THE FRENCH *CONSTAT*: DISCOVERING MORE EFFICIENT DISCOVERY

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ABSTRACT

In France and some other Civil Code nations, the constatation (typically termed a constat) is a written report relating facts likely to lead to legal consequences. This report, prepared by a legally trained judicial officer called a huissier, may be either ordered by a judge or requested by a party. The constat has no American counterpart, but there are immense benefits—savings in both time and expense—to introducing a comparable process in the American legal system. The probativeness of findings through a constat-like mechanism equal what is found in the more adversarial, American pre-trial and trial processes. In combination with presumptions and burdens of proof, the constat has much to offer U.S. judges, masters, litigators, and—of course—the parties themselves. It is, indeed, a French advantage in civil procedure.

In the United States, steep costs in money and manpower are two of the most significant problems affecting the civil justice system. Discovery is a lengthy and expensive process, sometimes causing delays by months or years. Legal professionals, parties, and many others (e.g., business employees) may be ensnared in the adversarial maelstrom. Compared to the United States, the French civil legal system is generally quicker and less expensive, and the use of constats in the United States can provide similar results for its legal system. American adoption of the constat offers a number of benefits, including an improved discovery process.

Many or perhaps all of the statements and documents from numerous sources could be contained in a single document, and the preparer's costs could be distributed among the parties. An additional benefit would be the constat's evidentiary weight. It would be difficult to refute in court, and a report prepared by a skilled, legally-trained and highly regulated professional, whether court-appointed or privately chosen, would help reduce excessive or otherwise wasteful discovery. American constats also would deter meritless claims and encourage settlement. Additonally, the constats could be particularly useful in electronic discovery of internet records and, as another example, in building robust yet cost-effective claims or defenses in intellectual property disputes.

The professionally prepared constat-like instrument would be strong evidence in American courts, but procedures could be crafted to ensure that courts could strike, and parties could successfully challenge, an erroneous report. As in the French system, American lawyers could, as one more tool in their arsenal, have an additional or counter constat prepared, if necessary. In the event that a judge accepts the facts contained in a constat, despite contrary evidence, the decision could be reviewable under an abuse-of-discretion standard. These safeguards and the limited procedural scope of the constat as a statement of facts, not something ordinarily encompassing opinion, will help to ensure that its use is compatible with due process. The

American legal system can cost less and move more expeditiously if the United States adopts a constat-like document to assist in fact-finding.

I. INTRODUCTION

It is axiomatic that many legal disputes, even those deemed intractable, could be resolved more efficiently. Lawyers and judges understand that focusing on the essential elements of a case, with everything else winnowed away as early in the process as possible, often promotes the fair, fast, and comparatively cheap administration of justice.[1] One tool to advance this objective would be the use of statements of fact, or sworn reports, as commonly performed in the French and many other Civil Law systems. These statements, termed *constats* (translated as "findings" from the French word, *constatations*), are typically associated with the French legal professionals known as *huissiers de justice*.[2]

The *huissier* and the *constat* have no American equivalent,[3] and, fittingly, there is no simple English translation for the word *huissier*. Some *huissiers* provide service within the courts and tribunals by attending hearings, announcing the cases to be heard, and keeping order; in this role, they are known as *huissiers audienciers*,[4] functioning the same as the British

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[1] *See* FED. R. CIV. P. 1. Noting that the Federal Rules of Civil Procedure "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." *Id.*

[2] *Constat*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/constat [https://perma.cc/7QWJ-P2RC].

[3] However, according to a recent survey, twenty-eight of fifty-two responding countries indicated that they have judicial officers who carry out statements of fact which function as proof (i.e., establish the facts). Le grand questionnaire de l'Union Internationale des Huissiers de Justice [The Grand Survey of the International Association of Judicial Officers] para. 16, at questions 1-2, (Fr.), http://questionnaire2011.uihj.com/index.php?ID=1011971&questUIHJ_page=16 [http://perma.cc/3P8K-XFQL] [hereinafter UIHJ Survey]. In other words, they have *constats*—descriptions by a *huissier*, or like official, of material facts he/she witnesses that play a role in establishing proof (evidence). *Id.* Those thirty-four of the fifty-two responding nations saying "yes" to the constat are Algeria, Belgium, Benin, Bulgaria, Burkina Faso, Canada, Chad, Congo, Czech Republic, France, Gabon, Haiti, Ivory Coast, Latvia, Lithuania, Luxembourg, Mali, Mauritius, Moldavia, Montenegro, Morocco, Niger, Norway, Poland, Romania, Russia, Scotland, Senegal, Slovakia, Slovenia, Switzerland, Thailand, Togo, and Uganda. *Id.* Four other nations, out of the fifty-two, state that they use *constats* developed by *huissier*-like persons to establish proof under some conditions. *Id.* at question 1 (not counting nations already otherwise saying they use a *huissier*-like person (Albania, Georgia, Hungary, and Spain)). In effect, about three-fourths of responding nations use a statement of fact in some format, with fourteen nations saying that they do not: Denmark, England, Finland, Germany, Greece, Kazakhstan, Macedonia, Montenegro, Poland, Portugal, Serbia, South Africa, Sweden, and the United States. *Id.*

[4] CHRISTIAN COINTAT, LA COMMISSION DES LOIS CONSTITUTIONNELLES, DE LEGISLATION,

"usher."[5] *Huissiers* are also responsible for serving process[6] and executing judicial decisions,[7] like the British "bailiff."[8] The American definition of "bailiff" encompasses both the British roles of "usher" and "bailiff;" however, it remains an insufficient translation of *huissier*, as French *huissiers* perform operations above and beyond those assigned to American bailiffs.[9] France's *Chambre Nationale des Huissiers de Justice* ("National Chamber") lists additional functions of the *huissiers,* which include the collection of debts, drafting of documents, legal consultation for businesses, administration of buildings, sales at public auction, and performance of *constats*.[10] Their work also extends to the authentication of legal documents, recovery of property, and enforcement of judicial orders running the gamut from physical property transfers, electronic transfers, and highly personal matters such as child custody rights and visitation awards.[11] At the very least, a basic, but more comprehensive translation of the term *huissier* than "mere" bailiff is the still incomplete trio of court usher, bailiff, and server of official documents.[12] It is the execution of *constats*, and its potential benefits to the

DU SUFFRAGE UNIVERSEL, DU REGLEMENT ET D'ADMINISTRATION GENERALE [COMMITTEE OF LAWS], S. REP. NO. 345 (2002) (Fr.), http://www.senat.fr/rap/r01-345/r01-3451.pdf [https://perma.cc/9RVR-GAMU] [hereinafter FRENCH SENATE REPORT]. The French word for hearing is *audience*, explaining the "*audiencier*" distinction. *Audience*, LAROUSSE CONCISE DICTIONARY: FRENCH ENGLISH/ENGLISH FRENCH 249 (1st ed. 1993).

[5] *See What Does a Court Usher Actually Do?*, GUILLAUMES LLP SOLICITORS (Jan. 6, 2017), https://www.guillaumes.com/news/what-does-a-court-usher-actually-do [https://perma.cc/EY2J-VCKX].

[6] In its analysis on whether a Canadian corporation received sufficient service of process, the court recognized *huissiers* as acceptable persons under the Hague Convention to deliver service, further defining the term by its French roots as "process servers." Dimensional Commc'ns, Inc. v. OZ Optics Ltd., 218 F. Supp. 2d 653, 659 (D.N.J. 2002).

[7] FRENCH SENATE REPORT, *supra* note 4; Ordonnance no. 45-2592 du 2 novembre 1945 [Order No. 45-2592 of Nov. 2, 1945], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Nov. 3, 1945, p. 7163 [hereinafter Order].

[8] *Bailiff*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/bailiff [https://perma.cc/Z2N8-VH5W].

[9] *Bailiff*, BOUVIER LAW DICTIONARY (Stephen M. Sheppard ed., 2012).

[10] *Conseils*, LES HUISSIERS DE JUSTICE, http://www.huissier-justice.fr/conseils-57.aspx [https://perma.cc/56HY-CD68]; *Recouvrements amiables des petites créances*, LES HUISSIER DE JUSTICE – A VOTRE SERVICE, http://www.huissier-justice.fr/recouvrements-amiables-des-petites-creances-44.aspx [https://perma.cc/Y9LT-66FV]. *See generally* THIERRY GUINOT, L'HUISSIER DE JUSTICE: NORMES ET VALEURS 73–81, 165–223 (2004) (providing a leading *huissier*'s discussion of his profession's history, education, practices, and values, especially as they relate to the *huissier*'s exercise of his duties).

[11] GUINOT, *supra* note 10, at 165-213, 218-23.

[12] *See* Robert W. Emerson, *The French Huissier as a Model for U.S. Civil Procedure Reform*, 43 U. MICH. J.L. REFORM 1043, 1046-47 (2010) [hereinafter Emerson, *The French Huissier*].

American legal system, that are the focus of this article.

The *constat* is a (usually written) sworn report relating "a certain number of [factual elements] likely to lead to legal consequences" in order to preserve those facts as evidence.[13] When a private person retains a *huissier*'s services in drafting a *constat*, the *huissier* must be discreet: the reason for the *constat*, the information gathered, and even the identity of the party normally remain confidential.[14] Except as necessary to perform the *constat*, the *huissier* is expected to be discreet about the details of his factfinding activities—unless and until the *constat* is filed or otherwise introduced in a legal proceeding.[15] In the meantime, the *huissier* keeps these *constats* secure from disclosure.[16] A *constat* may be ordered by a judge or requested by an individual[17] and is used in varying situations that range from recording the state of a building before it is rented[18] to documenting a misrepresentation on a website.[19] As a

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13 Natalie Fricero, Professor of Law and Dir. of the Inst. of Judicial Studies, Univ. of Nice, Address at the Institutes of the National School of Procedure of Paris: A Propos du Constat d'Huissier de Justice [About the Report of the Huissier de Justice], at 1 (Sept. 9, 2008) (author's translation) (transcript on file with author).

14 Robert F. Taylor, *A Comparative Study of Expert Testimony in France and the United States: Philosophical Underpinnings, History, Practice, and Procedure*, 31 TEX. INT'L L.J. 182, 206 (1996). "[T]he expert must respect professional privileges, such as confidentiality. The parties can prohibit an expert from revealing any information obtained in the course of his investigations. Further, the rules of privilege and professional ethics forbid an expert from giving interviews about his mission." *Id.*

15 *See id.;* GUINOT, *supra* note 10, at 73-76, 143-48.

16 To meet the norms of confidentiality, the author has redacted or otherwise kept confidential the names of parties for whom a *constat* was drafted but has not been disclosed, such as in litigation.

17 Fricero, *supra* note 13, at 3; Order, *supra* note 7. For an example of a judge ordered *constat*, *see* Chardon Constat, *Huissier de Justice*, member of *la société professionelle Xavier Bariani et Mathieu Chardon*, Versailles, France, Nov. 15, 2005 (on file with author) (armed with a court order and accompanied by the landlord and a police officer, the *huissier* entered an apartment, took numerous photographs and wrote his observations) [hereinafter Chardon Constat Nov. 15, 2005]. For a brief discussion in layperson terms, with examples of possible subjects for a *constat*, see *The Statement of Facts*, LES HUISSIERS DE JUSTICE, http://www.huissier-justice.fr/en/the-statement-of-facts-321.aspx [https://perma.cc/3AXM-MTKL].

18 That would be done both for private apartments, (Chardon Constat, *Huissier de Justice*, member of *la société professionelle Xavier Bariani et Mathieu Chardon*, Versailles, France, May 31, 2010 (on file with author) [hereinafter Chardon Constat May 31, 2010]), and for retail spaces, (Chardon Constat, *Huissier de Justice*, member of *la société professionelle Xavier Bariani et Mathieu Chardon*, Versailles, France, Apr. 30, 2010 (on file with author) [hereinafter Chardon Constat Apr. 30, 2010]).

19 Chardon Constat, Xavier Bariani, Jean-Michel Bobin & Mathieu Chardon, Versailles, France, June 13, 2008 (on file with author) (statement of *huissier* Chardon as to what he observed on the website of a company that co-edited a book with Chardon's publisher client—"Name Redacted" Editions—but now, as observed in the *constat*, describes itself online as the

rule, a *constat* only possesses the value of simple information[20] in court;[21] but, in practice, evidence contrary to a *constat* is not easily admitted.[22] Thus, a *constat* is a powerful tool for private parties anticipating litigation due to the evidentiary value afforded to it by presiding judges. In other words, a *constat* may create a presumption of truth that puts the burden to rebut that presumption on the opposing party. At the very least, those concepts—presumptions and burdens—are useful in comparing this civil code concept within the American legal system.

If a new practice, modeled after the *constat*, were introduced into the American legal system, it might contribute to a more efficient discovery process by reducing the time and money spent on lawsuits. This proposed practice could prevent some poorly reasoned or factually groundless cases from going forward. However, some changes to both the current American system and the *constat* would be necessary to facilitate its execution and acceptance in the American legal system. Such changes would include introducing a variation of the *constat* compatible with American rules of evidence, and creating a limited master[23] with powers and constraints more similar to those of a *huissier*.

II. HUISSIER AND THEIR REPORTS

A. *The Huissier Profession*

1. Functions, Education, and Regulation

As mentioned above, *huissiers* have multiple functions that include, and exceed, those of the American bailiff.[24] The *huissier* is simultaneously an "*auxiliare de justice*,"[25] an "*officier ministériel*,"[26] and a "*professionnel*

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sole editor of that book about a popular French singer, rather than being the co-editor with "Name Redacted" Editions) (on file with author) [hereinafter Chardon Constat June 13, 2008].

