and* Shael Herman, *The Contribution of Roman Law to the Jurisprudence of Antebellum Louisiana*, 56 LA. L. REV. 257, 304 (1995) (discussing Napoleon's concern with restoring order through the Roman law and the emergence of an emphasis on price in characterization of transactions as Napoleon stabilized the post-Revolutionary government), *with* Rein Müllerson, *Promoting Democracy Without Starting a New Cold War?*, 7 CHINESE J. INT'L L. 1, ¶ 64 (2008) (discussing arguments suggesting that radical legal reforms promoted by the United States were simply meant to undermine Russia's geopolitical stability and not enhance well-being).

412. *See* ALI/UNIDROIT PRINCIPLES, *supra* note 21, at xxxv.

It also presents parties a greater range of contractual choice—a key goal in efficiency rationale premised on rational choice theory.[413]

In many ways, the movement toward a greater role for the special master has already begun, ameliorating the inefficiencies represented in high U.S. procedural costs, possibly reflecting the reality that procedural costs are having a broader effect on U.S. competitiveness.[414] Indeed, the 2003 amendments to the FRCP on special masters were a reflection of a natural development in the common law toward providing masters a greater role in increasingly common complex litigation.[415]

At any rate, the new potential of the special master has not been fully explored, and there are yet further amplifications, particularly in the area of administrative law, where such a procedural mechanism or person would reduce cost. Much as the *huissier audiencier* serves as a liaison between the court and the parties, and between private parties, thereby reducing the need for additional lawyers and reducing legal fees, the special master can supplement the American attorney's role, aid with regulatory compliance, and bring suits to resolution in less time.[416]

V. ENHANCING THE SPECIAL MASTER: DOMESTIC COMPLICATIONS AND ISSUES IN INTERNATIONAL CONVERGENCE

Of course, it has been argued that changes geared toward streamlining the litigation system will narrow the settlement range, reducing the cost-benefit of settlement.

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413. *Contra* Kojo Yelpaala, *Legal Consciousness and Contractual Obligations*, 39 MCGEORGE L. REV. 193 (2008) (juxtaposing classical rational choice and efficiency theory in contracts against the conclusions of behavioral scientists). The ability of parties to opt-in or out of new avenues in civil procedure, particularly those developed by comparativists, is a common one. *See generally* Geoffrey C. Hazard, Jr. & Michele Taruffo, *Transnational Rules of Civil Procedure*, 30 CORNELL INT'L L.J. 493 (1997) (providing a set of civil procedure rules designed to ensure greater efficiency in international legal disputes, but permitting parties the right to litigate under current domestic conflict of law rules).

414. Brazil, *supra* note 406, at 2 ("The picture of the discovery system that has emerged . . . is disturbing.").

415. *See supra* note 82 and accompanying text.

416. Brazil, *supra* note 406, at 3–5.

> It is sufficient here to emphasize the bottom line: big-case discovery far too often takes place in what I have characterized as a "responsibility vacuum": none of the principal actors in the discovery arena . . . regularly assume effective responsibility for the system as a system. The result is a process that is inefficient . . . .

Id. at 2.

> But these criticisms miss the mark. Pressed to their limit, they argue for an exorbitantly expensive procedural system in which alternate dispute resolution is almost always preferable. Given that the status quo entering litigation is an actual or threatened loss borne by the victim, such expensive procedural systems in effect create a policy of bias in favor of injurers' actions and against victims' needs for redress. Furthermore, the ways in which [alternative dispute resolution] might make the civil justice system change would not necessarily make litigation less costly . . . .[417]

Whatever the case may be, the move toward contractual and economic legal models in U.S. jurisprudence, alongside the reemergence of the special master following the 2003 Amendments to the FRCP, demonstrates that the "overburdened and under staffed" federal courts are seeking quasi-judicial, often court appointed, persons to assist the supervision and decision-making process.[418] Greater procedural efficacy in Europe should inhibit the early, nuisance-value settlement of what would likely turn out to be meritless claims. The same should hold true for American civil actions, where the social safety net is relatively lacking (compared to Europe), and potential plaintiffs may have a greater incentive to persist in an action than would European parties. In Civil Law jurisdictions, where a magistrate or judge usually conducts or at least oversees the investigation to determine if a claim is valid, the government ordinarily assumes the economic burden.[419] This alleviates some of the pressure for a defendant to "settle quickly" to avoid unnecessary litigation expense if an objective, well-versed magistrate can make a judgment on the merits—rather than going through a long, discovery heavy, adversarial process of empanelling, educating, and then persuading a lay jury. In America, without these inquisitorial tools, injured parties lacking meritorious substantive claims appear likely, through the exercise of their procedural rights, to bring to trial a cause of action; the plaintiffs would be seeking to extract from risk-averse, cost-conscious defendants a settlement of at least nuisance value.[420] In Europe, an

417. Tidmarsh, *supra* note 342, at 552; *see also* Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1362 (1994).

418. Margaret G. Farrell, *Special Masters in the Federal Courts Under Revised Rule 53: Designer Roles, in* ALI-ABA COURSE OF STUDY: THE ART AND SCIENCE OF SERVING AS A SPECIAL MASTER IN FEDERAL AND STATE COURTS 1, 5 (2006).

419. That assumes there is no significant party reimbursement of, or other fees associated with, private payment for public administrative and investigative costs.

420. Christopher Hodges, *Multi-Party Actions: A European Approach*, 11 DUKE J. COMP. & INT'L L. 321, 343–44 (2001); *see also* Tidmarsh, *supra* note 342, at 526 ("The inquiry is not,

injurious but meritorious defendant might be better treated in court since the government's assumption of economic burden encourages the theory that behavioral control and the bearing of losses should come not from litigants but from regulation and welfare[421] (i.e., the socialization of negative externalities).[422]

Regardless of these cultural differences, the current shift in American law toward a contractual model "has yet to be accompanied by clear rules to guide lawyers or judges or by exploration of the normative implications of the nascent doctrines."[423] Since this Article argues that broader use of the special master should be gradual and confined to parties best able to confront new, experimental models of procedure because of their ability to contract into or out of specific legal obligations or rights,[424] the implementation of the broader application of the quasi-judicial features of the *huissier audiencier* (and, to a lesser extent, the *huissier de justice*) through masters conforms to a contractual approach to civil procedure. This choice, presented to the parties to a contract or in commercial and class action litigation, seeks to transplant the efficiency of alternative dispute resolution mechanisms (here, as developed from the Civil Law) and thereby overcome the additional cost of masters and magistrates with more efficient, government-led dispute resolution.[425] While, as explored below, the special master has much in common with the *huissier*, and its use has grown,[426] a number of political and social forces, particularly constitutional concerns[427] and the problem of defining privacy

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What do substantive law and justice require? Instead, the inquiry is, Have the rules of the game been carried out strictly? If any material infraction is discovered, . . . our sporting theory of justice awards new trials, or reverses judgments, or sustains demurrers in the interest of regular play." (quoting Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 REP. A.B.A. 395, 406 (1906))).

421. *See* Edward F. Sherman, *Dean Pound's Dissatisfaction with the "Sporting Theory of Justice": Where Are We a Hundred Years Later?*, 48 S. TEX. L. REV. 983, 984–85, 987 (2007) (discussing differences between common law and Cvil Law procedures).

422. In a limited, direct way, we see this distinction between the American rule, where each party bears its own costs (unless Congress, a state legislature, or a special common law exception has crafted a fee-shifting statute), and the approach found elsewhere, where the winner of a suit ordinarily is reimbursed for legal expenses from his opponent.

423. Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 627 (2005).

424. *See id.* at 598–99; *see also supra* Part IV.C.

425. *See* Farrell, *supra* note 418, at 17 (citing Jack M. Sabatino, *ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1292 (1998)); Ferleger, *supra* note 61, at 8; Resnik, *supra* note 423, at 627.

