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
B. Comparative Law in Theoretical Context
C. The Huissier as Model: Complications and Possibilities

II. HISTORY
A. Equity, Masters, and U.S. Discovery in Historical Context
   1. The American Courts of Equity Before 1938
   2. Delaware and the Effects of the American Revolution on U.S. Corporate Law
   3. The Special Case of Louisiana Before 1938
B. The Development of the Huissier de Justice
   1. The Notarial Professions
   2. Emergence of the Contemporary Huissier

III. USES OF THE HUISSIER AUDIENCER IN CIVIL LITIGATION
A. The Huissier Under the Nouveau Code de Procédure Civile
   1. Introduction to the Contemporary Huissier Audiencier
   2. The Huissier's Report
   3. Conclusion
B. The Dayan and Société Civile Cases: Use of the Huissier in Contemporary U.S. Civil Litigation
   1. Introduction to Using Huissiers' Reports in U.S. Courts
   2. The Dayan Case: An Opportunity for the Transnational Litigator?
   3. Société Civile: Extending the Dayan Theory
   4. Conclusion

IV. THE HUISSIER AS A MODEL: REFORMING U.S. DISCOVERY THROUGH ADAPTATION
A. A Comparative Law and Economics Analysis of Procedure
B. Efficiency of the French Procedural Method
C. Giving Parties to Commercial Litigation the Right to Choose an Investigative Magistrate

V. ENHANCING THE SPECIAL MASTER: DOMESTIC COMPLICATIONS AND ISSUES IN INTERNATIONAL CONVERGENCE
B. Complications to Effective Reform
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. That seems to be far less controversial, or at least newsworthy, than when a U.S. court refers to foreign laws for support. Indeed, it seems that after a lengthy history of utilizing foreign case law in its decision making, American courts now face considerable criticism for doing so.

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).


3. Justice O’Connor, dissenting, argued that “over 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).

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. Stating that the central issues were factual, the Court then upheld the use of huissier d'audiencier 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 ... ."

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). Franchisees 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, 95 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, 5 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.” The huissier operates as an enforcer of debt obligations and judgments, as well as a process server, when acting as a bailiff. 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. 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.

The huissier’s report, a dossier typically signifying accuracy and professionalism to French practitioners, 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


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.

the American tradition's rich history of equity. Indeed, defining the nature of this disjunction between inquisitorial and adversarial legal systems is a semantic exercise of dramatic proportions. 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. 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. Vestiges remain in most Western legal cultures, including the United States, where bailiffs, trustees, receivers, and sheriffs, among others, serve in administrative and other subordinate roles as court officials or semi-private government adjuncts.

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


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.


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. All the while, 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 are significant pressures toward reexamination of federal rules regarding discovery, particularly in the use of masters and investigative magistrates.

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. This can serve many useful purposes, among which is to function as a paradigm from which particular administrative functions in U.S. courts

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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").


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."ootnotes 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.\textsuperscript{27}

\textbf{B. Comparative Law in Theoretical Context}

This Article examines the contemporary context in which the \textit{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 \textit{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.\textsuperscript{28}

In comparing two modern legal doctrines—the French \textit{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,\textsuperscript{29} discovery,\textsuperscript{30} and the gathering of testimony\textsuperscript{31}—one can identify the similarities between these re-


\textsuperscript{28} David Nelken, \textit{Towards a Sociology of Legal Adaptation}, in \textit{ADAPTING LEGAL CULTURES} 7, 8 (David Nelken & Johannes Feest eds., 2001) (citing Lawrence Friedman, \textit{Some Comments on Cotterell and Legal Transplants}, in \textit{ADAPTING LEGAL CULTURES}, supra, at 93); cf. William Ewald, \textit{Comparative Jurisprudence (II): The Logic of Legal Transplants}, 43 \textit{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.").

\textsuperscript{29} \textit{See} \textit{FED. R. CIV. P. 53}.

\textsuperscript{30} \textit{See} \textit{FED. R. CIV. P. 26}.

\textsuperscript{31} \textit{See} \textit{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


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).

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.

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. 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 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" thus may be an exaggeration, but also is certainly a recent phenomenon to be distinguished from the English as well as Continental legal formats.

40. The Norman Conquest of 1066, for example.

(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).
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. 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), were insufficient and indeed inefficient. By the reign of Edward III, chancery 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. English chancery, a body of law reflecting Continental procedure, was the model for the equity and chancery courts in the United States. 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, 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)).
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?hl=en& 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. 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 dispensed with numerous anachronisms that continue to plague foreign—especially Civil Law—jurisdictions. This streamlining and updating process, though, eliminated or weakened valuable procedural mechanisms that could provide greater effectiveness in adjudication in the twenty-first century.