[20] Order*, supra* note 7.

[21] *Id.*

[22] Fricero, *supra* note 13, at 11.

[23] *Master,* BLACK'S LAW DICTIONARY 1123 (10th ed., 2014) ("A parajudicial officer (such as a referee, an auditor, an examiner, or an assessor) specially appointed to help a court with its proceedings . . . usu[ally] with a written report to the court. Fed. R. Civ. P. 53. – Also termed (in sense 2) *special master*.").

[24] *See supra* text accompanying notes 4-12.

[25] As an *auxiliare de justice*, the *huissier*'s role is exactly what it seems: he is an auxiliary of justice who facilitates its administration and proceedings. Alexandre Mathieu-Fritz, *Les représentations sociales de la profession d'huissier de justice* [*The Social Representations of the Huissier de Justice Profession*], 54 DROIT ET SOCIETE 491, 494 (2003) (Fr.).

[26] *Huissiers* also benefit from their status as ministerial officers who are given a "piece of the public power" after being appointed by the Minister of Justice. *Id.*

libéral."[27] Some *huissiers* are required to take on the *huissier audiencier* role and provide service at court hearings;[28] when necessary, some *huissiers* may also perform *consultations* and interrogate witnesses on a case-by-case basis.[29] *Huissiers also* enjoy a monopoly on the service of process and the execution of judicial decisions.[30] They are authorized to collect any debt, even without a judicial order, carry out *constats*, and act as public auctioneers when needed.[31] Private clients most frequently request *constats*,[32] while judges may request a *huissier* for fact-finding or judicial liquidation proceedings.[33] Thus, a *huissier* serves not only a far-reaching function in the French legal system, but one unique to the profession.[34]

Another difference between French *huissiers* and American bailiffs is the level of education and training required. Bailiffs are required to have a high

[27] The *huissier* is considered to be a *professionnel libéral* because he manages his own practice and is paid based on the volume of the services he performs, although his fees are set by the government. *Id.* Huissiers must also purchase an "*etude*," a practice, which is bestowed for life and becomes part of their inheritable assets. *Id.*

[28] Mathieu-Fritz, *supra* note 25, at 507; *Métiers: Huissier Audiencier,* MINISTERE DE LA JUSTICE (Feb. 27, 2012), http://www.metiers.justice.gouv.fr/la-justice-hors-de-la-fonction-publique-12684/huissier-audiencier-26857.html [https://perma.cc/569D-VZ75].

[29] Interview with Christine Hugon, Professor, Univ. of Montpellier Law School, in Montpellier, France (June 10, 2015) (transcript on file with author) [hereinafter Interview with Christine Hugon]. For the technical meaning of the *consultation* that a judge's designee, *huissier* or otherwise, may perform, *see infra* notes 73, 80-82 and accompanying text.

[30] Order, *supra* note 7.

[31] *Id.* Under reforms enacted in 2015 and known as "the Macron Law" due to its chief proponent, then French Economy Minister (and now French President, since May 2017) Emmanuel Macron, the professions of *huissier* and of auctioneer will gradually merge to become a commissioner of justice as of July 1, 2022. Loi 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques [Law 2015-990 of August 6, 2015 for Growth, Activity, and Equal Economic Opportunities], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 7, 2015, p. 13537, art. 61 [hereinafter The Macron Law]. *See* Alfredo Allegra, *Procédures d'exécution: Fusion progressive des huissiers et commissaires-priseurs* [*Implementing Procedures: Progressive Merger of Bailiffs and Auctioneers*], LEXTIMES.FR (June 3, 2016, 9:36 AM), http://www.lextimes.fr/legislation/code-civil/procedures-dexecution/fusion-progressive-des-huissiers-et-commissaires-priseurs [https://perma.cc/W3KU-LXP6]; Sophie Claude-Fendt, *Une nouvelle profession: le commissaire de justice* [*A New Profession: The Commissioner of Justice*], EDITIONS FRANCIS LEFEBVRE (June 8, 2016), http://www.efl.fr/actualites/affaires/themes-divers/details.html?ref=ui-56098e44-2976-4e4a-8e14-13367e31cd12 [https://perma.cc/8M5G-WLZ9].

[32] Interview with Christine Hugon, *supra* note 29.

[33] THE JUDICIAL OFFICER IN THE EUROPEAN UNION: FRANCE, INTERNATIONAL UNION OF JUDICIAL OFFICERS 3, http://www.uihj.com/en/ressources/10148/54/france-en.pdf [https://perma.cc/RJR8-8Q6B] [hereinafter FRENCH JUDICIAL OFFICER].

[34] This function, including the practice of executing *constats*, is found in many nations besides just France. *See* UIHJ Survey, *supra* note 3.

school degree or equivalent, and, at some locations, they must also have some college education or prior work experience.[35] An aspiring *huissier*, on the other hand, must be of French nationality, obtain a master's degree (four years of university studies) of law, complete a two-year program as a *huissier* trainee with a specialized curriculum, and successfully pass a professional examination.[36] Under these standards, *huissiers* possess the same level of university education as French lawyers and judges.[37]

The *huissier* profession is, for the most part, self-regulated, with significant roles played by the National Chamber as well as regional and departmental chambers of *huissiers*.[38] Most jurisdictional disputes related to *constats* have, however, presumably been rendered moot by a recent decree, promulgated to carry out provisions in reforms known as the Macron Law.[39] The decree took a heretofore limited, local power to make findings of fact (*constatations*) and dramatically expanded that power by providing each *huissier* with nationwide authority, effective January 1, 2017.[40] More broadly, the respective chambers and their allocation of responsibilities help to further the integrity of the profession, perhaps most importantly the appearance thereof, as well as to preserve the neutrality (and, again, the manifestation thereof) that is essential to the *huissier* role. In effect, by bolstering the professionalism of *huissiers*, this multi-layered regulatory regime can continue to boost these judicial officers' public support and influence, especially as outdated, internal battles over territory disappear and the *huissiers* are free to operate nationally as they make findings of fact.

2. A Negative Social Image

Despite the high level of education required of *huissiers* and the important check on the profession served by the chambers, *huissiers* suffer from a

[35] BUREAU OF LAB. STAT., U.S. DEP'T OF LABOR, *Correctional Officers and Bailiffs, in* OCCUPATIONAL OUTLOOK HANDBOOK (2015), http://www.bls.gov/ooh/protective-service/correctional-officers.htm [https://perma.cc/6VAM-9VKB].

[36] FRENCH JUDICIAL OFFICER, *supra* note 33, at 1.

[37] Mathieu-Fritz, *supra* note 25, at 513.

[38] Order, *supra* note 7.

[39] *See* The Macron Law, *supra* note 31.

[40] Décret 2016-1875 du 26 décembre 2016 relatif à la compétence territoriale des huissiers de justice [Decree 2016-1875 of December 26, 2016 on the Territorial Jurisdiction of Bailiffs], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 28, 2016, no. 0301, at pmbl. *See* Mathilde Robert & Morgane Jouan, *La compétence territoriale des huissiers de justice étendue* [*The Territorial Jurisdiction of Judicial Officers is Extended*], PARABELLUM, Feb. 2, 2017 (noting that the decree dramatically expanded the *huissiers*' authority to perform *constats* from a relatively small, limited territory to an entirely national scope).

negative social image at odds with their social utility.[41] Conscious of the profession's poor reputation, the National Chamber has requested multiple opinion polls in the past few decades and has collected information from newspapers, radio, and television.[42] A survey conducted by IPSOS (a French market research company) in 1995 and 1996 revealed an almost evenly divided public opinion regarding *huissiers*, with a split between a "somewhat good" (46.8%) impression and a "somewhat bad" (27.0%) or "very bad" (13.5%) impression.[43] The profession was shown to be misunderstood, as only 36.7% of respondents knew that *huissiers* have *professionnel libéral* status;[44] most participants associated the words "*huissier de justice*" with seizures, debt recovery, or enforcing the law,[45] and only 8.7% associated them with performing *constats*.[46] Over one-half of the individuals surveyed by IPSOS agreed that one cannot converse or come to agreements with *huissiers*, that *huissiers* do not inspire trust, that *huissiers* do not treat debtors humanely, and that *huissiers*' fees are high.[47] However, the majority of individuals also agreed that the profession is socially useful and its members effective.[48] The IPSOS survey further found that, unsurprisingly, people who had voluntarily encountered a *huissier* were more likely to possess a favorable opinion of *huissiers* than those whose encounter was involuntary.[49]

[41] GUINOT, *supra* note 10, at 17 (noting the negative image of *huissiers*); Mathieu-Fritz, *supra* note 25, at 492. In films, *huissiers* are portrayed as racist, unscrupulous, and opinionated. *Id.* at 495. In literature, they are the subject of "intense criticism," *id.*, and "enjoy[] a negative image with which intrusion and death are constantly associated." *Id.* at 496. The written press does its part with articles about violence, both by and against *huissiers*, articles discussing *huissiers* accused of committing illegal acts, and articles describing how to resist the seizure or eviction actions of a *huissier*. *Id. See also* Irène Inchauspé & Muriel Motte, *Comme avec Dieudonné, les huissiers sont souvent en première ligne*, L'OPINION (Jan. 23, 2014), http://www.lopinion.fr/23-janvier-2014/dieudonne-huissiers-sont-souvent-en-premiere-ligne-8502 [https://perma.cc/V4XU-AZKK] (describing how *huissiers* are often greeted with insults, intimidations, weapons, and dog bites when attempting to perform their functions in the wake of France's financial crisis).

[42] Mathieu-Fritz, *supra* note 25, at 493.

[43] *Id.* at 498-99 (citing IPSOS, *L'image des huissiers de justice*, 4 (Mar. 1996)).

[44] *Id.* at 498 (citing IPSOS, *L'image des huissiers de justice*, 4).

[45] *Id.*

[46] *Id.* at 498 n.21.

[47] *Id.* at 499.

[48] *Id.*

[49] *Id.* at 500 (citing IPSOS, *L'image des huissiers de justice*, 19). Farmers, office employees, and retirees were more likely to view *huissiers* positively, while shopkeepers, commercial artisans, heads of companies, factory workers, and intermediaries were more likely to hold negative opinions. *Id.* The survey further showed that favorable opinions of *huissiers* decrease as the rate of urbanization increases. *Id.* at 501 (citing IPSOS, *L'image des huissiers de justice*, 19). A possible explanation is that the interactions of a rural *huissier* with debtors "have a greater chance of being and appearing more personalized." *Id.*

This difference between a chosen and a compelled contact may be analogized to American views on the criminal justice system, which divide along the lines of political ideology[50] and race[51] and which may correspond to a general trend toward distrust of government.[52]

For the *huissier*, the public miscalculation of roles evidently has continued to the present. For example, a November 2012 public opinion survey found that, despite evictions representing just 1% of the documents drawn up by *huissiers*, half of the French public thinks that evictions are the core business for *huissiers*.[53] Furthermore, the second highest number of French respondents, nearly 30%, spontaneously assert that the *huissier*'s job is to recover unpaid debts, when *huissiers* actually have, as discussed previously, multiple roles.[54] For instance, according to the President of the French National Chamber of Huissiers, 99% of what they do is gather proof, such as through *constats*.[55]

The reason for the overall negative image of *huissiers* is complex. Certainly, ignorance may *not* be bliss, and average citizens may not know the basic tenets of the French judicial system generally or the actual roles and influence of *huissiers* in particular.[56] The fact that *huissiers* usually have a

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[50] Justin McCarthy, *Americans Divided on Priorities for Criminal Justice System*, GALLUP (Oct. 14, 2016), http://www.gallup.com/poll/196394/americans-divided-priorities-criminal-justice-system.aspx [http://perma.cc/83BS-64HJ].

[51] Frank Newport, *Public Opinion Context: Americans, Race, and Police*, GALLUP (July 8, 2016), http://www.gallup.com/opinion/polling-matters/193586/public-opinion-context-americans-race-police.aspx [http://perma.cc/XMT6-NWQ2]. In 2015, public perception of law enforcement officers declined because of the bias exercised against minorities; however, recent polls show an increase to about 3 in 4 Americans stating that they have "a great deal" of respect for local law enforcement. Justin McCarthy, *Americans' Respect for Police Surges*, GALLUP (Oct. 24, 2016), http://www.gallup.com/poll/196610/americans-respect-police-surges.aspx [http://perma.cc/YVX4-CXCP]. This is the highest level of respect in nearly fifty years. Mark Berman, *American respect for police reaches highest level in 50 years*, WASH. POST (Oct. 25, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/10/25/american-respect-for-police-reaches-highest-level-in-50-years/?utm_term=.46e53d1a0e72 [http://perma.cc/E9H5-CXEB].

[52] The American public's regard for even the most respected branch of government, the judiciary, has slipped significantly—from 76% in 2009 to 53% six years later. Jeffrey Jones, *Trust in U.S. Judicial Branch Sinks to New Low of 53%*, GALLUP (Sept. 18, 2015), http://www.gallup.com/poll/185528/trust-judicial-branch-sinks-new-low.aspx [https://perma.cc/9AXR-WR5G].

[53] Catherine Rollot, *Les huissiers veulent améliorer leur image* [*The huissiers would like to improve their image*], LE MONDE (Apr. 2, 2013, 11:19 AM), http://www.lemonde.fr/societe/article/2013/04/02/les-huissiers-veulent-ameliorer-leur-image_3151857_3224.html [https://perma.cc/YAE6-QMSC].

[54] *See supra* notes 4-12 and accompanying text.

[55] Rollot, *supra* note 53.