426. *See* Hanrahan & Fioravanti, *supra* note 88, at 10–11 (discussing the increased use of special masters by Delaware's Chancery Court).

427. *See* Farrell, *supra* note 418, at 7–22.

rights in the age of *informatiques*,[428] have limited the expansion of the profession.

A. The Special Master After the 2003 Federal Rules of Civil Procedure Amendments: New Potential

The special master and the *huissier* share many aspects in common, particularly in regard to the breadth of potential roles they can be appointed to play in a given proceeding.[429] However, in the French system such a figure is indispensable, while in the United States the master's responsibilities often can be shared or assumed by the attorneys, the judge,[430] or the jury.[431] Thus, despite Brandeis' maxim of courts' "inherent power to provide themselves with appropriate instruments required for the performance of their duties,"[432] the special master has continued to suffer from its twentieth century history and remains mired in contests over appointment[433] and the common law constraints of the "exceptional condition"[434] requirement for appointment.

However, by the end of the twentieth century, the master began to reemerge as an essential figure in complex litigation that otherwise threatened to overwhelm the courts, especially during discovery.[435] While courts continued to caution against the "risk of having significant, potentially dispositive issues"[436] stripped from their jurisdiction by masters, the trend toward adoption of the new Rule 53 was clear by the late 1990s, extending it beyond pre-trial roles.[437] Indeed, these led up to the 2003 amendments, which

428. *Informatiques*, a French word with a meaning closely resembling informatics, or information technology, was coined by Phillipe Dreyfus. *See* Phillipe Dreyfus, *L'Informatique*, *in* L'INFORMATIQUE 11 (Librairie Larousse 1976).

429. *See* Farrell, *supra* note 418, at 7–22.

430. *See, e.g.*, Peter F. Schlosser, *Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems*, 45 U. KAN. L. REV. 9, 12–13 (1996) (discussing the role of the judge in the development of the case in Civil Law nations and the United States).

431. *See, e.g.*, Chase, *supra* note 404, at 870; David Edward, *Fact-Finding: A British Perspective*, *in* THE OPTION OF LITIGATING IN EUROPE 43, 45–46 (D.L. Carey Miller & Paul R. Beaumont eds., 1993) (discussing the rise and emphasis on the jury in the common law).

432. *Ex parte* Peterson, 253 U.S. 300, 312 (1920). *But see* Pressed Steel Car Co. v. Union Pac. R.R. Co., 241 F. 964, 967 (S.D.N.Y. 1917) (noting that despite the potential convenience, the court cannot compel parties to use a master).

433. *See, e.g.*, Shira A. Scheindlin & Jonathan M. Redgrave, *Revisions in Federal Rule 53 Provide New Options for Using Special Masters in Litigation*, N.Y. ST. B.J., Jan. 2004, at 18, 19–21.

434. FED. R. CIV. P. 53(a)(1)(B)(i).

435. *See* Scheindlin & Redgrave, *supra* note 433, at 24 n.19 (listing late twentieth century cases that experimented with a less limited role for the master).

436. United States v. Hooker Chems. & Plastics Corp., 123 F.R.D. 62, 63 (W.D.N.Y. 1988).

437. *See* Scheindlin & Redgrave, *supra* note 433, at 21 & 25 nn.27–32.

dramatically diminished the procedural hurdles to appointing a master[438] and rendered the master's powers increasingly similar to those of the *huissier.*

For instance, pre-trial masters were able to mediate, settle, and evaluate claims, supervise discovery, interpret settlements, coordinate related cases, make preliminary rulings on evidence, and generally assist and supervise parties.[439] Trial masters serve as appointed experts, review disputes for final decision or subject to court review, and accept referred matters from the court for findings and recommendations.[440] The master's role can also transcend both pre-trial and trial roles in "a) taking and interpretation of technical or complex evidence and b) compilation of data,"[441] which is remarkable considering that the same differentiation exists in France among the several forms of *expertise.*[442] Similarity between the two entities is also demonstrated in the post-trial master, who serves as an advanced form of the French bailiffs (or *huissiers,* without the distinction of *audiencier*): drafting opinions; administrating settlement and judgment funds; monitoring compliance; serving as a neutral observer; and general investigation.[443]

438. *Id.* at 22.

439. Ferleger, *supra* note 61, at 9–11 & nn.19–26.

440. *Id.* at 12.

441. *Id.* at 12–13 (footnotes omitted).

442. For instance, the *expertise demandée à titre incident* allows a judge to acquire relevant aid in findings of fact, often in areas that in the United States would be considered pre-trial roles for attorneys or subject to confrontation, but also to obtain interpretive evidential reports during litigation. Joëlle Godard, *Fact Finding: A French Perspective, in* THE OPTION OF LITIGATING IN EUROPE, *supra* note 431, at 57, 59–61; *supra* Part III.A.1 (discussing the *expertise officieuse,* permitting the judge to obtain limited analysis of the facts from the appointed expert, and also discussing the *constatation* and *consultation* where the parties or judge may order the *huissier* to compile reports or other data in an essentially non-analytic fashion). In France there is no "trial" stage as known in the common law, but simply a continuous litigation event. Beardsley, *supra* note 13, at 480 (stating that "there is no 'trial' in the common law sense in French civil procedure"); *see also* BELL ET AL., *supra* note 13, at 93–109 (detailing the litigation process in the French court of general civil jurisdiction, the Tribunal de Grande Instance, and thereby showing the numerous pre-trial events and the relatively few activities at the closest thing to a civil trial, the hearing (*l'audience*) before the tribunal); CATHERINE ELLIOT ET AL., FRENCH LEGAL SYSTEM 174 (2d ed. 2006) (noting that French pretrial civil procedure includes a number of tasks which in England would take place at the court hearing itself); Lambert, *supra* note 13, at 233–34 ("The [French] court exercises great control over pretrial proceedings, the parties being relegated to the more passive role of conducting discovery and otherwise refining the case for trial. The trial itself is composed of a series of separate hearings before a judge, rather than the continuous single-event trial so familiar to common-law jurisdictions . . . ."). In addition, *huissiers* are able to broker settlements, offer legal advice to parties, and to interpret the law either in a judicial capacity or as a legal advisor to the Judge Delegate, much as the master may make limited procedural rulings, induce settlements, and review and make determinations on, or analysis of, legal issues in dispute. *See supra* Part III.A.

443. Ferleger, *supra* note 61, at 14–17 & nn.34–43.

U.S. courts have also implemented the "augmented master," with additional assumption of roles traditionally reserved to the judge or parties to the lawsuit.[444]

Regardless of these similarities in form between *huissiers* and masters, and the apparent willingness of U.S. courts, obstacles to widespread use continue to exist for various reasons. These include protecting the role of the jury and judge in American procedure[445] and the simple matter of cost.[446] Indeed, while the use of masters might contain systemic issues and slash procedural costs, in individual cases masters "increase[] communication costs and can lead to delay in adjudication due both to the time required for the master's review and reporting, and then to rulings on objections to reports."[447] The master tends to assume the role of the jury; thus, to turn to a master's findings is now forbidden in jury trials unless the parties consent,[448] and concerns about the master's taking legal decisions out of a court's hands[449] remain and must be addressed.[450]

As discussed below, while increased use of the master will necessarily change American jurisprudence, this is neither out of sync with historical jurisprudential values nor does it necessarily impact the judge's ultimate authority in the same way the use of masters in a jury trial would.[451] However, as masters' reports are subject to judicial review, increased application, even if limited to non-jury

444. *See id.* at 23–25 (listing "elements [that] might be among those in an order for an 'augmented mastership'").

445. *See In re* U.S. Fin. Sec. Litig., 609 F.2d 411, 428 (9th Cir. 1979) ("We recognize that use of masters in jury cases is ' . . . the exception and not the rule . . . ,' because they do represent a limited inroad on the jury's traditional sphere." (omission in original) (quoting FED. R. CIV. P. 53(b))).