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. However, as with ecclesiastical courts during the English Civil War and later that same century

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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.


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,\(^5\) 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 . . . . \(^5\)\(^8\)

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.\(^5\)\(^9\) 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,\(^6\)\(^0\) inflexible,\(^6\)\(^1\) and a vestige of oppressive imperial power.\(^6\)\(^2\) At that time, the equity courts gathered testimony \textit{ex parte} by a court official—\textit{the commissioner or master}—who was not unlike the \textit{huissier audiencier}.\(^6\)\(^3\) Although the parties drafted, or at least had some editorial control over inter-


\(^5\)\(^8\) Kessler, supra note 14, at 1204 (footnote omitted).

\(^5\)\(^9\) \textit{Id.}

\(^6\)\(^0\) \textit{Id.} at 1225–24.

\(^6\)\(^1\) Quillen & Hanrahan, supra note 14, at 821–22; \textit{see also} David Ferleger, \textit{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 \textit{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.” \textit{Ex parte Peterson}, 253 U.S. at 312.

\(^6\)\(^2\) Quillen & Hanrahan, supra note 14, at 826; \textit{see also} G. Glenn & K. Redden, \textit{Equity: A Visit to the Founding Fathers}, 31 VA. L. REV. 753, 753 (1945) (describing “equity” as a “thing of continuous growth”).

\(^6\)\(^3\) Kessler, supra note 14, at 1224.


\(^6\)\(^5\) Michael R.T. MacNair, \textit{The Law of Proof in Early Modern Equity} 167–77 (1999); Kessler, supra note 14, at 1267; \textit{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. 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. The masters' informal experimentation was later recognized in case law, and it eventually developed as the stated preference in a majority of jurisdictions. 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.

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. 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. 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.

As one U.S. federal judge wrote:

68. Remsen v. Remsen, 2 Johns. Ch. 495 (N.Y. Ch. 1817).
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 Special 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.\(^\text{74}\)

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.\(^\text{75}\) 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.\(^\text{76}\)

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.\(^\text{77}\) Furthermore, the jury was  

\(^{74}\) 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. At issue was, and is, the accuracy of witness recollection in the differing forms of evidence gathering, or the ability to "test" the witness. 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. 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.

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, but over time, and especially in
the past decade, courts have again gained experience with masters appointed to perform both pre- and post-trial functions.\(^{85}\) 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.\(^{86}\) 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,

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).


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))).


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." By exploring Delaware's fortuitous use of equity, one sees the benefits of the flexibility underlying equity's procedural heritage.

Prior to 1701, 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: "through the . . . Court of Assizes in New York and . . . the Provincial Council in Philadelphia," by the Governor of New York, who was able to correct erroneous jury results from county courts, and via a de novo appeal from jury judgments in a nonjury court 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.


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. Weiner, 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.


93. Quillen & Hanrahan, supra note 14, at 823.
codified under William Penn. Hence, equity was used in both Pennsylvania and Delaware as a proxy for imperial power, meting out natural justice and favoring control over the jury. In other colonies, too, equity was a significant source of law, demonstrating how well-rooted it was in the colonists’ legal tradition.

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. In Delaware, the post-Revolution state constitution continued the practice, but without the crown. 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 monarchical executive authority). 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."\textsuperscript{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.\textsuperscript{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."\textsuperscript{103} These were similar to the criticisms leveled against the vestiges of English chancery and equity in Revolution-era America.\textsuperscript{104}

Plainly, the Delaware Court of Chancery was able to overcome these criticisms. Partly due to the pioneering work of Chancellor Nicholas Ridgely,\textsuperscript{105} to the Court's extraordinary equitable...
powers, and to the general corporations law enacted in 1899, Delaware Chancery became increasingly relevant during the nineteenth and early twentieth centuries. Between 1910 and 1920, major, modern corporate litigation emerged, with a transformed Court of Chancery given extended powers to appoint a receiver, deem a director not an employee, pierce the corporate veil in cases of fraud, regulate some share purchases and dissolutions, and uphold the validity of out-of-state directors' meetings.

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. For example, many

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. Atkins, 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)).


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))).


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. Of course, strictly speaking, the Court of Chancery is not a specialized court as it has broad jurisdiction. However, in other jurisdictions, specialized courts based on Delaware's can be jurisdictionally confined to commercial disputes, applying new procedural devices in limited, experimental settings not unlike the UNIDROIT-Civ Pro.

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. However, the procedural aspects most relevant to

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).