[56] Similar to the findings regarding the *huissier*, confidence in the court system in

social status and standard of living higher than the debtors they pursue may fuel the public distaste.[57] Other causes include the *huissiers'* power to violate the privacy of the home[58] and the strong association between them and the "coercive dimension of seizure or forced [debt] recovery."[59] Finally, the historical vilification of *huissiers* in written form certainly "tend[s] to explain the negative character of the representations associated with the profession."[60] Legal texts and press articles during the *Ancien Régime* (1453-1789) related the numerous complaints filed against *huissiers* for extortion and illegal procedures and the "public clamor" raised by such offenses.[61] This created a stereotype of "the dishonest *huissier* who abuses the power that is given to him," an image kept alive even today by the media attention over cases involving *huissiers*.[62]

One infamous example is that of Bernard Marche, a Lyonnais *huissier* found guilty of forgery, bankruptcy fraud and other scams, and "aggravated abuse of trust" for his activities within a "*phantom* practice."[63] Marche fled France after his hearing, taking another 1 million francs on top of an embezzled 1.7 million francs, and was on the run for six years until he was finally caught in the United States.[64] More recently, Lyon experienced another financial *huissier* scandal when a criminal court convicted two local *huissiers*, Henri Leroy and Bruno Rosnelont, of embezzling 120,000 euros.[65]

America improves with knowledge and experience. A 1999 study by the American Bar Association revealed that a higher level of knowledge regarding the courts and justice system correlated with an increased level of confidence. However, the study found that even experienced respondents had little confidence in lawyers and the legal profession. AM. BUS. ASS'N, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 7 (Feb. 1999), http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/perceptions_of_justice_system_1999_1st_half.authcheckdam.pdf [http://perma.cc/7KL9-8N5D].

[57] Mathieu-Fritz, *supra* note 25, at 503.

[58] *Id.* at 505.

[59] *Id*. (quoting IPSOS, *L'image des huissiers de justice,* at 10).

[60] *Id.* at 504.

[61] *Id.*

[62] *Id.*

[63] Search for Bernard Marche, BIBLIOTHEQUE MUNICIPALE DE LYON, http://numelyo.bm-lyon.fr/include/babelyo/app/01ICO001/ (type "Bernard Marche" in the search bar; then select "Marche, Bernard" from the left column titled "par personalité;" and click on the second photograph); *12 ans de prison ferme requis à l'encontre de Bernard Marche* [*12 Years in Prison Required Against Bernard Marche*], MLYON (Jan. 24, 2002, 7:53 PM), http://www.mlyon.fr/6157-12-ans-de-prison-ferme-requis-a-l-encontre-de-bernard-marche.html [http://perma.cc/MCU2-6S3Q] [hereinafter *Huissier on the Run*].

[64] *Id.*

[65] Timeo Danaos, *Scandale financier: deux huissiers Lyonnais saisis par la justice* [*Financial Scandal: Two Lyonnais Huissiers Seized by Justice*], LE POST (Apr. 7, 2009, 5:34

It is not surprising that *huissiers* are viewed as a "necessary evil" by many[66] and despised by some, especially in their capacity as debt collectors.[67] Still, *huissiers* more strongly resemble lawyers in the United States than "repo men" who haul away automobiles in the dead of night. They are highly educated in the law of their country[68] and are governed by professional organizations as well as the courts.[69] Although some *huissiers* draw negative attention to themselves and the profession when breaking professional rules and laws,[70] the same may be said for American lawyers.[71] Ultimately, the *huissier* profession, especially the *constat* function, merits a closer look as a possible solution to American procedural problems.

PM), http://archives-lepost.huffingtonpost.fr/article/2009/04/07/1487093_lyon-deux-huissiers-saisis-par-la-justice.html [https://perma.cc/S3NK-QLR4]. In Toulouse, a *huissier* and his business partner were tried for fraud in running an auction house. *Correctionnelle. Un huissier comparaît pour une vente aux enchères truquée* [*Courts. A Huissier on Trial for a Rigged Auction*], LA DEPECHE (Oct. 9, 2008, 10:30 AM), http://www.ladepeche.fr/article/2008/10/09/480632-Correctionnelle-Un-huissier-comparait-pour-une-vente-aux-encheres-truquee.html [https://perma.cc/GT8X-ASXC] [hereinafter *Rigged Auction*]. Goods entrusted to be sold there were allegedly let go at prices below their market value and customers complained that they were not paid the full amount awarded to them. *Id.* An entire office of *huissiers* received a pecuniary sanction from the *Commission nationale de l'informatique et des libertés* ("CNIL" is a French administrative authority that protects personal data and privacy) after not complying with its order regarding personal data collected in the files of debtors. *Délibération n° 2006-173*, LEGIFRANCE (June 28, 2006), https://www.legifrance.gouv.fr/affichCnil.do?id=CNILTEXT000017652196 [https://perma.cc/VAM2-VMDT]. The order was made after a CNIL delegation discovered that the office was using an area in its electronic files meant for notes to store very personal information on debtors such as their mental or physical health history, amount of governmental support received, and whether the *huissier* or employee found them to be pleasant. *Id.* The comments contained in the files included: "'HIV-positive for 23 years', 'ex-police officer accused of theft then discharged', 'depressed', 'cancer of the intestines operation', 'incarcerated [man] awaits conditional release', 'suicide attempt', 'odious', 'stupid bitch', etc.'" *Id.*

[66] Mathieu-Fritz, *supra* note 25, at 499.

[67] *Id.* at 500.

[68] *See generally* FRENCH JUDICIAL OFFICER, *supra* note 33.

[69] Order, *supra* note 7.

[70] *See Huissier on the Run, supra* note 63; Danaos, supra note 65; *Rigged Auction*, *supra* note 65; *see also* JACQUES DUPLESSY & GUJILLAUME DE MORANT, LE TOUR DE LA FRANCE DE LA CORRUPTION (2016) (investigative journalists' account detailing a trail of corrupt activities, principally on the part of French officers of the law, including a mayor, a mediator, and a *huissier* each entrusted with others' property and liberty interests).

[71] Karen H. Rothenberg, *Recalibrating the Moral Compass: Expanding "Thinking Like a Lawyer" into "Thinking Like a Leader,"* 40 U. TOL. L. REV. 411, 411 (2009).

B. *The Huissier's Factfinding Report, the Constat*

To understand the role of the *constat*, it is necessary to distinguish between three main kinds of reports: the *constat*, the consultation, and the expertise. The *constat* is a compilation of factual findings and situations, which omits opinions on matters of fact or law.[72] The consultation is usually an oral statement of facts to the court, which does not require complex investigation.[73] The expertise is the most complicated of the three functions, as it requires experts to research and draft a discussion on a specific issue for the court.[74] As the *constat* is relatively low-cost and high-volume—an effective technique to supplement and accelerate the discovery process—it is the *huissier's* *constat*-creating function that is recommended for implementation into the American legal system rather than the consultation or expertise reports.[75]

There are two different types of *constats*: those ordered by a judge[76] and those requested by a private citizen.[77] Both types of *constats* are authorized by Senate order that defines the value of a *constat* as "simple information."[78] Although a *constat* in either situation is limited to "purely material findings," considerable differences exist between a *constat* backed by a judicial order

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[72] Emerson, *The French Huissier*, *supra* note 12, at 1080.

[73] *Id.* at 1082 ("The *consultation* serves as a middle ground between the *constatation*, which is only useful in relatively simple fact-finding matters, and the *expertise*, which requires complex formalities: 'When a purely technical question does not require complex investigation, the judge may instruct the person he/she shall appoint to provide him/her with a simple opinion.'").

[74] *Id.* The expertise can be separated into three different categories: *expertise aimable* (friendly expertise), *expertise officieuse* (informal expertise), and *expertise judiciaire* (judicial expertise). *Id.*

[75] The *consultation*'s oral nature may simply make it, in the adversarial contest of testimony, an additional "round" in the American courtroom. As for the *expertise*, to a certain extent these already on occasion have been ordered, albeit relatively rarely, by U.S. courts. *See* Emerson, *The French Huissier*, *supra* note 12, at 1084 n.234, 1116 (on American court-appointed expert witnesses and masters, respectively); Robert W. Emerson, *The Neutral Factfinder as a Pathway to Legal Reform: Examples from Franchising*, 10 VA. L. & BUS. REV. 63, 82-84 (2015) (on court-appointed expert witnesses and masters) [hereinafter Emerson, *The Neutral Factfinder*]. Much more likely in the American legal system is that, rather than a judge ordering such an expensive report, the parties directly hire their own experts. *See* discussion *infra* Section III.E.2 (proposing that U.S. judges appoint a limited form of master in order to perform *constat*-like functions).

[76] Emerson, *The French Huissier*, *supra* note 12, at 1081 n.214 ("The judge may order a *constatation* at any time during the proceedings . . . .") (citing CODE DE PROCEDURE CIVILE [C.P.C.] arts. 238, 249 para. 1, 253 (Fr.)), *translated in* THE FRENCH CODE OF CIVIL PROCEDURE IN ENGLISH 47-49 (Christian Dodd trans., 2006).

[77] Fricero, *supra* note 13, at 1.

[78] *Order*, *supra* note 7; Emerson, *The French Huissier*, *supra* note 12, at 1081 n.214.

and one that is not.[79]

Judicially ordered *constats* are governed by the *Code de Procédure Civile* ("CPC") which allows a judge to "commission any person of his choice to [inform the judge] in the form of findings, consultation or an expertise on a question of fact . . . ."[80] The judge may appoint a *huissier* either of his own will or at the request of a party.[81] General provisions covering consultations, expertise, and *constats* state that *huissiers* must complete their duties "conscientiously, objectively and impartially."[82] Moreover, *huissiers* must report all information pertaining to the questions at hand, but may not reveal other information discovered during his mission.[83] The judge ultimately controls the mission and is not bound by the findings of the *huissier*.[84] The CPC provisions specific to *constats* further limit the *huissier* by prohibiting him from giving his opinion on the possible "factual and legal consequences" of his findings.[85] The CPC also enables the judge to order a *constat* "at any time including at the conciliation stage or during the deliberation."[86]

Despite the limitations placed on them as observers, when *huissiers* execute a *constat* by order of a judge, they "act as an auxiliary of justice and [have] wider powers at [their] disposal."[87] For example, they may perform *constats* in places that are privately owned but "open to the public" (subway, airport, restaurant, etc.) without the permission of the owner, which they would otherwise need if working for an individual.[88] They may also enter private spaces without consent of the person who has use of the premises, whereas a *huissier* working for an individual must obtain either consent or a

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[79] *Id. See generally* MARIE-PIERRE MOURRE-SCHREIBER, LA PREUVE PAR LE CONSTAT D'*HUISSIER* DE JUSTICE (2014).

[80] *CODE DE PROCEDURE CIVILE* [C.P.C.] [Civil Procedure Code] art. 232, *translated in* LEGIFRANCE, https://www.legifrance.gouv.fr/content/download/1962/13735/version/3/. . ./Code_39.pdf [https://perma.cc/9F24-R9VT] [hereinafter C.P.C.] (explaining that even though the judge is not legally obliged to choose a judicial officer [*huissier*] to perform statements of fact [*constats*], it is always [*a huissier*] that he appoints). Interestingly, the provisions governing the judicial *constat* apply to all French courts, including courts of commercial litigation. French commercial litigation is characterized by its speediness and informality. JOHN BELL ET. AL., PRINCIPLES OF FRENCH LAW 2 (2d ed. 2008). Indeed, commercial disputes are rapidly resolved by law administered by commercial men and women, rather than by professional judges. *See id*. at 48.

[81] *See* C.P.C., *supra* note 80, art. 232.

[82] *Id.* arts. 235, 237.

[83] *Id.* art. 244.

[84] *Id.* arts. 236, 246.

[85] *Id.* art. 249.

[86] *Id.* art. 250.

[87] Fricero, *supra* note 13, at 3.

[88] *Id.* at 6.

judicial order.[89] Additionally, a *huissier* has the power to request documents from parties or third parties, with the support of the judge if necessary.[90]

On the other hand, the large majority of *constats* are created at the request of private individuals or companies, and do not fall under the above-mentioned CPC provisions concerning judicially-mandated *constats*.[91] All that is necessary for one to obtain such a *constat* is a telephone call to a *huissier* explaining the situation and expressing the desire for a report to be made.[92] The mission of the *constat* is therefore set by the individual requesting it. This aspect of the individual-requested *constat* requires certain safeguards to protect the non-requesting opponent's rights.

Typically, in France, the right of *contradictoire* ("contradiction") allows the opposition to examine and challenge the *huissier*'s findings of fact, conclusions, or analyses.[93] This right is similar to the confrontation rights given to criminal defendants in the American legal system, guaranteeing them the ability to confront all witnesses and evidence brought against them,[94] and the due process rights of any defendant to receive notice and affording them the opportunity to present their objections.[95] The principle of contradiction requires "full disclosure of all facts, including documents and depositions, used as the basis for oral arguments."[96] However, the principle does not apply when a *constat* prepared at an individual's request is created at a time when litigation is not pending.[97] For those *constats* to be admitted to judicial proceedings, they must be "communicated to the adversary in due course, like other papers and documents," since the principle of contradiction did not apply to its creation.[98]

There are some other restrictions on privately initiated *constats*, including situations when the *huissier* must refuse to execute it. When the *huissier* faces

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[89] *Id.*

[90] C.P.C., *supra* note 80, art. 243.

[91] MOURRE-SCHREIBER, *supra* note 79, at 68-78.

[92] Interview with Christine Hugon, *supra* note 29; interview with Mathieu Chardon, Huissier, Versailles, Fr., and Sec'y of the UIHJ, Paris, Fr. (Jan. 27, 2016) (on file with author).