446. *See* David I. Levine, *Calculating Fees of Special Masters*, 37 HASTINGS L.J. 141, 143 (1985) (noting that special masters' fees can be "quite large"); *id.* at 151, 166 (reviewing cases where courts found fees excessive).

447. Ferleger, *supra* note 61, at 8.

448. Current Rule 53

> accepts the practice under the former rule of appointment of masters to functions agreed to by the parties. So long as the appointment meets with the court's approval, and the master is not to preside at a jury trial, the parties can consent to a master performing any specified duties.

Id. at 25–26 (footnotes omitted); *accord* 9C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2613 (3d ed. 2008).

449. *See, e.g.*, Scheindlin & Redgrave, *supra* note 433, at 21.

450. In effect, it is that venerable issue for almost all proposed procedural reforms: how to keep errors to a minimum, in number and degree, while still reducing overall procedural costs.

451. *See, e.g.*, United States v. Hooker Chems. & Plastics Corp., 123 F.R.D. 62, 63 (W.D.N.Y. 1988); Conn. Importing Co. v. Frankfort Distilleries, Inc., 42 F. Supp. 225, 227 (D. Conn. 1940); Jerome I. Braun, *Special Masters in Federal Court*, 161 F.R.D. 211, 216 (1995); Cross, *supra* note 359, at 58; Kessler, *supra* note 14, at 1224–38; *see also infra* Part V.B.1.

trials, could simply result in a greater appellate backlog as parties challenge lower court decisions on the grounds of error by the master or in the master's appointment.[452] This would increase the cost of error in American courts, potentially negating the benefits of having masters to induce settlement and relieve the courts or parties of onerous procedural burdens.[453] As it currently stands, the United States' cost of error is comparatively low;[454] while expensive, American courts tend to arrive at sound conclusions.[455] Clear standards for the use of masters and their findings are therefore essential, something potentially difficult to assess in current law as a result of the recent changes to Rule 53.[456]

Since it is imperative that the courts define the master's new role, there is, at present, a sizeable opportunity to provide masters with broad powers and to give greater discretion to lower court judges in utilizing masters' findings[457] and also to make such findings more difficult to controvert at the appellate level.[458] Certainly,

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452. *See, e.g.*, Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 683 (1997) (finding that the American system has "been too successful in opening the courthouse door"); Miller, *supra* note 355, at 911–12 (discussing a scenario where a reduction of procedural costs would increase the amount of litigation in the United States).

453. *See* Paul R. Rice, *Judicial Management of Complex Litigation: Further Comments on the Use of Informal Management Techniques and on Procedures for the Resolution of Privilege Claims*, *in* MANAGING COMPLEX LITIGATION, *supra* note 74, at 293, 302 (finding that the benefits of using special masters are more likely realized where "lawyers [want] them to work" and they are willing to assume the added cost and make a good faith attempt at expeditiously resolving the dispute).

454. Miller, *supra* note 355, at 908; *cf.* Burbank & Silberman, *supra* note 452, at 676–77 (finding that the American system has "been too successful in opening the courthouse door").

455. *See* Miller, *supra* note 355, at 908.

456. *See* Margaret G. Farrell, *The Sanction of Special Masters: In Search of a Functional Standard*, *in* ALI-ABA COURSE OF STUDY: THE ART AND SCIENCE OF SERVING AS A SPECIAL MASTER IN FEDERAL AND STATE COURTS 35 (2007).

457. *See generally* Shira A. Scheindlin & Jonathan M. Redgrave, *Mastering Rule 53: The Evolution and Impact of the New Federal Rule Governing Special Masters*, FED. LAW., Feb. 2004, at 34, 37–39 (finding that the amended Rule 53 affords greater flexibility in the use of masters).

458. At the appellate level, a master's findings or report are ordinarily regarded as presumptively correct, *see, e.g.*, Int'l Indus., Inc. v. Warren Petroleum Corp., 248 F.2d 696, 699 (3d Cir. 1957); Nelse Mortensen & Co. v. Treadwell, 217 F.2d 325, 329 (9th Cir. 1954), and set aside where "clearly erroneous," *see, e.g.*, Krinsley v. United Artists Corp., 235 F.2d 253, 257 (7th Cir. 1956). In the case of a special master, the reviewing court must recognize "the need for judicial restraint in reviewing his or her findings." 36 C.J.S. *Federal Courts* § 627 (2003); *see also* Lampe v. Sec'y for Health & Human Servs., 219 F.3d 1357, 1360 (Fed. Cir. 2000). However,

> when findings fail fully to resolve a controversy, or fail to supply a clear understanding of the basis for a decision, or when the findings are significantly contradictory, they cannot support a judgment. Moreover, even when there is evidence to support a

the parties should be able to challenge such reports, and there will inevitably be egregious incidents on appeal where the findings or uses of the master are untenable.[459] In France, for instance, the right of *contradictoire*, in some ways corresponding to the American right of confrontation, permits parties to guide the *huissier* in her examinations and to challenge various findings of fact, conclusions, or analyses.[460]

Thus, the opportunity for U.S. courts to reduce procedural costs following the 2003 amendments cannot be overlooked. However, the reforms will be imperfect without clear standards.[461] At the same time, a greater role for the master brings about benefits in harmonization and uniformity of the law,[462] while the appropriate deference will ensure that the savings in procedural cost are not overwhelmed by the increased cost of error.[463]

B. Complications to Effective Reform

Despite the potential of the master to be reinvigorated by the recent changes to Rule 53, the process of expanding the master's role is fraught with a number of issues unique to U.S. procedural

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finding, it can be held clearly erroneous if, on review of the entire evidence, the reviewing court arrives at the firm conviction that the finding is mistaken.

In re U.S.A. Motel Corp., 450 F.2d 499, 503 (9th Cir. 1971) (citations omitted).

459. *See In re* U.S.A. Motel Corp., 450 F.2d at 503.

460. *See supra* note 273 and accompanying text.

461. *See* James S. DeGraw, *Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters*, 66 N.Y.U. L. REV. 800, 803 (1991) (discussing the lack of clear rules, guidelines on the use of masters, and appellate standards of review for masters' reports); Farrell, *supra* note 456, at 39, 42–46.

462. Miller, *supra* note 355, at 916–17 ("Harmonization, it should be noted, is not the same thing as efficiency. . . . [A] number of economic arguments counsel in favor of harmonization. . . . On the other hand, harmonization carries economic costs."). Benefits of harmonization can include the opening of legal jurisdictions to persons outside local bar monopolies, greater certainty (or at least awareness of options) for potential litigants, and the evisceration of obscure local rules. *Id.* at 917. However, it must be kept in mind that "civil procedure is in fact strictly connected with the great intellectual movements of peoples; and that its varied manifestations are among the most important documents of mankind's culture." Mauro Cappelletti, *Social and Political Aspects of Civil Procedure—Reforms and Trends in Western and Eastern Europe*, 69 MICH. L. REV. 847, 885–86 (1971). Of course, this has not prevented harmonization from becoming a key force in global jurisprudence, particularly in the European Union courts, where it approaches the sacrosanct. Case 26/62, Van Gend en Loos v. Nederlandsie Administratie der Belastingen, 1962 E.C.R. 95; *cf.* Luca Enriques & Matteo Gatti, *The Uneasy Case for Top-Down Corporate Law Harmonization in the European Union*, 27 U. PA. J. INT'L ECON. L. 939, 944 (2006) (attempting to show harmonization as a "real-world" and inevitable process rather than an idealized objective).