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.\footnote{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 \textit{huissier de justice} is found.\footnote{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.\footnote{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.\footnote{124} For the next 43 years, the state's supreme court continued to oppose the other branches' efforts to repeal the Civil Law.\footnote{125} In fact, it was not until 1870 that the Louisiana Civil Code was published solely in English.\footnote{126} While these endeavors to impose common law procedure failed, many principles of the Civil Law had eroded through a piecemeal process.\footnote{127}

For example, in 1937, the year before the Louisiana notary lost its status as a separately classified legal profession, Professor Gordon 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).

\footnote{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, \textit{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, \textit{supra} note 13 (discussing the procedural differences between the Louisiana system and the French system).}

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

\footnote{123. See Gruning, \textit{supra} note 120, at 458 (\"[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 . . . .\")}
Ireland wrote that Louisiana had become a common law state. In Ireland’s article, however, engendered a renaissance of the Civil Law in Louisiana.

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. 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.

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. Vestiges of the process remain, and in any event their historical presence further demonstrates the compatibility of evidence gathered by an

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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. 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, which invested certain official powers of the state in professional persons. This innovation, which greatly reduced cumbersome bureaucratic processes in Ancient Rome, related to official seals

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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 STROMHOLM, 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,\textsuperscript{137} through the scriba\textsuperscript{138} and notarius\textsuperscript{139} who could authenticate private acts and operate in the capacity of legal advisor to private parties.\textsuperscript{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.\textsuperscript{141} A related profession, executores, was more akin to modern, semi-private huissiers and county sheriffs, who were empowered to enforce judgments and debts.\textsuperscript{142}

While the actual functions may have been vague,\textsuperscript{143} the ancient professional notaries\textsuperscript{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.\textsuperscript{145} Indeed, the presence of the

\begin{footnotes}
\footnote{137. See Malavet, \textit{supra} note 17, at 408–09.}
\footnote{138. "[C]lerk in a court or in an office." \textsc{Adolf Berger}, \textsc{Encyclopedic Dictionary of Roman Law} 692 (1953) (pl.: \textit{scribae}).}
\footnote{139. "A person, usually a freedman or slave, skilled in shorthand writing; in the later Empire \textit{notarius} is \textit{synonymous with} \textit{scriba." Id. at 599 (pl.: \textit{notarii}); \textit{see also} 2 \textsc{Marcel Planiol}, \textsc{Civil Law Treatise} § 134 n.1 (La. State Law Inst. trans., 1959); \textsc{Eduardo Bautista Pondé}, \textsc{Origen e Historia del Notariado} 24–30 (1967) (discussing the Hellenic influences of the notary).}
\footnote{140. See Malavet, \textit{supra} note 17, at 408–19.}
\footnote{142. Id.}
\footnote{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. \textsc{Radding}, \textit{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. \textit{Id.}; \textit{see also} Ewald, \textsc{Comparative Jurisprudence (I)}, \textit{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).}
\footnote{144. \textsc{Heikki E.S. Mattila}, \textsc{Comparative Legal Linguistics} 4 (Christopher Goddard trans., 2006).}
\footnote{[I]n continental Europe one can refer to \textit{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.}
\footnote{Id.}
\footnote{145. See Closen & Dixon, \textit{supra} note 136, at 874–75. \textit{See generally} Mario Ascheri, \textit{Turning Point in the Civil-Law Tradition: From Ius Commune to Code Napoléon}, 70 \textsc{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).}
\end{footnotes}
notary, and of viable economies, was coupled with the rule of law and may continue to be so related.\footnote{146}

The notary continued to evolve on the Continent,\footnote{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.\footnote{148} By contrast, in the common law, the notary never obtained such prominence;\footnote{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.\footnote{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.\footnote{151}

Indeed, this preference may have been emblematic of the advancement of the notarial profession in France, particularly after the \textit{Loi Ventôse} of 1803,\footnote{152} which extensively reformed notarial practice:

\begin{footnotes}
\footnote{146} Furthermore, other undeveloped societies also dispensed with notaries where transactions were limited. \textit{See}, \textit{e.g.}, Closen & Dixon, \textit{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)).

\footnote{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, \textit{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. \textit{Id.} at 418.

\footnote{148} \textit{See} PONPD, \textit{supra} note 139, at 1–30.

\footnote{149} \textit{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, \textit{supra} note 17, at 426–27.

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


\footnote{152} Malavet, \textit{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. \textit{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).

\(^{153}\) 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. Indeed, the notary's functions are generally incompatible with such officials. 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. 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). Initially, huissier indicated a person who was responsible for the (physical) assurance of the


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 député." Id. at 64 n.19.