[93] Emerson, *The French Huissier*, *supra* note 12, at 1119.

[94] *Right of Confrontation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[95] Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 306 (1950).

[96] Taylor, *supra* note 14, at 188.

[97] Fricero, *supra* note 13, at 8. Ordinarily, judicially-mandated *constats* and some privately-requested *constats* would arise in the context of litigation and be subject to the right of *contradictoire. Id.*

[98] Fricero, *supra* note 13, at 8. Regarding the principle of communication, note that the right extends to *any* litigation about the circumstances leading to the request for the *constat* in the first place, but to apply it to all litigation ultimately affecting the parties seems excessive and impractical. Instead, notification about particular *constats* simply should, at a minimum, always be undertaken whenever it is likely that, for a current lawsuit, a *constat* will be submitted as evidence.

a physical or legal obstacle, such as personal illness or an illegal mission, the *huissier* has a duty to refuse.[99] *Huissiers* are also prohibited from carrying out *constats* concerning their relatives by blood or law.[100]

No matter who orders a *constat*, the *huissier* must always respect fairness, the rights of the defense, professional ethics, dignity, and privacy.[101] This means the *huissier* may not engage in any schemes which put him outside of his mission as an impartial and objective ministerial officer.[102] For instance, the *Conseil d'État*, the "supreme administrative court,"[103] held that a *constat* prepared at the request of an employer is not a "clandestine process of surveillance" that requires prior notice to an observed employee.[104] Thus, it is acceptable for a *huissier* to simply record his observations of the actions of an employee at work who is unaware of his presence.[105] However, having an employee shadowed is an "illicit means of proof, since it necessarily implies an attack on [his] private life," and therefore a *constat* made for the purpose of authenticating observations made during such a shadowing of someone's personal life is inadmissible as proof.[106] A *huissier* employing third persons in hopes of provoking certain actions from an employee is also unacceptable,[107] except in cases of discrimination.[108]

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[99] Fricero, *supra* note 13, at 3.

[100] Order, *supra* note 7.

[101] *See id.*

[102] *See id.* (noting how a *huissier*, working in tandem with his client, hid from the client's spouse and thus was able to secretly watch and report on a marital quarrel provoked by the client).

[103] MARTIN WESTON, AN ENGLISH READER'S GUIDE TO THE FRENCH LEGAL SYSTEM 87 (2d ed. 1991).

[104] Fricero, *supra* note 13, at 9; Conseil d'Etat [CE] [highest administrative court], June 7, 2000, N. 191828, https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000008064343&fastReqId=565532399&fastPos=1%20%20%20is%20English%20translation%20%20%20%20of%20%20 [https://perma.cc/AUM4-5NYR].

[105] Conseil d'Etat [CE] [highest administrative court], June 7, 2000, N. 191828, https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000008064343&fastReqId=565532399&fastPos=1%20%20%20is%20English%20translation%20%20%20%20of%20%20 [https://perma.cc/AUM4-5NYR].

[106] Cour de cassation [Cass.] [supreme court for judicial matters] soc., Dec. 6, 2007, not published in bulletin (Fr.) (no. 06-43392 on LEGIFRANCE), https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000017583764 [https://perma.cc/862E-42U4].

[107] Fricero, *supra* note 13, at 9; Cour de cassation [Cass.] [supreme court for judicial matters] soc., Mar. 18, 2008, Bull. civ. V, No. 65 (Fr.). A *huissier* had multiple third parties make cash purchases from a saleswoman and then inspected her sales register and cashbox after she had left. *Id.*

[108] Fricero, *supra* note 13, at 9. *See* Order, *supra* note 7.

A court will also reject a *constat* as evidence if it is inaccurate.[109] While the majority of the information in the *constat* may not be disputed,[110] the findings of the *constat* (even when collected properly) theoretically only have the value of simple information.[111] *Constats* are not binding on either the opposing party[112] or the judge.[113] The opposing party "may freely bring evidence to the contrary."[114] If a party brings a *constat* into the proceedings, the judge must at least look at it;[115] however, the judge may then evaluate "with supreme power the scope and meaning" of the *constat* and either admit or reject it.[116] The court thus has the unilateral ability to strike from pleadings "any redundant, immaterial, impertinent, or scandalous matter."[117]

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[109] Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., Apr. 1, 2009, Bull. civ. III, No. 79 (Fr.). In one example, a *huissier* measured the disputed distance from some trees to one side of a wall rather than to the middle of the wall as he should have; this inaccurate measurement caused his report to be deemed worthless. *Id.* In another example, the *huissier* gave a different square footage in his *constat* than was reported by an expert, which led the *Cour de Cassation* (French Supreme Court) to call the *huissier*'s report "an opinion from a person who is not an expert in calculation of surfaces and which as a result cannot be accepted." Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., Mar. 31, 2009, not published in bulletin (Fr.) (no. 07-21900 on LEGIFRANCE), https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000020485857&fastReqId=242888679&fastPos=1 [http://perma.cc/23G2-KP8K].

[110] *See* Fricero, *supra* note 13, at 12. Observations such as the date and the assertion of the existence of the request or order may be disputed. *See id.*

[111] Order*, supra* note 7.

[112] Fricero, *supra* note 13, at 11.

[113] C.P.C., *supra* note 80, art. 246.

[114] Fricero, *supra* note 13, at 11.

[115] *Id.* (citing Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., Sept. 25, 2002 (Fr.) (pourvoi no. 01-03129 on LEGIFRANCE), https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007443077&fastReqId=1123924358&fastPos=1 [http://perma.cc/V3SW-62BA]).

[116] Fricero*, supra* note 13, at 11 (citing Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Jul. 3, 2008 (Fr.) (pourvoi no. 07-16693 on LEGIFRANCE)), https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000019128146&fastReqId=1837054156&fastPos=1 [http://perma.cc/FYX4-XPWC]). In the United States, a judge can issue partial summary judgment rulings on individual issues or facts. FED. R. CIV. P. 56(a)&(g). If one party furnishes evidence like a *constat* that is substantial enough to sustain a motion for summary judgment, at least to that issue, then the other party inherits a production burden because Rule 56(c) requires parties to use discovery and not pleadings to assert that a dispute of fact exists. FED. R. CIV. P. 56(C).

[117] FED. R. CIV. P. 12(f). Under the Federal Rules of Evidence, the burden to argue for and seek a striking of evidence is on the parties. FED. R. EVID. 103. One such objection could be for misleading the jury. FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

Regardless, the *constat* seems to have a greater value than is indicated by these rules. In practice, the *huissier*'s status as ministerial officer gives greater credibility to the *constat*, and "evidence to the contrary, even though it can result from any means, is not easily admitted."[118] Additionally, the *Cour de Cassation* has held that for a court to "denature" a *constat*, either by "distorting [its] clear and precise words"[119] or by omitting its relevant findings, is a violation of the *Code Civil*.[120]

1. The Requirements of the *Constat*

As the written report of a *huissier*, the *constat*—no matter who requests it—is subject to certain CPC provisions requiring it to contain the "date, identity of the complainant, indication [when applicable] of the judicial decision having ordered the *constat*, [and the] full name and signature of the *huissier*."[121] The body of the *constat* contains two parts: the "genesis of the mission" and the "operations."[122] The first part simply states who requested or ordered the *constat* and why they did so.[123] The operations portion contains written physical observations often accompanied by visual proof such as photographs or computer screen prints.[124] The *huissier* may only record what they observe with their five senses;[125] they must keep their observations "purely material" by avoiding any explanation or interpretation

[118] Fricero, *supra* note 13, at 11. It is routinely asserted that "[i]n France, [the *huissiers'*] credibility is undisputed." Mathieu Chardon, Sec'y, Int'l Ass'n of Judicial Officers, Address at Ministry of Justice, Tallinn, Estonia (Mar. 1, 2002) (transcript on file with author) [hereinafter Chardon, Address at Ministry of Justice].

[119] Fricero, *supra* note 13, at 11 (citing Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., Apr. 3, 2001 (Fr.) (pourvoi no. 99-14541 on LEGIFRANCE), https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007418700&fastReqId=2134185488&fastPos=1 [http://perma.cc/RCD2-SCUN]). A court of appeal held that there were 5 television outlets and 5 telephone jacks although the *constat* stated that there were 6 television outlets and 7 telephone jacks. *Id.*

[120] Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., Jan. 20, 2009 (Fr.) (pourvoi no. 07-20922 on LEGIFRANCE), https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000020184024&fastReqId=91181000&fastPos=1 [http://perma.cc/S4WH-LTCC]. Despite one *constat* stating that the premises contained debris and furniture after the end of a lease and another stating that the keys had not been returned as of the day of the report, the lower court found that it was not proven that the tenant remained in the premises after the end of the lease. *Id.*

[121] Fricero, *supra* note 13, at 10.

[122] *Id.*

[123] *See id.*

[124] *See id.* at 11. *See generally* GUILLAUME DUBOS & JEROME TASSI, GUIDE DES SAISIES-CONTREFAÇONS ET DES CONSTATS 353-63 (2016).

[125] Chardon, Address at Ministry of Justice, *supra* note 118, at 8.

of the facts,[126] similar to the fact-based pleading requirements in American courts.[127] No one may tell the *huissier* which facts to record, and if a judge does, it "amounts to a delegation of the power to judge."[128] Similarly, if the facts permit a deduction to be made, as in a *constat d'adultère,* it must be made by the judge, not the *huissier*.[129] This principle applies beyond the *constat d'adultère* to any *constat* that involves some sort of logical deduction, such as when a *huissier* reports a misrepresentation made on a website.[130] The judge determines if there was, in fact, a misrepresentation, and the *huissier* will be required to disclose and assist in any fact-finding that the judge needs. Under CPC provisions, *huissiers* are required to provide this assistance even if it results in personal ramifications against the *huissier* because they are prohibited from giving opinions on the possible "factual and legal consequences" of their findings.[131]

The *huissier* must also be careful not to interrogate parties or third persons while preparing a *constat*.[132] If one of the parties is present and makes spontaneous declarations to the *huissier*, he may record them, but may not make comments or ask questions to maintain objective content.[133] Regarding third persons, a *huissier* making observations at the request of an individual "may conduct examinations [ask questions] for the sole purpose of clarifying his observations."[134] After a *huissier* gathers the appropriate information,

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[126] Fricero, *supra* note 13, at 4.

[127] FED. R. CIV. P. 8.

[128] Fricero, *supra* note 13, at 4.

[129] *Id*. The *constat d'adultère* (of adultery) "never records the adultery but an ensemble of related, neighboring facts which permit an adulterous relation to be deduced . . . ." *Id.*

[130] *See* Interview with Christine Hugon, *supra* note 29.

[131] C.P.C., *supra* note 80, art. 249. "The court also may appoint an *huissier*, who is a combination of a process-server and a private investigator for the court, and often helps complete the factual picture of the case." Nicolas Marie Kublicki, *An Overview of the French Legal System from an American Perspective*, 12 B.U. INT'L L.J. 58, 87 (1994).

[132] *Id.* at 4-5.

[133] *Id*. at 4. However, the force of the statements as evidence is questionable as the *Cour de Cassation* has stated that "he to whom the huissier's constat attributes statements may bring back evidence of their falsity by the simple production of his own documents to contradict them, without having to prove particular steps undertaken to make recognized the erroneous character of these declarations . . . ." Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 25, 2009, not published in bulletin (Fr.) (pourvoi no. 07-21980 on LEGIFRANCE), https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000020454172&fastReqId=1941957085&fastPos=1 [http://perma.cc/6ART-TH42].

[134] Fricero, *supra* note 13, at 5. (citing Cass. soc., Dec. 6, 2007 (pourvoi no. 06-43392 on LEGIFRANCE)), https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000017583764&fastReqId=224593209&fastPos=1 [http://perma.cc/862E-42U4]).

constats are presented in written form except in the rare circumstance when a judge asks for the findings to be presented orally.[135] When in written form, the *huissier* must have authored the *constat*, with the exception of any information verified and prepared by another ministerial officer.[136]

The subjects of *constats*, especially those ordered by private parties, vary widely.[137] *Huissiers* may be called to examine everything from an inherited piece of property to a woman's breasts after plastic surgery.[138] Owners of retail or private properties may wish to have a *huissier* document the condition of the space before a renter moves in,[139] or the new tenants may wish to do so.[140] *Constats* can also document conditions of buildings before or after renovations.[141] A husband may even wish to document the state of the conjugal home after a wife has left.[142] Other observations found in *constats* include: representations on a website; a house before construction began on neighboring lots; a stock of grocery products ruined by power failure and to be destroyed; the receipt of the rules of a game run by a beer company; the receipt and delivery of ballots for a company's internal election; a broken trailer hitch block on a train; damage and flooding in one store after a fire in another; a new fence that might encroach onto neighboring property; and the posting of a building license notice.[143]

French *huissiers* are called upon to create *constats* for a variety of reasons in the family law context. Before a lawsuit begins, or during its course, the *huissier* is often employed to collect evidence of misconduct, such as

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[135] C.P.C., *supra* note 80, art. 250; Fricero, *supra* note 13, at 10.

[136] Order, *supra* note 7. Moreover, the huissier must produce two identical original copies of the *constat*: one to be left with the court or other administrator, and the other to be kept by the *huissier*.

[137] Chardon, Address at Ministry of Justice, *supra* note 118, at 9.

[138] *Id.* at 10.

[139] *See supra* text accompanying note 17.