463. Miller, *supra* note 355, at 918 (discussing the Hazard-Taruffo transnational rules of civil procedure).

history. On the one hand, the Seventh Amendment gives a defendant the right to demand a jury trial in civil cases.[464] Conversely, the use of a master challenges these rights, sometimes in fundamental ways.[465] While historically the master was not viewed as impinging on constitutional rights, modern jurisprudence paints a more complicated story.[466]

1. Discovery in the American Tradition

An enhanced role for special masters, where they take on aspects of the presentation of evidence, eviscerates the attorney's role in certain aspects of litigation, and in American litigation the unearthing of important documents can be determinative of settlement options and trial outcomes.[467] Thus, in the American system, parties may be reluctant to yield control over the proceedings to a third party, especially where doing so eliminates the examination of witnesses in court or where expertise is required.[468]

Prior to the FRCP's adoption in 1938, American discovery was more akin to the Continental system of limited access to documents than the modern notion of broad discovery rights: "[R]estrictions undergirded a court process structurally antithetical to information gathering tools."[469] The movement toward notice pleading sought to eliminate the "sporting" rules of evidence and procedure preceding the 1938 reforms, which had left a number of "hidden traps for the unwary."[470] And, for a time, the novelty of American discovery showed its virtues in the tobacco and asbestos cases, both inconceivable without broad access to corporate documents.[471] Nevertheless, by the 1970s, weaknesses in the current system had already emerged, and each round of amendments to the FRCP since 1983 has, in some way, further limited discovery

464. U.S. CONST. amend. VII.

465. *See* Kessler, *supra* note 14, at 1247–50.

466. *Id. See generally* DeGraw, *supra* note 461.

467. *See generally* Seymour Moskowitz, *Discovering Discovery: Non-Party Access to Pretrial Information in the Federal Courts, 1938–2006*, 78 U. COLO. L. REV. 817 (2007).

468. Mark A. Fellows & Roger S. Haydock, *Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation*, 31 WM. MITCHELL L. REV. 1269, 1286–87 (2005) ("As a practical matter, the special master referrals have occurred, and will continue to occur, when the court and the parties feel the need for a special master. A judge who tries to foist a special master on litigants who strongly oppose a master will need a rather high exceptional condition to justify the reference.").

469. Moskowitz, *supra* note 467, at 829.

470. *Id.* at 832.

471. *Id.*

rights in an effort to contain the increasing procedural costs associated with the 1938 rule.[472]

The expense and time delay associated with the current discovery regime—in addition to the increase in complex litigation and judicial workload—has, since the end of the twentieth century, demonstrated once again the need for masters in civil and criminal filings,[473] necessarily limiting the New Deal conception of discovery rights and, likely with it, public access to a greater amount of discovery information.[474] This ultimately implicates the public's First Amendment right of access, broaching the issue of how an advanced role for the master might implicate the tradition of live testimony at trial.[475]

The Sixth Amendment guarantees the right of the accused to cross-examine a witness.[476] While the Sixth Amendment confrontation right does not apply in a civil trial,[477] confrontation is still the norm there.[478]

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472. *Id.*; *see also id.* at 826 ("Opponents of public access to discovery information often claim that this potential availability will make court proceedings dramatically slower and more expensive.").

473. Fellows & Haydock, *supra* note 468, at 1287–96. For a similar analysis of the situation in state courts, see Lynn Jokela & David F. Herr, *Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool*, 31 WM. MITCHELL L. REV. 1299, 1314–23 (2005).

474. *See* Moskowitz, *supra* note 467, at 875–78 (arguing that advances in electronic case management will ameliorate the need for dramatic reform of discovery methods).

475. *Sixth Amendment at Trial*, 36 GEO. L.J. ANN. REV. CRIM. PROC. 621, 623 (2007); *see also* David Crump, *The Case for Selective Abolition of the Rules of Evidence*, 35 HOFSTRA L. REV. 585, 619 (2006); Charles Hobson, *The Minimalist Privilege*, 1 N.Y.U. J.L. & LIBERTY 712, 713, 715 & n.43 (2005). Although practically universally rejected by most courts, the notion that defendants in civil proceedings have due process rights that include the right of confrontation has some support. On occasion, courts have imbued traditionally civil proceedings with certain criminal characteristics that would enable judges to enforce the full panoply of criminal defendant protections. *See* Specht v. Patterson, 386 U.S. 605, 608, 610–11 (1967) (invalidating a Colorado law instituting proceedings "whether denominated civil or criminal" to commit sexual offenders by finding that the procedure entailed making a new criminal charge, which necessitates due process safeguards); *cf.* People v. Burnick, 535 P.2d 352, 369 (Cal. 1975) (holding that the Fourteenth Amendment demanded that the standard of proof be beyond a reasonable doubt for sex offenders in civil commitment proceedings). Moreover, one commentator has documented that several courts have recognized due process rights to confronting witness in civil settings, namely school discipline hearings. *See, e.g.*, Brent M. Pattison, *Questioning School Discipline: Due Process, Confrontation, and School Discipline Hearings*, 18 TEMP. POL. & CIV. RTS. L. REV. 49, 53 & n.31 (2008) ("There is significant disagreement among courts about whether, or when, procedural due process requires confrontation of witnesses in school discipline hearings. . . . [S]everal courts . . . have found confrontation to be required by due process."); *see also* Klein, *supra* note 34, at 721. The author suggests courts create a middle of the road hybrid proceeding that exists between civil and criminal law and proposes that the confrontation right be included among the procedural safeguards in the hybrid system.

476. U.S. CONST. amend. VI.

477. Crump, *supra* note 475, at 619.

478. Hobson, *supra* note 475, at 715 & n.43; *see also supra* note 475.

Two aspects of this tradition of confrontation come to play when examining the *huissier* and the special master.[479] As to the *huissier*, the gathering and use of evidence obtained abroad, as in the *Dayan* case, poses special issues to the American litigator,[480] while, on the other hand, the special master in domestic matters tends toward attenuation of the tradition of live testimony currently favored in civil trials.[481]

Where evidence must be obtained abroad, French law provides few alternatives if American courts fail to recognize a *huissier*'s report or findings on the grounds that "the use of unconventional foreign methods of examination . . . exceed the limits of accepted American standards of fairness and reliability."[482] For instance, in *United States v. Salim*, the French court forbade taped depositions and teleconferencing during depositions, only allowing a U.S. court reporter to transcribe portions of the proceedings and, following the typical procedure of the *huissiers* (though the American court referred to such as magistrates), the French court required the keeping of a separate record by the magistrate and the submission of interrogatories in written form by the American prosecutor and defendant.[483] A second deposition ultimately permitted teleconferencing and private translation (three languages were in use during the deposition), and the findings were later read into evidence at trial, leading to an appeal by the defendant under Rule 15 of the Federal Rules of Criminal Procedure,[484] Rule 804(b)(1) of the Federal Rules of Evidence,[485] and the Confrontation Clause.[486]

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479. *See infra* notes 489–490 and accompanying text.

480. Bryan A. Carey, *Should American Courts Listen to What Foreign Courts Hear?: The Confrontation and Hearsay Problems of Prior Testimony Taken Abroad in Criminal Proceedings*, 29 AM. J. CRIM. L. 29, 31–32 (2001) (discussing complications that arise in connection with international deposition taking); Matthew J. Tokson, *Virtual Confrontation: Is Videoconference Testimony by an Unavailable Witness Constitutional?*, 74 U. CHI. L. REV. 1581, 1611 n.176 (2007) (citing United States v. Salim, 855 F.2d 944, 947, 949–50 (2d Cir. 1988)) (discussing French prohibition of taped depositions; French prevention of fishing expeditions and attendance of defendants at depositions).

481. Hobson, *supra* note 475, at 713.

482. *Salim*, 855 F.2d at 946.

483. *Id.* at 947; *see also* Carey, *supra* note 480, at 47–49.