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

The French Huissier proceeding's tranquility, in much the same sense a modern American bailiff ensures the routine and non-violent presentation of evidence at trial. 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.

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 appariatores, 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.

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. These persons put together litigants' claims, executed the decisions of the judges, and took on more particular roles in manorial jurisdictions. 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

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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).


were five separate forms of *huissier* alone, and specialized *huissiers* were employed in a number of services, from royal or bureaucratic functionaries to service as official witnesses at important events. 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 monarchical authority.

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. The greater the power, privileges, 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. As financial crises emerged, many new offices were created, and by 1598, the entire French judicial system was venal. 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.

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

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171. *Huissier audiencier, huissier à cheval* (on horseback serving rural areas); *huissier à pied* (walker of the city center); *huissier priseur* (auctioneer); *huissier à 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*).


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

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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.\textsuperscript{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.\textsuperscript{187} Unlike the United States, where the change in legal form was not as far reaching,\textsuperscript{188} France quickly reinstated a, albeit modernized, version of monarchy.\textsuperscript{189} Napoleon quickly reinstated the methodology of office holding used before the Revolution, finally making the offices freely alienable, limited in number, and later subject to taxation.\textsuperscript{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.\textsuperscript{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

\textsuperscript{186} Doyle, \textit{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." \textit{Id.}

\textsuperscript{187} \textit{Id.}

\textsuperscript{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.

\textsuperscript{189} See Doyle, \textit{supra} note 165, at 44.

\textsuperscript{190} \textit{Id.} The positions remained, in effect, \textit{plum sinecures}. Cf., Bennett Schiff, Georges Seurat and the Color of Brilliance, \textit{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).

\textsuperscript{191} Doyle, \textit{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.  

III. USES OF THE *HUISSIER AUDIENCER* 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. Another result is theoretical: understanding the operation of the *huissier* can serve as a catalyst for comparison and reform of domestic institutions, and *huissiers* may assist in overcoming foreign legal barriers to discovery. 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.

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").

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.")), 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, technical experts, surveyors, and the investigation of witnesses by the judge, among others.

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; 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, 55 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.
battles. 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. Indeed, audiencier itself indicates “listener” or “hearing,” and derives from the Latin auditiorius, a person that is or gives an official audience.

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, 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, a typically oral statement of expert facts that does not require a highly structured analysis. Finally, there is the expertise, which, as explored below, may be further subdivided and serves a number of procedural functions. The French court will usually avoid the expertise, where possible, as a result of its complexity.

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. Maigre d'Arnis, Lexicon Manuale Ad Scriptores Medii Et Infimi Latinitatis 241 (Paris, M. l'Abbé Migne 1866). Auditiorius 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.
208. Id. arts. 256–62, translated in French Code in English, supra note 156, at 49–50.
209. Id. arts. 263 to 284, 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.
The *constatation* is, simply, the compilation of an official report, the *constat*, on factual situations, excluding opinion on matters of fact or law. The *constatation* is produced by a *huissier audiencier* or other investigative magistrate (stylized the *constatant*), who verifies technical questions. 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.

In essence, the *constat* supplants much of the discovery and presentation of eye-witness testimony that occurs in the United States. 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)).

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, 240, 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.\textsuperscript{216}

\textbf{b. The Consultation}

The \textit{consultation} serves as a middle ground between the \textit{constatation}, which is only useful in relatively simple fact-finding matters, and the \textit{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.”\textsuperscript{217}

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

\textbf{c. Expertise}

Finally, the \textit{expertise} is another task with which investigative magistrates, third party fact-finders, and \textit{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.\textsuperscript{221} Pursued as a matter of last resort,\textsuperscript{222} an \textit{expertise} requires one or more persons (\textit{experts}) to research and draft a discussion on a specific issue.\textsuperscript{223}

There are three general forms of \textit{expertise}: \textit{expertise aimable} (friendly expertise), \textit{expertise officieuse} (informal expertise), and \textit{expertise judiciaire} (judicial expertise).\textsuperscript{224} Expertise judiciaire may be