[140] Chardon Constat, *Huissier de Justice*, member of *la société professionelle Xavier Bariani et Mathieu Chardon*, Versailles, France, Apr. 1, 2010 (documenting a cash register, conveyor belt, and other objects left by previous tenant) [hereinafter Chardon Constat Apr. 1, 2010].

[141] *See*, *e.g.* Chardon Constat, *Huissier de Justice*, member of *la société professionelle Xavier Bariani et Mathieu Chardon*, Versailles, France, Mar. 11, 2010 (before neighbors began work on adjoining wall) [hereinafter Chardon Constat Mar. 11, 2010]; Chardon Constat, *Huissier de Justice*, member of *la société professionelle Xavier Bariani et Mathieu Chardon*, Versailles, France, Aug. 24, 2010 (after masonry company abandoned unfinished project) [hereinafter Chardon Constat Aug. 24, 2010].

[142] Chardon Constat, *Huissier de Justice*, member of *la société professionelle Xavier Bariani et Mathieu Chardon*, Versailles, France, Aug. 9, 2010 (an example of such a *constat*) [hereinafter Chardon Constat Aug. 9, 2010].

[143] Chardon Constat May 31, 2010, *supra* note 18; Chardon Constat Apr. 30, 2010, *supra* note 18.

between spouses, and to prepare a *constat* detailing text messages, e-mails, and other electronic correspondence.[144] This is an important function, as these types of evidence are commonly erased or no longer available when needed by the court in later proceedings, a concern often remedied by the increased use of electronic discovery in the legal context generally.[145] These communications can be used to demonstrate the breach of an agreement between spouses, or to show an infidelity.[146] The collection of this private information may come as a shock to some, but the *Cour de Cassation* has found this intrusion to be lawful, as long as it was not accompanied by fraud or violence.[147] The *constat* may also be used to inventory the property of the marital home, which can be beneficial if one spouse is claiming an item does not exist, or to show the couple's standard of living.[148] However, there are limits on a *huissier*'s fact-finding abilities in cases regarding family-relations; for example, when a husband requested that a *huissier* obtain evidence of his wife's insanity, the French court denied the request, reasoning that it exceeded privacy limitations and failed to respect human dignity.[149]

Nevertheless, a *huissier* is permitted, at the request of an employer, to prepare a *constat* describing e-mails and text messages received and sent by an employee from a work e-mail address or on a work phone.[150] The only limitation the *Cour de Cassation* has placed on a *huissier*'s power to delve into an employee's business communications is that the files or messages cannot be marked "personal."[151]

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[144] *Le constat d'Huissier de Justice utilisé comme mode de preuve dans le conflits familiaux,* CHAMBRE DES HUISSIERS DE JUSTICE DE PARIS (2012), http://www.huissiersdeparis.com/le-constat-dhuissier-de-justice-utilise-comme-mode-de-preuve-dans-les-conflits-familiaux/ [https://perma.cc/4W8Y-99BS] [hereinafter Family Law Publication].

[145] John H. Jessen et al., *Digital Discovery*, *in* MASSACHUSETTS CONTINUING LEGAL EDUCATION, INC., MASSACHUSETTS EXPERT WITNESSES § 10.1 (Peter Lauriat ed., 2010) ("As computer use and e-commerce have exploded in recent years, so too has the need for experts who are able to reliably retrieve and preserve electronic evidence for litigation purposes.").

[146] *Id.* § 10.9.

[147] *See* Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., June 17, 2009, Bull. civ. I, No. 07-21796 (Fr.).

[148] *See* Family Law Publication, *supra* note 144.

[149] Wallace R. Baker & Patrick de Fontbressin, *The French Référé Procedure – A Legal Miracle?*, 2 MIAMI Y.B. INT'L L. 1, 21 (1993). *See generally* Wallace R. Baker & Patrick de Fontbressin, *The French Référé Procedure and Conflicts of Human Rights*, 25 SYRACUSE J. INT'L L. & COM. 69 (1996).

[150] Xavier Berjot, *Droit: l'employeur peut consulter les SMS du téléphone professionnel du salarié*, LES ECHOS, Feb. 22, 2015, http://archives.lesechos.fr/archives/cercle/2015/02/22/cercle_124406.htm [https://perma.cc/JJR8-RC8V].

[151] *See* Cour de cassation [Cass.] [supreme court for judicial matters] soc., June 19, 2013,

Another interesting role of *huissiers* is to document the selling of counterfeit goods or the commission of other acts of infringement. Typically, a victim who has unknowingly purchased a counterfeit product, but later discovered its flaw, will employ a *huissier* to stake out the public shop where the counterfeit was sold and produce a *constat* documenting an empty-handed third party entering the shop and exiting with the alleged counterfeit.[152] This evidence is important, as France requires the plaintiff prove that the counterfeiter's shop is accessible to the public and visible from a public highway in order to establish the defendant is running an illegal enterprise.[153] The *huissier* can also be used if the counterfeit was sold over the internet; the *constat* will describe the IP address the alleged counterfeiter operates, how the *huissier* was able to find and access the website, details regarding the electronics the *huissier* used, etc.[154]

The *constat* is clearly a valuable tool for judges presiding over civil lawsuits and individuals or companies facing or anticipating legal action. When prepared correctly, the factual statements in the *constat* are generally taken as true, and certain elements are unchallengeable.[155] By covering a wide range of topics and executing their duties through highly trained well-regulated judicial officers, *constats* provide the courts with reliable information, allow judges to inform themselves on many routine situations, and permit private parties to create a record of almost any state of affairs.

2. The Patent-Infringement Cousin of the *Constat*: The *Saisie-Contrefaçon*

The *saisie-contrefaçon* is another unique duty of the *huissiers* limited specifically to patent infringement actions.[156] Used in French civil—and

Bull. Civ. V, No. 12-12138 (Fr.).

[152] Coraline Favrel & Nicole Bondois, *Feu le constat d'achat d'huissier en matière de contrefaçon?*, BRM AVOCATS, Apr. 11, 2011, http://www.brmavocats.com/avocats/2011/04/feu-le-constat-d'achat-d'huissier-en-matiere-de-contrefacon [https://perma.cc/YS8A-XV8H] (evaluating the legality of this use of the *huissier* in proving infringement).

[153] MICHEL ABELLO ET AL., GUIDE DES SAISIES-CONTREFAÇONS ET DES CONSTATS 337-39 (2016).

[154] *See Contrefaçon et constat d'huissier*, RESEAU D'AVOCATES D'AFFAIRES (Aug. 30, 2012), http://www.le-droit-des-affaires.com/contrefacon-et-constat-d-huissier-article67.html [https://perma.cc/8KXT-LGTK]; ABELLO ET AL., *supra* note 153, at 339-45.

[155] Legally a *constat* is like any other statement and can be rebutted, but in practice courts give constats considerable weight and tend to presume that the contents are true. *See* Jean Graham Hall & Douglas F. Martin, *PUBLIC LAW - Guidelines for a new profession*, 89 LAW SOC'Y'S GAZETTE 39, 23-25 (1992).

[156] Literally, "seizure-counterfeit." French to English Translation of *saisie-contrefaçon*, GOOGLE TRANSLATE, https://translate.google.com/?hl=en&tab=wT#fr/en/saisie-contrefaçon. Note, this title is technically accurate—a *constat* may be considered closely related to a finding

sometimes criminal—cases, the *saisie-contrefaçon* is an *ex parte* order granting the *huissier* the power to enter the alleged infringer's premises and seize evidence of infringement.[157] Similar to the *constat*, evidence gathered by the *huissier* is treated as a binding finding of fact.[158] Indeed, the majority of infringement cases turn on the existence of such evidence—cases that present *saisie-contrefaçon* evidence are usually decided in favor of the plaintiff, while cases without this evidence are often dismissed.[159]

The element of surprise is key to *saisie-contrefaçon* orders. The infringing party does not think to destroy or hide the evidence of infringement because the *saisie-contrefaçon* order is issued *ex parte*.[160] If the claimant believes that evidence of the infringement may exist in multiple locations, the seizures should all occur at the same time to maintain surprise.[161]

While the *saisie-contrefaçon* may appear on its face to be too intrusive—especially from an American perspective—it is not without its limitations. The order can only be granted in one of the seven *Tribunaux de Grande Instance* on the basis of a valid French or European intellectual property right—bases such as foreign patents do not suffice.[162] The judge has the discretion to limit the scope of the order and can require the claimant to post a bond insuring against potential loss to the infringer resulting from the seizure.[163] Furthermore, the order must specifically describe the property or documents to be seized; a claimant cannot request a *huissier* to conduct a general investigation.[164] Perhaps most importantly, the *huissier* must conduct the seizure exactly as described in the order.[165] Because the seizure is nearly

of fact, but the *contrefaçon* is an order to seize evidence. Both may, and often are, fulfilled by the work of *huissiers.*

[157] CODE DE LA PROPRIETE INTELLECTUELLE [INTELLECTUAL PROPERTY CODE] art. L. 615-5 (Fr.) [hereinafter C. PRO. INTELL.].

[158] *Les contrefaçons et les propriétés intellectuelles & industrielles*, GREGORY FOURGNAUD, http://huissier-78-fourgnaud.fr/huissier-78-yvelines/huissier-saisie-contrefacons-proprietes-intellectuelles-industrielles/ [https://perma.cc/KZV4-7B48] [hereinafter GREGORY FOURGNAUD].

[159] In fact, 80% of infringement actions involve a *saisie-contrefaçon*. Pierre Véron, *The Practice of Multi-jurisdictional Patent Litigation*, FORUM CONFERENCE (Jan. 9, 2009), https://www.veron.com/veron/publications/Colloques/The%20practice%20of%20multijurisdictional%20patent%20litigation_France.pdf [https://perma.cc/GY6N-HP5V].

[160] *Id.*

[161] *Id.*

[162] C. PRO. INTELL art. R. 615-1.

[163] *Id.* art. R. 615-2.

[164] *Id.* The *huissier* can either seize physical evidence or describe the evidence that he saw in a *saisie-contrefaçon* report. GREGORY FOURGNAUD, *supra* note 158. Either form of evidence has binding force in court. *Id.*

[165] In *Vetrotech Saint Gobain Int'l v. Interver*, the court entitled the *huissier* to ask all relevant questions but limited the questioning to those necessary to the investigation. Cour de

always conducted with independent third parties such as police or patent attorneys, the *huissier* must pay special attention to ensure the rest of his party does not stray from what was authorized in the *saisie-contrefaçon*.[166] If any trade secrets or otherwise sensitive information are gathered from the seizure, the court ensures that these records are kept confidential.[167] Finally, the claimant has fifteen days to bring an action using the findings from seizure.[168]

If any of these requirements are breached, the entire *saisie-contrefaçon* could be declared void.[169] As previously stated, the validity of the order or seizure is often hotly contested because cases turn on the existence of *saisie-contrefaçon* evidence.[170] A defendant could claim that the claimant misstated facts when requesting a *saisie-contrefaçon* order from a judge,[171] that the *huissier* or other member of the seizing party violated the specific parameters of the order,[172] or that the fifteen-day limit to bring an action had elapsed.[173] If the court accepts any of these claims and rules that the *saisie-contrefaçon* is invalid, the plaintiff's case is all but defeated.[174] Courts are generally strict when enforcing the proper requirements because of the potential for abuse.[175]

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cassation [Cass.] [supreme court for judicial matters] com., Feb. 12, 2013, No. 11-26361 (Fr.). The *huissier*, however, "asked 24 questions to Interver concerning the composition of the product, its manufacturing process, the manufacturing period, and the extent of the marketing." *FR - Vetrotech Saint Gobain International v. Interver / Cour de cassation*, EPLAW PATENT BLOG (Mar. 19, 2003), http://www.eplawpatentblog.com/eplaw/2013/03/fr-vetrotech-saint-gobain-international-v-interver-cour-de-cassation.html#more [https://perma.cc/7RSZ-9APF]. This investigation, the court ruled, was beyond the scope of the order and amounted to a fishing expedition under the pretext of a *saisie-contrefaçon*. *Id.*

[166] Cour de cassation [Cass.] [supreme court for judicial matters] com., Sept. 29, 2015, No. 14-12430 (Fr.). Here, a *huissier* relied on the patent expert accompanying him and did not exercise independent judgment in recording his finding during the seizure. Anne-Laure Villedieu & Sabine Rigaud, *De l'esprit critique de l'huissier en matière de saisies-contrefaçon*, LEXPLICITE (Feb. 16, 2016), http://www.lexplicite.fr/de-lesprit-critique-de-lhuissier-matiere-de-saisies-contrefacon/ [https://perma.cc/77GV-RLCY]. The court nullified the descriptive portion of the report as beyond the scope of the order. *Id.*

[167] Véron, *supra* note 159.

[168] C. PRO. INTELL. art. R. 615-3.

[169] *Id.*

[170] ABELLO ET AL., *supra* note 153, at 329-35; OLIVER HUBERT, ASPECTS PROCÉDURAUX DE LA CONTREFAÇON DE BREVET D'INVENTION 45-47 (2017) (discussing the frequent use of the saisie-contrefaçon in disputes over the merits of a patent or a patent application).

[171] Tribunaux de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Nov. 29, 2013, 13/15971 (Fr.).

[172] Cour de cassation [Cass.] [supreme court for judicial matters] com., Sept. 29, 2015, No. 14-12430 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] com., Feb. 12, 2013, No. 11-26361 (Fr.).

[173] C. PRO. INTELL. art. L. 615-5.

[174] ABELLO ET AL., *supra* note 153, at 329-35.

[175] *See* Interview with Christine Hugon, *supra* note 29.

Thus, the importance of strict adherence to the procedure of obtaining evidence through a *saisie-contrefaçon* order cannot be overstated.