484. FED. R. CRIM. P. 15.

485. FED. R. EVID. 804(b)(1).

486. *Salim*, 855 F.2d. at 949; *see also* Carey, *supra* note 480, at 48. In finding against the defendant on appeal and holding that the evidence obtained in the deposition was admissible, the Second Circuit demonstrated the readiness with which U.S. courts have accepted testimony obtained under foreign legal strictures. For instance, the Court found that while use of written questions was not as spontaneous as an oral deposition, the procedure allowed for counsel to review responses and draft new questions, thus alleviating the problems of the French format. *Id.* at 50–51. The deposition in *Salim* was therefore taken in compliance with Rules 28 and 31 of the Federal Rules of Civil Procedure, and it had sufficient indicia of reliability to fit within the hearsay exception for former testimony, much as in *Dayan*. *Id.* at

On the other hand, of course, the special master is a particular challenge to the right of cross examination and the right to a jury. As one judge lamented:

> Any party who so desires is doubtless free to put before the jury any competent evidence at variance with the Master's conclusions and to submit any resulting conflict to the jury. There will, however, be no opportunity to discredit the Master's conclusions with the jury by the contention that vital evidence submitted to the jury was not before the Master. For the rule in subdivision (e)(3) [of Rule 53] expressly provides that in jury actions "the master shall not be directed to report the evidence." This provision clearly, and very sensibly, contemplates that for all purposes of the Master's report the jury shall not be burdened with the mass of evidence underlying the findings. That being so, any offer to show the content (positive or negative) of the evidentiary record which was before the Master would be excluded and the court might properly instruct the jury that since under the prescribed procedure, Rule 53(d), every party had as much opportunity to present evidence to the Master as to the jury it must be presumed that all pertinent evidence within the scope of the Master's report had been made available to the Master and had received judicial consideration by the Master in formulating his report and by the court in accepting the report.[487]

Thus, the master's conclusions appear inevitably hard to refute, and conflicting with the American concept of cross-examination as the means to challenge the facts and accuracy of an opposing party and their proffered evidence. Yet, the U.S. procedural system has long tolerated such incursion, particularly before 1938.[488] It is incongruous to argue that today the master has somehow become more offensive to the foundational principles of American jurisprudence and the adversarial trial.

48–50. *Compare Salim*, 855 F.2d at 952–54, *with* Dayan v. McDonald's Corp., 466 N.E.2d 958, 969–70 (Ill. App. Ct. 1984). Because *Salim* came before the changes to the Confrontation Clause analysis wrought by *Crawford v. Washington*, 541 U.S. 36 (2004), its fitting within a hearsay exception was sufficient to meet the Confrontation Clause requirements. *Salim*, 855 F.2d at 955; Carey, *supra* note 480, at 50–51.

487. Conn. Importing Co. v. Frankfort Distilleries, Inc., 42 F. Supp. 225, 227 (D. Conn. 1940).

488. *See supra* Part II.A.

2. The Changing Nature of the Adversarial System and the Jury

Since the master is, like the *huissier*, appointed and instructed by the judge and subject to judicial review and censure, the changes it brings to contemporary jurisprudence or procedure are at least less striking than in the case of the jury.[489] Indeed, even in France, where the jury has been retained for criminal trials, the *huissier*'s role is attenuated, as certain rights to cross-examination and live testimony remain from historical law or emerged recently, particularly as a result of the European Court of Human Rights and, to a lesser extent, the European Union.[490]

Nonetheless, France has experienced a fragmented history with the jury.[491] While the English version of the trial by jury was French in origin,[492] it fell out of favor in post-Revolutionary and modern France. In numerous ways current French jurisprudence has sought to make amends for the evisceration of a lay decisional force in civil adjudication;[493] efficiency concerns drove early reforms away from a jury in civil cases, and a number of arguments have been leveled against the efficacy of juries since then.[494]

> One of the major issues discussed in 1790 was whether a jury should be used in civil proceedings as well as in criminal proceedings. Once again, it was perhaps the obsession with simplicity, speed and cost that was behind the decision not to use a jury in civil proceedings, a decision that has had a major impact on French judicial procedure until the present time.[495]

Indeed, while the jury is more significant in American legal culture, its use is not alien to the inquisitorial system and, in any

489. *Compare* Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394, 417–18 (1986) (arguing that judges must maintain tight control over the master and the case), *with* Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487, 493 (1989) (discussing criticisms of adopting alternative dispute resolution techniques in government-led adjudication, particularly as it regards their challenge to the right to a jury trial).

490. *See* David Corbé-Chalon & Martin A. Rogoff, *Tort Reform* à la Française*: Jurisprudential and Policy Perspectives on Damages for Bodily Injury in France*, 13 COLUM. J. EUR. L. 231, 231 (2007); John D. Jackson & Nikolay P. Kovalev, *Lay Adjudication and Human Rights in Europe*, 13 COLUM. J. EUR. L. 83, 89 & n.22 (2006).

491. Jackson & Kovalev, *supra* note 490, at 89.

492. Burkhard Schafer & Olav K. Wiegand, *Incompetent, Prejudiced and Lawless? A Gestalt-Psychological Perspective on Fact Finding in Law as Learning*, 3 LAW, PROBABILITY & RISK 93, 99 (2004).

493. Larivière, *supra* note 364, at 743–46.

494. "The principal effect of [Hazard-Taruffo's] rules would be to eliminate the jury in [international tort litigation] . . . ." Miller, *supra* note 355, at 918.

495. Larivière, *supra* note 364, at 737–38.

event, was simply supplanted there by alternative institutions such as the three-judge panel.[496]

The jury or other substitutes, such as lay judges or the three judge panel, is broadly recognized across Western cultures as an essential institution to maintain the fairness of law and prevent excessive elitism.[497] Yet, while juries are a permanent fixture in the American legal landscape, this does not mean that the legal system is beholden to them.[498] On the contrary, even disregarding the decline of jury trials in American commercial litigation, the U.S. court system provides checks on the jury's power through various procedural mechanisms, the foremost of which is appeal.[499] Hence, there are reasons to challenge the tradition of requiring live testimony in order for juries to properly determine witness veracity embodied by the hearsay rules of the Federal Rules of Evidence.[500]

The concept of a third party fact-finder serving in a civil jury trial is therefore not inimical to U.S. jurisprudence. Rather, it provides an additional check on juror activism and bias, and anyway, psychological studies of layperson legal decision-making demonstrate that the use of additional professionals and court appointed actors in the litigation process will not skew the outcomes of jury trials.[501] Further, those studies show which decisions juries are most efficient and accurate at making. The modern jury is one quite

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496. *Id.* at 744.

497. *See id.*

498. Arie M. Rubenstein, *Verdicts of Conscience: Nullification and the Modern Jury Trial*, 106 COLUM. L. REV. 959, 976 (2006) (discussing *Duncan v. Louisiana*, 391 U.S. 145 (1968), where the Supreme Court adopted a functionalist approach to the right to a jury trial).

499. *See id.* at 982 (discussing approaches to regulating jury nullification in criminal trials). By way of analogy, and even more recently, the use of videotaped interrogatories, particularly in child molestation cases, has opened the door to further changes in the notion of live in-court cross-examination before the jury. David F. Ross et al., *The Child in the Eyes of Jury: Assessing Mock Jurors' Perceptions of the Child Witness*, 14 LAW & HUM. BEHAV. 5 (1990) (assessing the reactions of mock jurors to varying forms of child testimony, particularly the use of written versus videotaped examinations of children). A number of state jurisdictions have experimented with the use of independent child psychologists as examiners in a one-time, taped session, played before jurors, that is meant to effectively secure a defendant's confrontational rights while preventing undue psychological stress on the child witness resulting from vigorous, adversarial cross-examination. Frank E. Vandervort, *Videotaping Investigative Interviews of Children in Cases of Child Sexual Abuse: One Community's Approach*, 96 J. CRIM. L. & CRIMINOLOGY 1353, 1377–80 (2006). Such a use of an independent examiner, albeit in the criminal law context, is parallel to uses of masters, *huissiers*, or other officers to marshal testimony humanely and prepare a report of relevant data. *See supra* Part III.A.

500. Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 2 (2000).

501. *See, e.g.*, Lindholm, *supra* note 80 (discussing eyewitness accuracy and perceptions thereof by laypersons and legal professionals); Schafer & Wiegand, *supra* note 492, at 106–07 (investigating juror activism and bias in the United States and the United Kingdom); Leif A. Strömwall & Pär Anders Granhag, *Affecting the Perception of Verbal Cues to Deception*, 17 APPLIED COGNITIVE PSYCHOL. 35 (2003) (discussing deception detection research).

dissimilar from the jury familiar in the time of the American Revolution, and even from the juries of the nineteenth century, when the master was increasingly viewed as an antagonist to their role.[502]

Indeed, early juries followed rules and expectations quite the opposite of the contemporary conception: they were expected to ascertain facts which they did not know, to discuss the case with the parties and with each other, and to ask questions of witnesses, all evincing a Continental preference for truth-seeking over procedure.[503] Even as evidence began to be presented in court during the eighteenth century, juror activism remained prevalent in American courts well into the twentieth century.[504] In fact, it was not until 1930 that open questions from the jury ceased,[505] which was, perhaps unsurprisingly, contemporaneous to the demise of the master.

The reemergence of the special master in the 2003 FRCP amendments comes at a time almost a century of change away from the jury activism of the nineteenth century. Hence, the masters' impact on the jury (if such use is one day permitted in jury trials) and their ability to judge the accuracy of eyewitness testimony out of court is unclear. In the modern period, the conception of the jury has evolved into a mechanism for purely factual determination, hence the rise of antagonism to jury nullification, or the jury's finding of innocence or guilt based not on law but on personal disagreement therewith, during the nineteenth and early twentieth centuries.[506] The master, like the jury, is vested with the responsibility of ascertaining facts for their accuracy and, as a result of the movement toward greater emphasis on factual verification by the jury rather than a check on state power,[507] must

502. See Rubenstein, *supra* note 498, at 963–72; Schafer & Wiegand, *supra* note 492, at 99.

503. Schafer & Wiegand, *supra* note 492, at 99.

504. *Id.* at 99–100. In 1907, for instance, North Carolina formally permitted juror questioning. *Id.* at 100.

505. *Id.* The ability of jurors to question does remain, though rarely invoked, within the discretion of trial courts. *Id.* at 97–98.

506. *See* Rubenstein, *supra* note 498, at 967–68.

507. *Id.* at 967.

> Changing cultural and epistemological 'fashions' can have a significant influence on this process. Common law and continental law initially both put a premium on knowledge at the expense of neutrality. In the common law countries however, the emerging predominance of empiricist philosophy and ideas typical of the Scottish enlightenment helped to shift the balance toward neutrality. These thinkers placed a premium on direct, personal experience and were skeptical of 'indirect' knowledge-knowledge acquired by reading authoritative writing.

Schafer & Wiegand, *supra* note 492, at 95.

now seamlessly operate as both an instrument of accurate representation of facts but also guard against excessive state interference in private affairs, particularly in private law. Since the special master is particularly used in non-jury trials, she inevitably has the responsibility of upholding these two values in such trials; there, the master serves as a substitute for a lay-person decision force in much the same way as multiple or lay judges.[508]

Torun Lindholm's cognitive approach to comparing the veracity of judging witness statements between laypersons and professionals demonstrates the changes, at the determinative level, brought about by the use of neutral third parties such as masters in place of jurors, the judge, and advocates.[509] Lindholm gauged the use of Swedish law-enforcement professionals, such as police detectives and judges, and compared them to laypersons, attempting to adjust for the influence of racial and ethnic backgrounds and presentation modality.[510] She hypothesized that the law-enforcement groups would show better performance and accuracy than laypersons in discriminating among adult witnesses' accurate and inaccurate answers to cued recall questions regarding a simulated kidnapping.[511]

Lindholm found her hypothesis to be generally correct: law-enforcement was generally better able to judge for veracity than laypersons.[512] Certain aspects of her findings are worth particular note, and further demonstrate that the ability of *huissiers* and other magistrates to judge witness veracity—and thus their similarity to, or difference from, juries—will be influenced by their professional training.[513] Of all three groups studied, police detectives were the most effective at determining accuracy of eyewitness statements, and laypersons the least so.[514] While judges were somewhat more accurate than laypersons,[515] their methodology was distinctive:[516] "[J]udges' high hit rate was primarily due to their tendency to use

508. Larivière, *supra* note 364, at 743–46.

509. Lindholm, *supra* note 80, at 1301.

510. *Id.* at 1304–05.

511. *Id.* at 1302.

512. *Id.* at 1305.

513. *Cf. id.* at 1312.

514. *Id.* at 1306. Although "[e]ven at their best, the detectives made a substantial number of incorrect judgments, and some of them performed at chance levels." *Id.* at 1311.

515. *Id.* at 1308. Lindholm concludes that judges are *not significantly more accurate* than laypersons: although the judges' hit rate is higher for declaring truthful statements to be true, that stems from a greater willingness to respond that a statement is truthful. *Id.* at 1310–11. Lindholm addresses reasons for the judiciary's increased readiness; she hypothesizes it has more to do with sheer quantity—the judge's heightened exposure to witness statements—rather than any specific set of criteria. *Id.*

516. *Id.* at 1310.

a liberal response criterion when judging the statements, and the only group that showed a recurrent ability to discriminate correct from incorrect witness responses was the police detectives."[517]

It seems then that masters, who are typically attorneys or retired judges and share a similar education and background to judges, would presumably fall into the judicial category and use specific response criteria to determine veracity. Since the greater use of masters would necessitate a large standing reserve of qualified professionals, it is unlikely that masters would be as inaccurate as laypersons who "lack . . . experience with what witnesses to crime [or tort] scenarios may recall"[518] and therefore "have more difficulty when judgments concern an eyewitness's memory for details."[519]

Nevertheless, judges were not significantly more accurate than laypersons.[520] The master may combine the best features of both the judge and the jury – maintaining legal expertise but also acting as a balance against excessive state interference. Indeed, the master may sometimes come to identify certain aspects of the proceedings with personal identity and belief and thus have the ability to shift findings in ways that mirror the effects of jury nullification.[521] Of course, as previously discussed, appellate courts will have to maintain vigilance in preventing maneuverings with the effect of jury nullification, but the very concept of jury nullification

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517. *Id.*

518. *Id.*

519. *Id.*

520. *Id.* at 1311. All persons studied had a bias toward judging statements to be correct rather than incorrect, but it was strongest among judges:

> The judges' strategy may be based on prior knowledge regarding the typical recall ability of crime witnesses. That is, given the witnessing conditions, and the details witnesses were asked for in the current study, judges may know from experience that the ratio of correct witness responses is relatively high. . . . It seems reasonable that an experienced judge who is uncertain as to whether a specific witness statement is correct or not would choose to give the witness the benefit of the doubt.

Id. at 1310–11. "Alternatively, judges' response bias may be a result of their perception that the judgment task was difficult." *Id.* at 1311.