\begin{footnotesize}
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\item \textsuperscript{216} Cf. Browne et al., \textit{supra} note 195, at 97 n.286.
\item \textsuperscript{217} N.C.P.C. art. 256, \textit{translated in French Code in English, supra} note 156, at 49.
\item \textsuperscript{218} Taylor, \textit{supra} note 32, at 198.
\item \textsuperscript{219} \textit{Id.} (citing N.C.P.C. arts. 257, 272).
\item \textsuperscript{220} \textit{Id.} at 199 & n.160. Compare N.C.P.C. art. 257 para. 2, \textit{translated in French Code in English, supra} note 156, at 50 (\textit{consultation}), with \textit{id.} art. 250 para. 2, \textit{translated in French Code in English, supra} note 156, at 48 (\textit{constatation}).
\item \textsuperscript{221} Cf. Taylor, \textit{supra} note 32, at 199.
\item \textsuperscript{222} See N.C.P.C. art. 263, \textit{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 \textit{id.} art. 265, \textit{translated in French Code in English, supra} note 156, at 51 (requiring a showing of why an \textit{expertise} was necessary).
\item \textsuperscript{223} Taylor, \textit{supra} note 32, at 199.
\item \textsuperscript{224} \textit{Id.} at 199–201.
\end{itemize}
\end{footnotesize}
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.


\(^{229}\) 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. In the American system, dual approaches are permitted, with multiple experts often presented by both parties, typically with contradictory conclusions. 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. This is the most common form of expertise in the French system.

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,” “be present during some of the expert’s activities,” “suggest alternative approaches” to the judge. 

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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 demande 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.").

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 à 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.” 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. 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.

The final report, which is subject to amendment at the judge’s discretion, is confidential. 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. Remedies are, however, solely within the court’s competence and can include anything from purging of the tainted sections to a new expertise.

Judges are not bound by any expert’s opinion since the ultimate conclusions of law are solely within their competence. 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.

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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.)).


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.


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.

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." 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. 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. Thus, in the common law system, which lacks a substantially equivalent profession, huissier reports are inevitably challenged as hearsay, and exceptions are necessary for their use at trial.

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. 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. 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. 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. 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. The remaining twenty-two cases can be divided into separate groups according to time frame and the reason for mention of the huissier.

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 for comparative purposes in the field of commerce.

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. 1850) ("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.\footnote{260} This suggests the ease with which notice can be used to evade liability in a property dispute,\footnote{261} in a discussion of the inability to sell a right to litigate,\footnote{262} in discussing the perfection of a fraudulent indebtedness against the United States government by a French estate,\footnote{263} and in determining the right of foreigners to sue the United States government.\footnote{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,\footnote{265} Canadian service of process,\footnote{266} service of process under the Hague Convention,\footnote{267} French
depositions, and the uses of huissier audiencier reports and testimony in evidence.

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. 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.

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. 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.


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.\textsuperscript{273} It would seem, then, that the report is classic hearsay under the federal rules.\textsuperscript{274}

Thus, in order to use advantageous \emph{huissier}'s reports, or at least their findings, in an American court, some type of concurrent jurisdiction must be present.\textsuperscript{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.\textsuperscript{276} Thus, the persuasion of the court, the ability to subpoena the \emph{huissiers}, and the availability of likely discarded original notes may be determinative where a hearsay objection is raised.\textsuperscript{277}

2. The \textit{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,
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. represents an amalgamation of the procedural histories of the United States and France.

Raymond Dayan was an early franchisor of McDonald’s in Paris, 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”) in accordance with the master licensing agreement. 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. Dayan’s treatment by McDonald’s was ultimately characterized as “a unique and stylized franchise” 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.

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. As the filth and disorderliness of Dayan’s restaurants became apparent, 283

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

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

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. “Based on findings by the Huissiers on April 14, 1978, McDonald's gave notice to Dayan of default...” In his responsive pleadings, Dayan then retained a private, and plainly biased, huissier to contradict the findings of the court appointed huissier audienciers.

In France, Dayan was unlikely to succeed in having a huissier audiencier's report declared inadmissible by a court. 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, which had been made over drinks one evening on a

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"...
napkin, and later questioned by McDonald’s board. In the
United States, as one theory arguing for retrial, Dayan objected to
the admission of the huissier audienct reports into evidence under
the hearsay doctrine.

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,” Dayan first objected on the
grounds that the huissiers were not credible witnesses and hence
the trial judge should have rejected their testimony, and second,
that the reports were hearsay and erroneously admitted into evi-
dence as past recollection recorded.

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. at 968.

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 men-
tioned 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 admis-
sibility 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 inspec-
tions 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 mak-
ing 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 tes-
tified 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 . . . .”).
The 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. This arrangement does not render the huissiers' testimony or reports incapable of belief.

The Court then shifted its focus to Dayan's hearsay objection. 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. 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. 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.

The Trial Court did not admit the huissiers' reports in full. 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. 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.

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.  

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. 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. 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.

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). 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. 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.


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
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.


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.


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. 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. 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.”

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. The key findings related to whether the provision of the French Code, under which the judgment was made, indicated a specified sum of money.