III. ADOPTING THE CONSTAT: HOW AND WHY?

A. *Inefficiency of the American Legal System as Compared to the French*

Although the *constat* (or an equivalent report) is relatively unknown in the United States, it could help ameliorate two of the greatest problems within the American justice system: the cost and time required to reach a resolution. "In the eyes of many, '[d]elay is the most significant single problem affecting the [United States] civil justice system.'"[176] This viewpoint is not limited to those working in the legal profession. In 2003, 64% of the public surveyed stated they would prefer to arbitrate a dispute rather than go through litigation, and 67% thought that litigation is too lengthy.[177] Most of the delay occurs before trial; for civil cases that went to trial in state courts in 2005, the average length of a jury trial was 3.9 days, and the average length of a bench trial was only 1.7 days.[178] However, the average time from filing to disposition for those same cases was 26.6 months for cases tried by jury, and 20.8 months for cases tried by a judge.[179] A contributing factor is that it usually takes over ten months after a court case is initially filed for the court to impose its first discovery deadline.[180] These delays are often largely

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[176] Richard L. Marcus, *Malaise of the Litigation Superpower, in* CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE 71, 88 (Adrian A. S. Zuckerman et. al., eds., 1999). A survey of distinguished American trial lawyers conducted in 2008 showed that 69% of the responding lawyers "said the civil justice system . . . took too long to resolve cases." INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. AT THE UNIV. OF DENVER & AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY, INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 1 n.1 (2008), http://iaals.du.edu/sites/default/files/documents/publications/interim_report_final_for_web.pdf [https://perma.cc/9EEM-BXS5] [hereinafter TRIAL LAWYER REPORT].

[177] ROPER ASW, 2003 LEGAL DISPUTE STUDY: INSTITUTE FOR ADVANCED DISPUTE RESOLUTION 27 (2003).

[178] LYNN LANGTON AND THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: CIVIL JUSTICE SURVEY OF STATE COURTS 8 (2008), https://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf [https://perma.cc/8Y4R-R2W5].

[179] *Id.* Various factors may contribute to this delay (e.g. delay tactics, incompatible schedules between attorneys and witnesses, continuances, and litigations over pre-trial motions). While incorporating the *constat* as suggested below may not act as panacea to all litigation delays, it may alleviate the problem by diminishing discovery time.

[180] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. AT THE UNIV. OF DENVER & AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY, SUMMARY OF THE EMPIRICAL RESEARCH OF THE CIVIL JUSTICE PROCESS 2008-2013 18 (2014) http://iaals.du.edu/images/wygwam/documents/publications/Summary_of_Empirical_Resear

attributable to resource constraints.[181] In U.S. federal court, Congress is slow to fill vacancies and reluctant to create judicial positions for districts that have seen expanded caseloads.[182] The government and its funding of the judiciary is the perceived hindrance.[183]

Moreover, the cases that are considered to be the least expensive are those that do not involve formal discovery.[184] The American trial lawyer survey revealed that 85% of the respondents agreed that "litigation in general and discovery in particular are too expensive."[185] The excessive cost is "a matter of serious concern" because it "could enable those with unjustified claims or defences [sic] to club their opponents into submission" or "preclude a considerable number of claimants from ever reaching court."[186] In addition to the expense, discovery is itself a lengthy process within the already lengthy course of litigation.[187] The number of parties and schedules involved tend to slow the procedures.[188] Furthermore, the discovery stage has a unique and independent significance as to the outcome of a case as a whole. The sheer number of considerations during discovery's many stages[189] make the parties

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ch_on_the_Civil_Justice_Process_2008-2013.pdf [https://perma.cc/CG87-EWD6] [hereinafter SUMMARY REPORT].

[181] Judge Pamela A. M. Campbell, a Florida Circuit Court judge since 2006, noted that years ago she had approximately 700 cases annually, with the aid of a judicial assistant and two law clerks, while in 2016 she had about 2,000 cases with just one judicial assistant and no law clerks to help her. Interview by Nomiki Zervos with Judge Campbell, in St. Petersburg, Fl. (June 9, 2016). Since the late 1990s, the average time to trial increased by over a year for civil cases and almost doubled for criminal trials. Sudhin Thanawala, *Overloaded Federal Courts Lead to Delays in Civil, Criminal Cases as Judges Try to Keep Up*, U.S. NEWS & WORLD REP. (Sept. 21, 2015, 3:47 PM), http://www.usnews.com/news/us/articles/2015/09/27/wheels-of-justice-slow-at-overloaded-federal-courts [https://perma.cc/SYN7.27T6].

[182] *See* Thanawala, *supra* note 181.

[183] *See id*.

[184] SUMMARY REPORT, *supra* note 180, at 47.

[185] TRIAL LAWYER REPORT, *supra* note 176, at 4.

[186] Marcus, *supra* note 176, at 94.

[187] Brief for Petitioner at 8, Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (No. 05-1126), 2006 WL 2474078, at *8 [hereinafter Brief for Petitioner].

[188] *See* William W. Schwarzer, *The Federal Rules, The Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 703-05 (1989). The increasing complexity of the civil dockets have driven much discovery reform, decades ago, *id.*, to this day.

[189] Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135. U. PA. L. REV. 909, 922-25 (1987) (noting that the Federal Rules of Civil Procedure were designed under principles of equity, with judicial discretion playing a key role in interpretation and enforcement; with many factors for a decision maker to consider, the absence of bright-line rules may, however, undermine efficiency).

vulnerable to further disputes.[190] Obtaining information that could be the crux of a party's case may be challenged by the other side as being irrelevant, privileged, overly burdensome, or attorney work product.[191] These disputes can lead to some common assertions such as motions to compel,[192] protective orders,[193] or sanctions,[194] to name a few. These processes require further scheduling on court dockets and add delay and expense.[195]

In the French legal system, on the other hand, "restrictions on the scope of [lawyers'] activities tend to keep the fees much lower than in the United States."[196] Although surveys in France "[found] the justice system too costly,"[197] a lawyer who has practiced law in both France and the United States asserts that "when viewed from an American perspective, the French system of civil justice is cheap. It is quick. It produces judgments that overall seem to be satisfying."[198] The most recent statistics from both countries seem to confirm the claim that French civil justice takes less time than American civil justice. The average time from filing to disposition of terminated civil cases in U.S. district courts from September 2006 to September 2007 was 8.6 months.[199] In France, the average duration of terminated civil cases among the courts of first instance was 6.33 months in 2006.[200] The median time from

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[190] *See generally* Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 7 SEDONA CONF. J. 1, 1-2 (2006).

[191] FED. R. CIV. P. 26(b).

[192] FED. R. CIV. P. 37(a).

[193] FED. R. CIV. P. 26(c).

[194] FED. R. CIV. P. 37(d)–(f).

[195] FED. R. CIV. P. 34(b)(2).

[196] ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 102 (2001) (quoting Doris Marie Provine, *Courts in the Political Process in France, in* COURTS, LAW AND POLITICS IN COMPARATIVE PERSPECTIVE 239 (Herbert Jacob et. al. eds., 1998)).

[197] Loïc Cadiet, *Civil Justice Reform: French Perspective, in* CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE 291, 307 (Adrian A. S. Zuckerman et. al. eds., 1999).

[198] KAGAN, *supra* note 196, at 105 (quoting Richard Hulbert, *Comment on French Civil Procedure*, 45 AM. J. COMP. L. 747, 747 (1997)). *But see* Cadiet, *supra* note 197, at 307 ("97 per cent of the [French people] surveyed saw justice as being too slow . . . ."). However, it is suggested that litigants and their attorneys are often the cause of the delay, which also transpires during the preparation stage in France. *Id.* at 309 ("Cases are delayed 'for preparation' for long periods when no preparation actually occurs. This means that, in spite of long delays to prepare, the judge is not actually in any better situation to assess the dispute presented to him than if the case had come on more quickly.").

[199] ADMIN. OFFICE OF THE U.S. COURTS, 2007 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 175 (2008) http://www.uscourts.gov/statistics-reports/judicial-business-2007 [https://perma.cc/FUN7-KPBD] [hereinafter 2007 ANNUAL REPORT]. This figure includes all terminated cases, whether or not they went to trial. *Id.*

[200] *See* SECRETARIAT GENERAL, ANNUAIRE STATISTIQUE DE LA JUSTICE: ÉDITION 2008 33

filing in the lower court to disposition of civil cases in U.S. courts of appeal was 32.16 months,[201] whereas French civil appeals, on average, took 13.3 months from the date the court of appeal was "seized" to the date of its decision.[202] When this figure is added to the average time a case spends in the court of first instance, the total amount of time from filing in the lower court to resolution in the court of appeal is 19.63 months—considerably less than that experienced in the U.S. court system.[203]

In contrast to its civil justice system, the French criminal justice system appears to be slower than its American counterpart. The time from the infraction to judgment in French courts of first instance averaged 11.32 months in 2006.[204] The lack of *constats* in French criminal cases may contribute to the significantly longer process there, perhaps all the more indicative of the utility of incorporating *constat*-like instruments in American civil procedure. In U.S. district courts from September 2006 to September 2007, the average time from filing to disposition of a criminal case was 7 months,[205] and a major contributing factor to a longer case life, as inferred from a case study analyzing factors that increase or decrease the duration of a case, is whether a litigant is *pro se* or if the litigant is represented by more than one attorney.[206] The total process from lower court filing to judgment on appeal took 31 months in French courts of appeal,[207] but only 26.12

(2009) http://www.justice.gouv.fr/art_pix/1_stat_anur08_20090317.pdf [https://perma.cc/7XQ5-AREW] [hereinafter ANNUAIRE STATISTIQUE]. The number given in the text is the weighted average taken from the total terminated civil cases and total average duration of cases from the *tribunaux de grande instance*, the *tribunaux d'instance*, and the *conseils de prud'hommes*. *Id.* at 32.

[201] *See* 2007 ANNUAL REPORT, *supra* note 199, at 108-10. The average of 28.6 months is for the 8,085 civil appeals (not including prisoner petitions) and bankruptcy appeals that were resolved on the merits (again taking a weighted average of the figures given). *Id*. at 112. The remaining 7,542 civil appeals and bankruptcy appeals were disposed of by consolidation or terminated procedurally but, unfortunately, no data is given on their average duration. *Id.* at 86.

[202] ANNUAIRE STATISTIQUE, *supra* note 200, at 318-19.

[203] For the U.S. figure to be less than the French one, the average duration of the 7,542 unaccounted-for appeals would probably have to be less than 6.2 months. However, a *constat*-like document would figure less heavily in appellate procedure.

[204] *See* ANNUAIRE STATISTIQUE, *supra* note 200, at 126–35. The number given in the text is the weighted average taken from the total decisions and total average duration of the procedure from the *cours d'assises,* the *tribunaux correctionnels*, the *tribunaux pour enfants*, the *tribunaux de police,* and the *tribunaux aux armées*.

[205] 2007 ANNUAL REPORT, *supra* note 199, at 256.

[206] *See* Teresa Dalton & Jordan M. Singer, *Bigger Isn't Always Better: An Analysis of Court Efficiency Using Hierarchical Linear Modeling*, 34 PACE L. REV. 1169, 1184 (2014).

[207] ANNUAIRE STATISTIQUE, *supra* note 200, at 136–37.

months in U.S. courts of appeal.[208] It is interesting to note that in criminal cases, *huissiers* may serve process, but do not perform *constats* or otherwise participate in the fact-finding.[209]

B. *Inefficiency in the American Discovery Process*

One particular area that would benefit from introducing the *constat* into the American legal system is the discovery process. Adopting the *constat* would help eliminate the high costs and delays associated with discovery, thereby creating a more effective and cost efficient means of fact-finding. Discovery is an expensive and lengthy process, which delays cases by months or even years.[210] Not only is the discovery process responsible for many delays in both civil and criminal cases, but discovery fees also account for approximately 90% of litigation costs.[211] Between 2006 and 2008, the average company involved in litigation paid discovery costs ranging from $621,880 to $2,993,567 per case.[212] Much of these expenses are allocated to the defendant.[213] Thus, defendants have a strong incentive to settle "even meritless" claims to avoid the costly discovery process.[214] Plaintiffs have taken advantage of defendants' willingness to settle in the face of long delays and high costs associated with discovery by filing frivolous claims in hope

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[208] *See* 2007 ANNUAL REPORT, *supra* note 199, at 108–09. The weighted average of 25.9 months is for the 14,461 prisoner petitions and criminal appeals terminated on the merits. The remaining 16,229 prisoner petitions and criminal appeals were disposed of by consolidation or terminated procedurally but, again, no data is given on their average duration. *Id.* at 86.

[209] *See* WALTER CAIRNS & ROBERT MCKEON, INTRODUCTION TO FRENCH LAW 50 (1995).

[210] Brief for Petitioner, *supra* note 187, at 8.

[211] *See id.* at 8 (citing Memorandum from Hon. Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rule of Practice & Procedure 4 (May 11, 1999)). This brief quotes dicta from *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 117 (2d Cir. 2005), *rev'd*, 550 U.S. 544 (2007), which was reversed for an unrelated issue. Although this statement does not carry the same authority as a holding, it does represent a court's acknowledgement of the issue. *See* Brief for American Petroleum Inst. as Amici Curiae Supporting Petitioners at 8-9, Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (No. 05-1126), 2006 WL 2474078 [hereinafter Brief for American Petroleum Institute].