521. *Compare* Greene, *supra* note 74, *with* Rubenstein, *supra* note 498, at 960 ("But some juries still acquit even when the evidence indicates that the defendant has violated the law. . . . Federal courts universally condemn jury nullification. Relying on formalist precedent from the nineteenth century, courts decry nullification on the ground that it exceeds the authority of the jury. However, recently some scholars have argued that nullification may in some cases be desirable and have called for increased tolerance of jury nullification." (footnotes omitted) (citing Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1151 (1997); Joan Biskupic, *In Jury Rooms, a Form of Civil Protest Grows*, WASH. POST, Feb. 8, 1999, at A1)).

is a key component of the jury's, or any other layperson decisional force's, ability to guard against the state.[522]

Lindholm additionally discussed the change in perceptions between written, live, and taped testimony.[523] In most Continental systems, for instance, judges will only judge testimony in a civil trial based on a written transcript,[524] and increasing the use of masters in U.S. courts would render this more common. On another level, however, it tangentially demonstrates the ability of differently trained persons to judge the accuracy of documentary evidence, which is key where the master is used in complex litigation to aid in fishing expeditions.[525]

Lindholm's finding that written transcripts were more easily judged for their accuracy is hence astounding for the majority of legal systems, which emphasize the importance of live, in-court, oral testimony.[526] Although live testimony is also prized for its ability to expose witnesses and parties to a more complete form of public scrutiny and direct challenge by the opposing party on facts asserted, it would appear these methods have a negative impact on accuracy judgments by the observer, regardless of status.[527] While cautioning that further research is needed in this area, Lindholm hypothesized that oral testimony, whether in video or live form, provides visual cues which offer salient, but unreliable, accuracy information tending to misguide accuracy judgment.[528] By summarizing testimony in the form of a report, magistrates—like the master or *huissier*—may then lead to greater accuracy in the judgments made during trial by a judge or jury since the misleading visual cues will be stripped from the presentation.[529]

Thus, magistrates such as the master and other third party neutrals, while they tend to be antagonistic to the role of the jury in cases where they serve contemporaneously, may in actuality serve

522. *See supra* notes 493–498 and accompanying text.

523. Lindholm, *supra* note 80, at 1310–11.

524. Tokson, *supra* note 480, at 1609.

525. *Id.*

526. Lindholm, *supra* note 80, at 1310 ("The fact that current evidence suggests that testimony transcripts provide a better basis for accuracy judgments than does live or taped testimony raises concerns regarding the orality principle to which most legal systems adhere . . . ."). While the better results for written over oral testimony may be shocking to many legal observers, that is far from the case for social scientists. Lindholm notes that the better performance—whether by experts or laypersons—in making accurate judgments by reading transcripts rather than watching testimony is in accord with previous research. *Id.*

527. *Id.* at 1310–11.

528. *Id.* at 1310.

529. One could conclude that the use of a magistrate would only alter the judging as to the accuracy of oral testimony, which lacks visual cues, to the same extent that documentary evidence (and its use in court) is affected by the presiding judge or magistrate.

as a proxy for a layperson decisional force in non-jury trials. Even where there is a jury, and masters were allowed to operate in U.S. jury trials, their influence may be to assist the jury in coming to more accurate conclusions through their likely use of liberal response criterion and greater familiarity with eyewitness accounts and documentary evidence. In this perspective, then, the advantages to greater utilization of masters will not compromise the institution of the jury, but may in fact enhance its role through greater accuracy verification or provide a sufficient jury substitute in commercial civil litigation, where the jury is increasingly absent in American legal culture and no layperson substitute, such as a three judge panel, generally exists.

C. Reforming Discovery in Complex and Commercial Litigation: Twenty-First Century Privacy Concerns

The *huissier* has had a long history in France and other Francophone societies, and his appearances in popular culture[530] demonstrate a deep, cultural resonance that illustrates the paramount issue in legal transplantation: cultural relativism.[531] The Western legal systems are built upon their distinct histories and, while bearing a family resemblance to each other even if only tenuously, globalization has brought in legal and economic traditions that are fundamentally different from, if not antagonistic to, the Western tradition.[532] Roscoe Pound's view of harmonizing disparate legal regimes within a single nation is problematic in the current legal landscape,[533] with issues far beyond concepts of privacy and procedure; extreme examples are, for instance, challenges to the very concept of interest and usury.[534] Yet, of course, the definition

530. Interestingly, these references have often revealed profound, public resentment of the powerful *huissier*. For example, countless insults, jokes, and homophobic slurs of North Americans in the 1700s were recorded in the numerous lawsuits brought by *huissiers*, some widely disseminated, against persons suddenly offended at service of process or other court functions, such as assistance in the sorting and reuse of the human remains of executed persons. Peter N. Moogk, *"Thieving Buggers" and "Stupid Sluts": Insults and Popular Culture in New France*, 36 WM. & MARY Q. 524, 524–25, 531 (1979).

531. *See supra* note 16.

532. *See* Tidmarsh, *supra* note 342, at 546.

533. *Id.* at 540.

534. A number of nations have, and likely will continue to, adopt and uphold the validity of Shari'a law, which prevents or limits the charging of interest or debt-financing of corporations (*riba*), fundamental to Western concepts of the free market. *See, e.g.*, William Ballantyne, *Introduction: Islamic Law and Financial Transactions in Contemporary Perspective, in* ISLAMIC LAW AND FINANCE 1, 1–5 (Chibli Mallat ed., 1988). An example of this problem can be seen in tax law, where Shari'a tax methods have hampered the ability of U.S. taxpayers to receive foreign tax credits. Vulcan Materials Co. v. Comm'r, 96 T.C. 410, 412–13 (1991).

and notion of privacy across borders has come into conflict where evidence can or must be concealed under the laws of foreign nations from U.S. discovery.[535] The goal of the transnationalist must therefore be to uncover ways to ameliorate the inevitable discord created by increasingly numerous interactions between disparate legal regimes.[536]

Particularly in the area of discovery, the manifestation of privacy is inevitably culturally unique.[537] Yet, supranational entities in Europe have undertaken to change the nature of European law, procedure, economics, trade, and human rights.[538] Regarding discovery and privacy, the European Court of Human Rights ("ECHR") and the European Court of Justice ("ECJ") have brought in some cases sweeping changes in French law and offer presages of a *ius commune* that is increasingly standardized, codified, and omnipresent throughout Europe, with likely effects not only for the *huissier*, but also on American ideology.[539]

In the subtle distinctions between the European and American view of privacy, and why discovery in America might be viewed as so intrusive to foreigners, the parables and generalizations of tourist guides would serve as a perfunctory introduction to the dissimilitude:

> As a French article warns visitors to the United States, America is a place where strangers suddenly share information with you about their "private activities" in a way that is "difficult to imagine" for northern Europeans or Asians. . . . It is "normal

535. *See, e.g.*, Christopher Cotton & Laurel Harbour, *International Discovery: Navigating Uncharted Waters*, 74 DEF. COUNS. J. 274 (2007) (providing a brief overview of data protection for major corporations under blocking statutes and the Hague Convention on Taking Evidence Abroad in Civil and Commercial Matters); Karen A. Feagle, *Extraterritorial Discovery: A Social Contract Perspective*, 7 DUKE J. COMP. & INT'L L. 297 (1996); David E. Teitelbaum, *Strict Enforcement of Extraterritorial Discovery*, 38 STAN. L. REV. 841 (1986) (discussing means to the prevention of information havens, or nations where documents might be withheld from U.S. litigants on the grounds that domestic laws prevent fishing expeditions).

536. Joel R. Reidenberg, *Resolving Conflicting International Data Privacy Rules in Cyberspace*, 52 STAN. L. REV. 1315, 1320 (2000) ("If the harmonization of privacy rules is . . . harmful for the political balance adopted in any country, then the peaceful coexistence of different privacy rules becomes essential to avoid online confrontations.").

537. *See id.* at 1318–19.

538. For an early discussion of this phenomenon, see Priscilla M. Regan, *The Globalization of Privacy: Implications of Recent Changes in Europe*, 52 AM. J. ECON. & SOC. 257 (1993) (discussing the Council of Europe's consideration of a harmonized data protection regime).

539. *See* Mitchel de S.-O.-l'E. Lasser, *The European Pasteurization of French Law*, 90 CORNELL L. REV. 995, 999 (2005) (providing an overview of traditional French juridical models and the impact of the ECHR, and to a lesser extent the ECJ, on those models, particularly the failure of the ECHR and the Cour de Cassation to "appreciate the logic and values underlying the other's preferred procedural model").