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.’” 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.”

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(1) (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. 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; he reached this determination despite a French legal classification that, when literally translated, indicated an uncompleted judgment because, in operation, the judgment was enforceable in France.

The Court in *Société Civile* was confronted with a situation different from that in *Caune v. Sagory* or *Chanoine v. Fowler*, 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. 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.

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*, and a similar

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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. 175 (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).
332. *Id.* at 229.
opinion issued by the French Ministry of Justice, as being advantageous for any further liability disputes or enforcement actions. 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.

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, as it was in Société Civile.

While it is true that the findings were similarly subject to controversy by being placed into evidence, the Société Civile court in effect gives the findings even greater direct credence, dispensing with any hearsay analysis, for instance. 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.

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.
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 detrains, 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.\textsuperscript{341}

4. Conclusion

In the utilization of \textit{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.\textsuperscript{342}

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

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\textsuperscript{341} See Kessler, \textit{supra} note 14, at 1240.

\textsuperscript{342} See Jay Tidmarsh, \textit{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.

\textit{Id.} at 582–83.
value in a common law system. 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? 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. In an increasingly de-harmonized federal system, corporations and corporate equity holders have come to shy away from the United States and its legal regimes, 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.


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 re-
gimes, but it also sours international investors on the U.S.
markets.\textsuperscript{348} London’s \textit{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.”\textsuperscript{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 dis-
pute.\textsuperscript{350}

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

At the same time, as the jury becomes increasingly subject to sci-
entific 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.\textsuperscript{354} Through reforms providing the master
with greater powers, such as some of those available to the \textit{huissier audiencier},
the special master may be transformed into an institu-
tion that enhances the effectiveness of American litigation, the
desirability of a U.S. forum, and stability as well as “rule of law” cer-
tainty underlying domestic investment. In the absence of such
needed changes, the legal-economic analysis of comparative pro-

\textsuperscript{348} See generally Robert A. Kagan, \textit{Adversarial Legalism and American Government}, 10 J.

\textsuperscript{349} Michael Herman, \textit{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).

\textsuperscript{350} Id.

\textsuperscript{351} See, e.g., Transparency Int’l, \textit{2008 Corruption Perceptions Index Table} (2009),
(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).

\textsuperscript{352} Kagan, supra note 348, at 375–76.

\textsuperscript{353} Herman, supra note 349 (internal quotation marks omitted).

\textsuperscript{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).
The French Huissier procedure 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

356. Id. at 906.
360. See Mattei, supra note 358, at ix.
economics theory. However, in the rush to extol the virtues of the flexible approach of the common law, especially in its approach to contractual interpretation, procedural costs have been overlooked or, in any event, the cost of American procedure has been underestimated.

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. 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.” 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. As a result, a number of scholars have either argued that the Civil Law is more efficient, or that at least portions thereof reduce key costs.

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

doctrine employed by the huissier can serve those principles at less cost than the United States’ current system.

[In 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.]

This Article seeks exactly that, but what exactly does a comparative law and economics legal approach entail? The boundaries are certainly indefinite. 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. Thus, parties should be protected from negative externalities in private law through injunction and in public law through compensatory damages.

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. The principle of Pareto efficiency, stipulating that transaction costs and technology

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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.\textsuperscript{575}

Involved, however, are "Pareto superior changes," whereby exchanges can occur where no one is better or worse off,\textsuperscript{577} 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.\textsuperscript{578} 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."\textsuperscript{579} 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.\textsuperscript{580}

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.\textsuperscript{581} Indeed, the contemporary law and economics field emerged in the United States and until the mid-1990s was mostly focused on domestic systems.\textsuperscript{582} 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.\textsuperscript{583} This kind of redrafting of legal promises is anti-

\begin{thebibliography}{9}
\footnotesize
\bibitem{376} See Calabresi, supra note 375, at 169.
\bibitem{377} See id. at 171.
\bibitem{378} Id.
\bibitem{379} Id. at 173.
\bibitem{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)).
\bibitem{381} Rowley, supra note 344, at 8–12.
\bibitem{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 \textit{6 The Economics of Legal Relationships: Law and Economics in Civil Law Countries} 107, 108 (Bruno Deffains & Thierry Kirat eds., 2001) [hereinafter \textit{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.").
\bibitem{383} See Robert D. Cooter, The Confluence of Justice and Efficiency in the Economic Analysis of Law, in \textit{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.").
\end{thebibliography}
thetic to European legal cultures, where specific performance is still considered preferable in contracts suits. 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. 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. Thus, the evaluation centers around determining whether the institutional arrangements in one nation are more or less efficient than those in another. At its core, however, the comparative economic approach continues to develop law through non-positive notions of efficiency rather than justice or social engineering. 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. Certainly, it continues to be the case that “most changes in most systems are the result of borrowing,” but the economist seeks to answer why this is the case rather than mere compilation of data suggesting it is so.