[212] LAWYERS FOR CIVIL JUSTICE, CIVIL JUSTICE REFORM GRP. & U.S. CHAMBER INST. FOR LEGAL REFORM, LITIGATION COST SURVEY OF MAJOR COMPANIES 3 (2010), http://www.uscourts.gov/file/document/lawyers-civil-justice-et-al-survey-litigation-costs-major-companies-2010 [https://perma.cc/S9L7-CSWC]. *See also* Daniel B. Garrie, *E-Discovery in Criminal Cases: A Need for Specific Rules*, 43 SUFFOLK U. L. REV. 393, 398 (2010) ("[Experts] estimated that in 2007, litigants would spend more than $2.4 billion on electronic discovery services and there is no end in sight to this growth. Only two years later, this expense had increased.").

[213] *See* Brief for American Petroleum Institute, *supra* note 211, at 7 (referencing antitrust discovery).

[214] *Id.* (representing the opinion of one litigator).

of a settlement.[215] This discovery abuse is a problem that has plagued litigation for decades and sparked repeated calls for a remedy.[216]

Furthermore, the extensive document production and lengthy depositions involved in the discovery process do not always benefit either party to the litigation.[217] Of the 4,980,441 discovery pages produced on average in major cases in 2008, only 4,772 pages were marked as exhibits at trial.[218] Such document production is responsible for "thousands of hours of attorney's fees, and increasingly, millions of dollars."[219] The discrepancy between the number of pages produced and those actually used at trial, accompanied by exorbitant legal expenses, illustrates the inefficiencies that result from the discovery process currently in place in the United States.

C. *Benefits of Adopting the Constat*

Adopting the *constat* may help to rectify these shortcomings by replacing the current practice of obtaining numerous statements and documents from various sources with a new practice of obtaining a single document drafted by a trained professional. If judges were able to send credible legal officers (say, a modified version of the master)[220] on fact-finding missions, a portion of the factual disputes could be settled outside of discovery. This would reduce the amount of time and effort required by the parties and their lawyers for discovery, and could also reduce costs. The costs would also be distributed more evenly among the parties since courts apportion payment for the master's services among the parties.[221] Thus, by providing for these changes to the American system, these benefits could be achieved without

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[215] *Id*.

[216] Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(A) – "Much Ado About Nothing?*," 46 HASTINGS L.J. 679, 683–84 (1995).

[217] *See* LITIGATION COST SURVEY OF MAJOR COMPANIES, *supra* note 212, at 3 ("Inefficient and expensive discovery does not aid the fact finder.")

[218] *See id*.

[219] *See* Brief for American Petroleum Institute, *supra* note 211, at 8. The massive amount of discovery documents to be produced has only increased with the advent of e-discovery techniques. *See* Milberg LLP & Hausfeld LLP, *E-Discovery Today: The Fault Lies Not in Our Rules* . . ., 4 FED. CTS. L. REV. 131, 137 (2011) ("Today, a lawsuit between corporations may involve 'more than one hundred million pages of discovery documents, requiring over twenty terabytes of server storage space.'"). In fact, a 2008 survey of Fortune 200 companies revealed that a vast majority of discovery documents produced are not used at trial. *See* LITIGATION COST SURVEY OF MAJOR COMPANIES, *supra* note 212, at 3-4 (describing how in cases with total litigation costs exceeding $250,000, the ratio of the average number of discovery pages produced to the average number of pages used at trial was 1,044 to 1).

[220] *See* discussion *infra* Section III.E.2.

[221] FED. R. CIV. P. 53(g)(3). This distribution is based on means, the amount at stake, and whether one party caused the need for the master more than the other. *Id.*

significant changes to the rules governing discovery.

In the French system, the *constat* carries much evidentiary weight, and the facts it contains are hard to refute in court.[222] If the American version were to carry this type of weight, it could reduce attorneys' incentives to perform discovery on the subject matter contained within the report due to the difficulty of presenting contrary evidence, and it would disincentivize challenges to discovery of certain subject matter.[223] Of course, a lawyer could still obtain discovery regarding any matter relevant to a client's claim or defense;[224] however, the hard-to-refute report prepared by a skilled court-appointed professional would deem such discovery requests excessive and therefore an undesirable waste of time and money.

The evidentiary weight of the *constat* further helps deter meritless claims while encouraging settlement by parties with deep pockets. Potential plaintiffs will be less likely to bring a meritless claim when findings of fact from a *constat* weigh heavily against them even before discovery.[225] On the other side of this coin are corporate or other wealthy defendants who may bully one-time plaintiffs into costly discovery to establish facts.[226] The pre-established facts from a *constat* could solve this problem by encouraging defendants to settle meritorious claims, knowing that the strong evidentiary weight of the *constat* severely hurts their chances of winning at trial.[227]

Additionally, while adoption of the *constat* would not necessarily lower electronic discovery costs,[228] it certainly can shorten processes and provide other economic benefits. In France, *constats* documenting internet infractions such as libel and plagiarism can be ordered from *huissier*-run websites for 150€ (roughly $175), for two screenshots.[229] Such documentation provides an effective and cost-efficient alternative to obtaining internet records from site operators or witness statements, which would be necessary in the American system. As professionals, *huissiers* are trained to recognize

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222 Fricero, *supra* note 13, at 11.

223 In general, neutral factfinding can serve to hone the issues and focus parties and judges on any core remaining matters. In other words, if it does not lead to settlements or quick judicial determinations, these statements of fact still provide dispute-resolution benefits in terms of time and costs.

224 FED. R. CIV. P. 26(b)(1).

225 *See* Fricero, *supra* note 13, at 11 (noting that *constats* carry much evidentiary weight).

226 *See* John M. Lynn, *Out of Control*, 8 W. VA. LAW. 14, 15 (1995).

227 *See* Fricero, *supra* note 13, at 11 (noting that *constats* carry much evidentiary weight).

228 While there are many different e-discovery platforms, they all tend to involve systems that parties can use to upload mass numbers of documents and use searches through meta-data and algorithms to find the key "hot" documents among the multitude of irrelevant documents. *See* Lumen Mulligan & Joy Isaacs, *E-Discovery 2.0*, 82 J. KAN. B. ASS'N 27, 27, 30 (2013).

229 Constat-Huissier, *Présentation du service*, CONSTAT-HUISSIER, http://www.constat-huissier.net/ [https://perma.cc/F45G-YZK9].

important facts and observations.[230] This centralized expertise could benefit the American legal system, which currently relies on many different parties of varying educational backgrounds and training to piece together potentially straightforward matters, such as internet plagiarism.

Finally, adapting the private version of the *constat* could reduce time and costs for private parties in ways similar to those discussed above. By having observations made before an incident, after it, or both, individuals could begin any subsequent lawsuit a step ahead or perhaps even avoid it altogether.[231] Moreover, almost any situation could be prospectively recorded and preserved as protection for any future dispute, as *constats* can encompass a broad range of subjects.[232] Such reports could also be useful in the context of insurance claims. The French *huissiers*' National Chamber asserts that insurance companies recognize *constats* in the same way as courts.[233] In this context, if the *constats* had the same effect in the United States, both the claims adjuster employed by an insurance company and individual policyholders would have the ability to obtain a credible account of the situation from a neutral observer. Thus, adopting *constats* could positively impact much more than the court system itself.

D. *Adapting the Constat: Uses and Limitations*

With a few changes, the *constat* could be adapted to fit into the American pretrial process. Under Rule 16 of the Federal Rules of Civil Procedure, a judge may order a pretrial conference to manage the case by making rulings about discovery, pleadings, evidence, and other matters necessary for the disposition of the case.[234] One goal of the pretrial conference is to "discourag[e] wasteful pretrial activities" and "expedit[e] disposition of the action."[235] Rule 16(c)(2) lists actions the judge can take toward this goal and allows discretion to "facilitat[e] in other ways the just, speedy, and

[230] *See generally Code de déontologie des huissiers de justice* [*Code of Ethics of Huissiers of Justice*], http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=%2F%2FH_4_1%2FH4_1R3.htm [https://perma.cc/E969-RXHK].

[231] For example, when a contractor neglects to finish a job, *see*, *e.g.*, Chardon Constat Aug. 24, 2010, *supra* note 141, or when one receives nonconforming goods, *see* Chardon Constat, *Huissier de Justice*, member of *la société professionelle Xavier Bariani et Mathieu Chardon*, Versailles, France, Aug. 18, 2010 (on file with author).

[232] Chardon Constat May 31, 2010, *supra* note 18; Chardon Constat Apr. 30, 2010, *supra* note 18.

[233] *Le constat*, LES HUISSIER DE JUSTICE – A VOTRE SERVICE, http://www.huissier-justice.fr [https://perma.cc/9P5U-M48Y].

[234] FED. R. CIV. P. 16(c)(2).

[235] FED. R. CIV. P. 16(a).

inexpensive disposition of the action."[236] The addition of the *constat* as an optional judicial tool could simply and effectively strengthen the judge's ability to encourage efficiency. While the judge would be able to order a *constat* at any time during the pretrial process, the pretrial conference would be the ideal time because it would let attorneys know which matters the report would target, so they could plan discovery accordingly. A simple addition could be made to Rule 16(c)(2) identifying the *constat*-equivalent as an available tool for the judge.

Rule 16(b) further states that a judge *must* issue a scheduling order limiting the time to join other parties, amend the pleadings, complete discovery, and file motions, and the judge *may* set other dates, whether for hearings or the parties' case management conferences.[237] By formally requiring all parties involved, including the judge, to participate in case scheduling, Rule 16(b) aims to mitigate some risks of delay and to tailor the actions of all parties accordingly.[238] Introduction of credible information in the form of *constats* would influence the judge's issuance of scheduling orders and rulings on anticipated motions. This could alleviate some courts' dockets and thereby expedite the litigation.

The judge would have discretion in deciding whether to order a *constat*, as well as what subject matter it would contain. But which matters *should* the report target? French *huissiers* perform *constats* on an almost limitless range of subjects, but they only perform basic observations of fact, not complex investigations.[239] The American *constat*-equivalent could be similarly used to establish basic facts that do not require discovery, while more complex subject matter could be left to the traditional discovery process. An addition to the FRCP should identify potential uses for the report, while giving judges discretion to order it in other areas. As judges or parties gain experience using the *constat*-equivalent, other efficient uses may become clear. Most importantly, the crafting of the rule should indicate that the *constat* is to be routinely undertaken for designated situations—that while technically up to the judge's discretion, these types of situations are intended to involve an administrative process not ordinarily subject to challenge.[240] After all, if a

236 FED. R. CIV. P. 16(c)(2)(P).

237 FED. R. CIV. P. 16(b).

238 *See* FED. R. CIV. P. 16 advisory committee's note to 1983 amendments, https://www.law.cornell.edu/rules/frcp/rule_16 [https://perma.cc/VY92-5KLU] ("[W]hen a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay . . . .").

239 Emerson, *The French Huissier*, *supra* note 12, at 1082.

240 A practice of routinely rendering *constats* in only certain situations may be crucial to ensure cost savings and simply to avoid, or at least minimize, procedural jousting over when the judicially-mandated *constats* are to occur. Emerson, *The Neutral Factfinder*, *supra* note

constat is prepared, parties can still challenge any findings of fact.[241] Likewise, if a *constat* is not undertaken, an aggrieved party remains able to undertake its own discovery.[242]

Huissiers often interrogate witnesses in French civil actions,[243] but this function would probably need to be limited in the American adversarial system, which values live witness testimony.[244] In American civil trials, allowing parties to cross-examine witnesses is the norm,[245] though not necessarily guaranteed by due process under the Fifth or Fourteenth Amendments.[246] Further, the American system recognizes the necessity of live testimony for jurors to evaluate witness credibility.[247] However, in some situations it might be appropriate for the American *huissier*-equivalent to do basic interviews with witnesses. For example, rather than conducting a formal deposition of a witness who is not essential for examination at trial, small changes to Title V of the FRCP (governing "Disclosures and Discovery")[248] could enable a factfinder to provide the court with substantially the same information as a formal deposition of a witness at a fraction of the cost. Rule 28 requires that depositions be conducted in front of an officer authorized to administer an oath or a person appointed by the court.[249] Rules 30 and 31 provide further requirements for oral and written depositions regarding leave of court, service of process, and notice.[250] Finally, Rule 32 details when depositions may be used at trial.[251] An additional rule providing for the use of a *constat* or modifications to Rules 28 through 32 might allow parties to more quickly acquire information substantially similar to information obtained in a formal deposition without incurring any additional costs.

As discussed above, the credibility of the American *constat* and the professional who prepares it would make the report hard to refute in court. However, procedures could be developed to allow parties to challenge an erroneous report.[252] As in the French system, the judge would have discretion

75, at 117-18.

241 Emerson, *The French Huissier*, *supra* note 12, at 1084-85.

242 *Id.* at 1081.

243 *Id.*

244 *Id.* at 1125. Though the *constat* could also find use in the realm of depositions.

245 *See* Charles Hobson, *The Minimalist Privilege*, 1 N.Y.U. J.L. & LIBERTY 712, 713, 715 & n.43 (2005).

246 Emerson, *The French Huissier*, *supra* note 12, at 1121 n.475.

247 *Id.* at 1125.

248 FED. R. CIV. P. 26–37.

249 FED. R. CIV. P. 28(a)(1)–(2).

250 FED. R. CIV. P. 30–31.

251 FED. R. CIV. P. 32.

252 *See e.g.*, C.P.C., *supra* note 80, art. 234 (allowing parties to challenge experts on the

to reject a *constat* if it was clearly flawed,[253] and the parties could have something similar to a modified right of contradiction. Parties would be free to bring evidence contrary to the observations contained in the report, but, like the French *constat*, this evidence would often be insufficient to counteract the observations contained within.[254] As an added safeguard, a lawyer seeking to challenge a *constat* could be given the option to pay to have an additional *constat* performed, with costs divided or assessed to the losing party if the original report was overturned. In addition, a judge's decision to accept the facts contained in a *constat,* despite contrary evidence, could be reviewable under an abuse-of-discretion standard. Certainly, a *constat* equivalent in U.S. courts could be required to adhere to the rules of civil procedure, such as the rules for pleadings and claims for relief. They could also be limited by the ethical obligations of the preparer to include only relevant and non-frivolous information.