> in America," an Internet site informs German tourists, for your host at dinner to ask "not just how much you earn, but even what your net worth is"—topics ordinarily quite off-limits under the rules of European etiquette. Talking about salaries is not quite like defecating in public, but it can seem very off-putting to many Europeans nevertheless.[540]

These curious insights, however trivial, reflect broader differences in the concerns of European business, and the current system of U.S. discovery emphasizes this.[541]

In the European tradition, privacy extends to the protection of personal reputation; much as celebrities in Europe are able to hold their paparazzi to account,[542] European businesses enter discovery with a similar expectation of the ability to protect their integrity,[543] and the *huissier* serves as a manifestation of this concern. Whereas American discovery forces the litigant to expose copious and often irrelevant documents to the opposing party, *huissiers* serve as neutral arbiters of the discovery process, sifting through information and distilling what is most relevant to the case, without allowing the opposing party to access and potentially defame the adversary.

American privacy law has focused instead on privacy rights as protection against the state, rather than against agents within a broader social context, expressed as the "sanctity of the home."[544] Thus, in private litigation, the extensive right to peruse an adversary's documents appears, in a cultural context, less invasive than the implementation of an arm of the state through a court appointed third party neutral, such as a special master or *huissier*. To the American psyche, and litigator, this intrusion touches upon the "sanctity of the home" and renders private discovery between the parties (which necessitates broad access to an adversary's

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540. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1155–56 (2004) (footnotes omitted).

541. *Id.* at 1156 ("To people accustomed to the continental way of doing things, American law seems to tolerate relentless and brutal violations of privacy in [consumer data, credit reporting, workplace privacy, discovery in civil litigation, dissemination of nude images on the internet, and the shielding of criminal offenders from public exposure].").

542. *See, e.g.*, Robin D. Barnes, *The Caroline Verdict: Protecting Individual Privacy Against Media Invasion as a Matter of Human Rights*, 110 PENN ST. L. REV. 599 (2006) (arguing the virtues of the ECHR's approach to balancing media and personal privacy rights); Whitman, *supra* note 540, at 1169 n.78 (citing cases brought by Princess Caroline of Monaco against European tabloids for an invasion of her privacy).

543. *See* Paul Gewirtz, *Privacy and Speech*, 2001 SUP. CT. REV. 139, 185–86 (discussing the German right to "the free development of one's personality").

544. Whitman, *supra* note 540, at 1215 ("Where American law perceives a threat to privacy, it is typically precisely because the state has become involved in the transaction.").

documents) preferable.[545] In contrast, while the state is still seen as a threat to privacy in Europe, it also appears less malevolent, even useful, as the protector of personal integrity, by the use of a third party (rather than an adversary) to search documents, or by the use of the state to protect against humiliation at the hands of the press.[546] However, in countless ways, these notions of privacy as protection of personhood or protection from state interference in inter-personal affairs appear quaint when considering the radical impact of information technology and supranational entities.[547]

Numerous proposals have been floated for how to retain privacy rights in the civil and criminal courts through the differentiation between types of data in an effort to limit the invasive effects of information technology, such as the improved ability with which an individual's movements and speech may be monitored and recorded.[548] As a result of the emphasis on privacy from the state, as opposed to the personification of privacy found in Europe, American courts have waffled over the issue of the limits of personal integrity privacy rights while the EU and ECHR have taken more proactive measures.[549] In like measure, a greater role for the special master may assist U.S. courts in overcoming the multitude of challenges that these changes bring as they tend to increase the complexity and number of documents in any given litigation.

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545. *Cf. id.* at 1216 (discussing the European system for maintaining lists of legal given names as an example of a practice that is untroubling to Europeans, yet would likely seem invasive to Americans).

546. *See id.* at 1172–73 (discussing how Napoleon's lifting of press censorship led to a movement for state protection of personal reputation).

547. *See* Brian F. Havel, *The Constitution in an Era of Supranational Adjudication*, 78 N.C. L. REV. 257 (2000) (discussing the impact of supranational entities, especially the World Trade Organization, on Article III of the U.S. Constitution). *Compare* A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461 (2000) (discussing the decline of personal privacy and its relevance as a result of the deployment of invasive technologies and information centralization), *with* Basil Markesinis et al., *Concerns and Ideas About the Developing English Law of Privacy (And How Knowledge of Foreign Law Might Be of Help)*, 52 AM. J. COMP. L. 133, 203 (2004) (discussing the influence of the ECHR on the development of an English common law of privacy rights), *and* James B. Rule, *Toward Strong Privacy: Values, Markets, Mechanisms, and Institutions*, 54 U. TORONTO L.J. 183 (2004) (arguing that technological forces render existing privacy laws anachronistic and in need of strengthening, particularly with regard to personal integrity privacy rights).

548. *See, e.g.*, Froomkin, *supra* note 547, at 1533, 1535; Rule, *supra* note 547, at 220, 224–25.

549. Barnes, *supra* note 542, at 599; Froomkin, *supra* note 547, at 1507–11, 1514; Scott Rempell, *Privacy, Personal Data and Subject Access Rights in the European Data Directive and Implementing UK Statute:* Durant v. Financial Services Authority *as a Paradigm of Data Protection Nuances and Emerging Dilemmas*, 18 FLA. J. INT'L L. 807 (2006) (analyzing the development of European data protection laws).

Rather than limiting the range of acceptable documents on other procedural grounds such as their placement, the legality of the search, or public knowledge, special masters and *huissiers* are uniquely able to access relevant information and provide summaries that broach the core issues, and thereby the intellectual property and corporate secrets of litigants may be protected. Current, broad discovery rights in the United States fail to encompass the necessary degree of informational privacy that will soon enough be necessary in a world of "smart dust," satellites with the ability to scan the interiors of buildings, and databases of emails, photographs, and video.[550] Without some restraint, social advantage will increasingly move into the hands of "[t]he rich, the powerful, police agencies, and a technologically skilled elite" with the resources to mine data in trial preparation and in civil life, potentially with devastating effects on equal access to justice and the ability to protect one's personal data and integrity.[551]

VI. CONCLUSION

Over the course of American history, the use of magistrates, masters, and other third party neutrals in proceedings has been cyclical in nature. Clearly, at one point the limitations that the use of a master placed on the parties, judge, and jury was acceptable and expected as a part of the U.S. common law trial. Over the twentieth century, however, a more fundamental view of the adversarial system emerged, and with it came the demise of the special master.

While this result may have been desirable and efficient when first implemented, the law and the legal environment has changed dramatically in the past century. Today, with the advent of information technology and globalization, litigation has become increasingly complex; the mounting number of documents, the effects on and of international law, and the need for more expertise, technological or otherwise, has rendered an ever growing number of issues beyond a judge's general knowledge and competence. The consequences of maintaining the current system are already apparent: evasion of U.S. laws and regulation through refusal to participate in the U.S. legal system or with blocking statutes, and the concomitant reduction of international competitiveness for companies involved in the United States and for the U.S. economy generally.

550. Froomkin, *supra* note 547, at 1538–39.

551. *Id.* at 1538.

Magistrates and other third party neutrals such as the *huissier*, however, provide an opportunity to overcome these new challenges. New and more expansive roles for such magistrates will bring about a reduction in procedural costs, and can be implemented through pre-existing procedural mechanisms such as the special master and Rule 53 of the FRCP. By looking abroad to nations such as France and its *huissier* for reform ideas, the United States can reposition itself, lessen costs, and lower the burdens placed on the court system with the current private system of discovery. While such change will certainly encounter opposition, the 2003 Amendments to the FRCP demonstrate a pre-existing desire on the part of courts and parties to move toward a greater role for masters. This most organic, and constitutionally and procedurally compatible, of changes should not be hamstrung by recalcitrant opponents, but instead encouraged and expanded. While foreign law has often been looked upon with distrust in the United States, the *huissier* has much to offer.