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. Alternatively, a need for a legal change may be demonstrated, and a

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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.
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. However, Civil Law countries including France have now been subjected to a number of studies addressing jurisprudential costs and competence. 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." 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. 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.


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. 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. An example of this is the decision not to extend the right to a jury to civil proceedings.

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. While procedural costs are low, the cost of error is quite high in France, the inverse of the American 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).

599. 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 Cadlet & 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.10 (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/l_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.
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?”

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. 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. 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.

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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).


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.

In such an environment, it is key to look to other ways to lessen procedural costs, where new regulation is likely to emerge 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.

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. Thus, any legal transplant or adaptation will inevitably be a piecemeal effort, barring upheaval. As a result, delineating jurisdiction and specific powers is essential, and here the proposal impacts commercial transactions. 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.


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 Mullerson, 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 audienctier 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.\textsuperscript{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.

\textsuperscript{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).

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

\textsuperscript{415} See supra note 82 and accompanying text.

\textsuperscript{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...
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 . . . .

Whatever the case may be, the move toward contractual and economic legal models in U.S. jurisprudence, alongside the re-emergence of the special master following the 2003 Amendments to the FRCP, demonstrates that the "overburdened and understaffed" federal courts are seeking quasi-judicial, often court appointed, persons to assist the supervision and decision-making process. 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. 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 empaneling, 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. In Europe, an

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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).


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 (i.e., the socialization of negative externalities).

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." 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, 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. While, as explored below, the special master has much in common with the huissier, and its use has grown, a number of political and social forces, particularly constitutional concerns and the problem of defining privacy

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)).


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.


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, have limited the expansion of the profession.


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. 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, or the jury. Thus, despite Brandeis' maxim of courts' "inherent power to provide themselves with appropriate instruments required for the performance of their duties," the special master has continued to suffer from its twentieth century history and remains mired in contests over appointment and the common law constraints of the "exceptional condition" 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. While courts continued to caution against the "risk of having significant, potentially dispositive issues 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. 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.


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).


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).


dramatically diminished the procedural hurdles to appointing a master and rendered the master's powers increasingly similar to those of the huiissier.

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. 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. 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," which is remarkable considering that the same differentiation exists in France among the several forms of expertise. Similarity between the two entities is also demonstrated in the post-trial master, who serves as an advanced form of the French bailiffs (or huiissiers, without the distinction of audiencier): drafting opinions; administrating settlement and judgment funds; monitoring compliance; serving as a neutral observer; and general investigation.

438. Id. at 22.
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 officielle, 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 huiissier 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 15, 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 95–109 (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 15, 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, huiissiers 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 procedure445 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 hands449 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.
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. 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. As it currently stands, the United States’ cost of error is comparatively low; while expensive, American courts tend to arrive at sound conclusions. 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.

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 and also to make such findings more difficult to controvert at the appellate level. Certainly,

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.


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., 285 F.2d 253, 257 (7th Cir. 1960). 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.\textsuperscript{459} In France, for instance, the right of \textit{contradictoire}, in some ways corresponding to the American right of confrontation, permits parties to guide the \textit{huissier} in her examinations and to challenge various findings of fact, conclusions, or analyses.\textsuperscript{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.\textsuperscript{461} At the same time, a greater role for the master brings about benefits in harmonization and uniformity of the law,\textsuperscript{462} while the appropriate deference will ensure that the savings in procedural cost are not overwhelmed by the increased cost of error.\textsuperscript{463}

\textit{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 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.

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

\textsuperscript{459} \textit{See In re U.S.A. Motel Corp.}, 450 F.2d at 503.

\textsuperscript{460} \textit{See supra} note 273 and accompanying text.


\textsuperscript{462} Miller, \textit{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. \textit{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, \textit{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 Enrique" 

\textsuperscript{463} Miller, \textit{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.\textsuperscript{464} Conversely, the use of a master challenges these rights, sometimes in fundamental ways.\textsuperscript{465} While historically the master was not viewed as impinging on constitutional rights, modern jurisprudence paints a more complicated story.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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

\textsuperscript{464} U.S. CONST. amend. VII.
\textsuperscript{465} See Kessler, supra note 14, at 1247–50.
\textsuperscript{466} Id. See generally DeGraw, supra note 461.
\textsuperscript{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.”).
\textsuperscript{469} Moskowitz, supra note 467, at 829.
\textsuperscript{470} Id. at 832.
\textsuperscript{471} Id.
rights in an effort to contain the increasing procedural costs associated with the 1938 rule.\textsuperscript{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,\textsuperscript{473} necessarily limiting the New Deal conception of discovery rights and, likely with it, public access to a greater amount of discovery information.\textsuperscript{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.\textsuperscript{475}

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

\textsuperscript{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.").

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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. 589, 619 (2006); Charles Hobson, The Minimalist Privilege, 1 N.Y.U. J. & 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. . . . Several 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.

\textsuperscript{476} U.S. CONST. amend. VI.

\textsuperscript{477} Crump, supra note 475, at 619.

\textsuperscript{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. As to the huissier, the gathering and use of evidence obtained abroad, as in the Dayan case, poses special issues to the American litigator, 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.

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." 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. 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, Rule 804(b)(1) of the Federal Rules of Evidence, and the Confrontation Clause.

479. See infra notes 489-490 and accompanying text.
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.
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.

\(^488\) 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. 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.

Nonetheless, France has experienced a fragmented history with the jury. While the English version of the trial by jury was French in origin, 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; 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.

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.

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


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


493. Larivière, supra note 364, at 743-46.


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.
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 Jurs' 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.
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. Strömmwall & 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.  

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. 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. In fact, it was not until 1930 that open questions from the jury ceased, 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. 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, 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.
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.\footnote{Larivièreme, supra note 364, at 743-46.}

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.\footnote{Lindholm, supra note 80, at 1301.} 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.\footnote{Id. at 1304-05.} 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.\footnote{Id. at 1302.}

Lindholm found her hypothesis to be generally correct: law-enforcement was generally better able to judge for veracity than laypersons.\footnote{Id. at 1305.} 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.\footnote{Cf id. at 1312.} Of all three groups studied, police detectives were the most effective at determining accuracy of eyewitness statements, and laypersons the least.\footnote{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.} While judges were somewhat more accurate than laypersons,\footnote{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.} “[J]udges’ high hit rate was primarily due to their tendency to use
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.\footnote{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”\footnote{518} and therefore “have more difficulty when judgments concern an eyewitness’s memory for details.”\footnote{519}

Nevertheless, judges were not significantly more accurate than laypersons.\footnote{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.\footnote{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

\footnotesize{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.} 

\footnotesize{Id. at 1310–11. “Alternatively, judges’ response bias may be a result of their perception that the judgment task was difficult.” Id. at 1311.}  

\footnotesize{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.\footnote{522}{See supra notes 493–498 and accompanying text.}

Lindholm additionally discussed the change in perceptions between written, live, and taped testimony.\footnote{523}{Lindholm, supra note 80, at 1310–11.} In most Continental systems, for instance, judges will only judge testimony in a civil trial based on a written transcript,\footnote{524}{Tokson, supra note 480, at 1609.} 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.\footnote{525}{Id.

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.\footnote{526}{Id. 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 demonstrate a deep, cultural resonance that illustrates the paramount issue in legal transplantation: cultural relativism. 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. Roscoe Pound’s view of harmonizing disparate legal regimes within a single nation is problematic in the current legal landscape, with issues far beyond concepts of privacy and procedure; extreme examples are, for instance, challenges to the very concept of interest and usury. 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 Ballantine, 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. 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.

Particularly in the area of discovery, the manifestation of privacy is inevitably culturally unique. Yet, supranational entities in Europe have undertaken to change the nature of European law, procedure, economics, trade, and human rights. 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.

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 dissimilarity:

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

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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.


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

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.\textsuperscript{[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.\textsuperscript{[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.\textsuperscript{[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 in-
formation technology, such as the improved ability with which an
individual's movements and speech may be monitored and re-
corded.\textsuperscript{[548]} As a result of the emphasis on privacy from the state, as
opposed to the personification of privacy found in Europe, Ameri-
can courts have waffled over the issue of the limits of personal
integrity privacy rights while the EU and ECHR have taken more
proactive measures.\textsuperscript{[549]} In like measure, a greater role for the special
master may assist U.S. courts in overcoming the multitude of chal-
lenges that these changes bring as they tend to increase the
complexity and number of documents in any given litigation.

\textsuperscript{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).

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

\textsuperscript{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).

\textsuperscript{548} See, e.g., Froomkin, supra note 547, at 1533, 1535; Rule, supra note 547, at 220, 224–
25.

\textsuperscript{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 Im-
plementing 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. 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.

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.

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.