Lastly, is the *constat* compatible with American conceptions of due process? Lawyers might be tempted to argue that it is not, and that taking evidence gathering out of the hands of the parties denies their right to a fair trial. Adopting the *constat* would represent a slight move toward a more inquisitorial model of jurisprudence, and there is an assumption by some in the legal community that inquisitorial forms of procedure are foreign to the American conception of due process.[255] For example, if we were to implement the *constat* into the American legal system, it could theoretically impede a lawyer's implicit responsibilities in an adversarial system, such as attorney-client and work product privilege, and the obligation to zealously advocate. These issues are not likely to be insurmountable considering the relatively limited procedural scope of the *constat*, as well as a historical receptiveness to inquisitorial procedures in American jurisprudence.[256]

1. Specific Uses of the *Constat:* Intellectual Property

Given all of the aforementioned benefits and considerations, an American *constat*-equivalent could prove itself to be useful in three commonly litigated areas, namely: trademark infringement, copyright infringement, and the procurement of government contracts. These suits often require extensive discovery and lengthy litigation, making them the perfect candidates for reform through the adoption of the *constat*.

same grounds as judges).

[253] C.P.C., *supra* note 80, art. 246.

[254] Fricero, *supra* note 13, at 11.

[255] Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial,* 90 CORNELL L. REV. 1181, 1261 (2005).

[256] *See* Emerson, *The French Huissier*, *supra* note 12, at 1123; Kessler, *supra* note 255, at 1198–210.

i. *Trademark Infringement*

Trademark cases are very fact-oriented and require an extensive record. *Constats* can be particularly useful in these cases due to their evidentiary and organizational benefits. The adoption of a *constat*-equivalent could protect both trademark owners and consumers by providing an impartial statement of facts to promote efficient litigation. Trademark infringement claims brought under the Lanham Act[257] are evaluated under a standard of "likelihood of confusion." There are many factors to consider in determining potential confusion, such as: (1) the strength of the mark; (2) the proximity of the goods; (3) the similarity of the marks; (4) evidence of actual confusion; (5) the similarity of marketing channels used; (6) the degree of caution exercised by the typical purchaser; and (7) the defendant's intent.[258]

A primary way that the *constat* would assist litigation in trademark infringement cases is by documenting an "adverse effect," which is typically required to prove infringement for a cause of action under the Lanham Act.[259] A *constat* would document lost sales, lost customers, or delays in the placement of orders to demonstrate irreparable harm suffered by the owner of the mark. Furthermore, *huissiers* can deliver cease and desist orders including a *constat* which documents the infringement. This function would be particularly useful in cases of infringement via the internet, as *huissiers* can use screenshots to document infringing material before it is taken offline.[260] Such documentation provides an effective and cost-efficient alternative to obtaining internet records from site operators or witness statements, as would be necessary in the American system.

If a trademark's validity comes into question due to an alleged lack of secondary meaning, a *constat* can provide evidence about the aforementioned indicia of secondary meaning.[261] *Constats* may document the first use of a mark and its subsequent uses, as well as advertising that includes the mark. A *constat* may also document attempted infringement to be used in later litigation.

A *constat* would be most useful in its ability to provide reliable documentation of the facts concerning an alleged infringer's use of an infringing mark in commerce.[262] This can include both physical and digital

[257] 15 U.S.C. § 1051 (2002) et seq.

[258] Polaroid Corp. v. Polarad Elect. Corp., 287 F.2d 492 (2d Cir. 1961), *cert. denied*, 368 U.S. 820 (1961).

[259] Purolator, Inc. v. Efra Distribs., 687 F.2d 554, 559 (1st Cir. 1982).

[260] *Supra* note 229 and accompanying text.

[261] Descriptive marks can be registered, if with proof of "acquired distinctiveness" in the public's mind. 15 U.S.C. § 1052(f) (2015); U.S. PAT. & TRADEMARK OFF., TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1212 (2017), http://www.uspto.gov/trademark/guides-and-manuals/tmep-archives (acquired distinctiveness or secondary meaning).

[262] A *huissier* may be limited by law in undertaking investigatory activities without the

infringements. Since a complaint becomes "more effective when it is accompanied by persuasive exhibits bolstering the plaintiff's claim . . . [the] plaintiff should consider appending a copy . . . of its mark . . . and of the defendant's infringing mark . . . [and] plaintiff should not hesitate to submit as exhibits to a complaint the actual products on which the respective marks are used."[263] A *constat* can fill this role nicely. Going beyond mere photographs of the two marks side by side, a *constat* can detail a mark's use in actual commerce, by providing photographs and detailed descriptions of the product being sold.

The strong factual details of a *constat* make it particularly well suited for use in *ex parte* proceedings, as the burden is higher to protect the rights of the opposing party. Additionally, a *huissier* may be requested to accompany federal law enforcement officers when conducting a seizure of goods to protect the parties' rights and preserve relevant facts.

Other important evidentiary issues in trademark cases include priority of use, chronology of use, and the relationship between multiple parties.[264] The mark holder can request a *constat* documenting a mark's first use and subsequent uses in preparation for potential future litigation. If infringement is suspected, a *constat* documenting an adversary's infringing mark can be made in anticipation of litigation. *Constats* demonstrating licensing, quality control, and marketing schemes can establish a mark's strength and confirm or rebut abandonment.

A *constat* can also bolster claims concerning the various factors of the Lanham Act's standard of "likelihood of confusion," especially for preliminary injunctions that require showing a high likelihood of success.[265] A *constat* examining the appearance, function, and appeal of products can help create a factual basis for the proximity and similarity of the plaintiff's product and the infringing product. Likewise, a *constat* can also record instances of returns the plaintiff receives from the infringing product, as well as complaint letters about the infringing product in instances where the

consent of the person about whom he reports. For example, even upon the decision of a judge instructing the *huissier* to proceed to a private location and develop findings of fact regardless of the consent of the person at that location, the *huissier* can only act between the hours of 6:00 AM and 9:00 PM. *Les Huissiers de Justice à Votre Service: Le Constat*, CHAMBRE NATIONALE DES HUISSIERS DE JUSTICE [FRENCH NATIONAL CHAMBER OF JUDICIAL OFFICERS], http://www.huissier-justice.fr/actualite.aspx?id=296 [https://perma.cc/5VEN-4MPX]. Surely there would be little or no such limitations for a *huissier* who simply conducts his investigation on the internet, seeking to find and document trademark violations or other problems there, rather than in person.

[263] INTELLECTUAL PROPERTY COUNSELING & LITIGATION § 57.02 (Lester Horwitz & Ethan Horwitz, eds., 2017).

[264] *Id.* § 71.01.

[265] *Supra* notes 257-258 and accompanying text.

consumer believes the infringer to be the actual mark holder. Moreover, a *huissier* can observe and record consumers who purchase infringing products and interview them about the product. Finally, actual confusion can be recorded through surveys.[266] A trained *huissier* could be beneficial in conducting surveys, assuming the surveys are formed according to, and conducted to meet, proper survey methodology.

ii. *Copyright Infringement*

Copyright law seeks to protect for a limited time "original works of authorship fixed in any tangible medium of expression."[267] The term "works of authorship" is interpreted broadly by courts to include the more traditional arts, such as literary and musical works, and more modern additions, such as audiovisual and architectural works.[268] Although the originality requirement presents a low threshold to authors,[269] both constitutional and statutory law denies copyright protection to such things as facts or ideas.[270] However, the use of public domain material does not necessarily preclude copyright protection, as the expression or compilation can possess originality.[271] A valid copyright vests several rights in the author or owner, including the right to reproduce or distribute the copyrighted work, to create derivative works based on the copyright work, and to license to third parties the right to use the copyrighted work.[272] Copyright infringement thus poses the potential of significant loss of income to copyright owners, and a *constat* that demonstrates an infringement can help solidify a plaintiff's claim of irreparable harm to his reputation.

To establish a valid claim of copyright infringement, a plaintiff must demonstrate: (1) ownership of a valid copyright; and (2) that copyrightable elements of that work were copied.[273] A plaintiff can establish a copyright infringement either directly with proof of actual copying or indirectly through proof of access and substantial similarity of copyrighted material.[274]

[266] Survey evidence may be disputed. INTELLECTUAL PROPERTY COUNSELING & LITIGATION, *supra* note 263, § 10.02(9)(b). "Not all surveys are of equal value, however. The weight accorded a survey depends upon the soundness of the survey methodology. Nonetheless, survey practices are more pertinent to the weight accorded the survey, rather than admissibility into evidence." *Id.*

[267] 17 U.S.C. § 102(a) (1990).

[268] *Id.*

[269] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991) ("a minimal degree of creativity . . . .").

[270] *Id.* at 344-45; 17 U.S.C. § 102(b).

[271] *See Feist Publ'ns*, 499 U.S. at 348.

[272] INTELLECTUAL PROPERTY COUNSELING & LITIGATION, *supra* note 263, § 59.01.

[273] *Feist Publ'ns*, 499 U.S. at 361.

[274] Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 614 (2d Cir.

Copyright infringement also extends to secondary liability where one contributes by encouraging direct infringement or where one infringes vicariously by profiting from another's direct infringement.[275]

As in the case of trademark law, a *constat* can be beneficial in various stages of copyright law litigation. Although federal law no longer requires notice, placing copyright notice on a work under 17 U.S.C. § 401 can prove beneficial, by recording the placement of notice, or lack of notice, on the work. A *constat* can even offer proof normally provided by notice, such as the year of publication. Additionally, joint authors could record their separate contributions through a *constat* before compiling a single work.

Similar to a *constat* in the trademark context, a *constat* in the copyright context can help record the facts of a physical or digital infringement. This is especially significant in the internet context where websites can be modified or removed almost instantly, denying plaintiffs their proof of infringement. Instead, a *huissier* can take a screenshot of a website and describe the infringement in a *constat*, thereby preserving the online information for litigation.[276] In other words, the use of *constats* in the copyright context can efficiently present the facts relevant to the infringement claim, even if the information is later deleted.

iii. *Patent Infringement*

In U.S. jurisdictions, patent litigation can be especially burdensome, due in large part to the discovery process. The costly and time-consuming process of discovery involves document retention, production, and review.[277] When completed, the parties may be no better off than when they started with respect to the facts required to assert various causes of action and defenses; however, they will have accrued hundreds of thousands or even millions of dollars worth of legal fees.[278] Incorporating a device like the French *saisie-contrefaçon*[279] could help prevent meritless claims from ever making it to discovery, while allowing meritorious claims to reach quicker dispositions or

1982).

[275] Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005).

[276] Constat-Huissier, *supra* note 229 and accompanying text.

[277] *See* Gary C. Ma, Erik R. Puknys, & E. Robert Yoches, *Discovery in US Patent Litigation—Being Prepared*, DIGITIMES (Aug. 18, 2009), http://www.finnegan.com/resources/articles/articlesdetail.aspx?news=84c62b11-cbc2-421e-aae2-651e4c32862f [https://perma.cc/Y8BG-BDXE].

[278] Chris Neumeyer, *Managing Costs of Patent Litigation*, IPWATCHDOG (Feb. 5, 2013), http://www.ipwatchdog.com/2013/02/05/managing-costs-of-patent-litigation/id=34808/ [https://perma.cc/7DE4-CE6L] ("[T]he cost of an average patent lawsuit, where $1 million to $25 million is at risk, is $1.6 million through the end of discovery and $2.8 million through final disposition.").

[279] *See supra* Section II.B.2.

settlements.

In patent litigation suits, the suit generally begins with an inquiry into the defendant's "design, construction, operation, sales, and marketing of accused products, including documents and records about research and development, testing, marketing, and profit margins."[280] Many companies expend non-negligible costs to comply with document retention requirements in compliance with discovery rules.[281] These expenditures arguably amount to one party subsidizing the opposing party's fact finding.[282] As discussed above[283], these cost allocation issues have lopsided effects: meritless lawsuits are encouraged, as plaintiffs have less at stake when the opponent is essentially required to do discovery for them;[284] plaintiffs with meritorious claims may be disincentivized, as smaller plaintiffs are discouraged by high litigation costs.[285]

The patent-specific version of the *constat*, the *saisie-contrefaçon*, offers a practical solution to this problem. Because the cost of performing a *saisie-contrefaçon* falls on the claimant, defendants are protected against being pressured into settling. However, the costs are far less prohibitive than those of expansive electronic discovery, so meritorious plaintiffs are not barred.[286] As with the *constat*, the *saisie-contrefaçon* has binding weight in court.[287] This means that parties who have performed a seizure, and have facts to support an infringement claim, will be able to settle for a higher amount or litigate more quickly and effectively.[288] Parties who failed to seize evidence or whose seizures were invalidated would be dissuaded from bringing suit, as a system that incorporates the *saisie-contrefaçon* would not allow for any subsequent discovery.[289] Tactical games, therefore, would be replaced by

[280] Ma, *supra* note 277.

[281] *See* Milberg LLP & Hausfeld LLP, *supra* note 219, at 317.

[282] Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773, 778 (2011) ("Because the costs incidental to discovery production are, morally and economically, properly attributable to the requesting party, allocation of discovery costs to the producing party effectively transforms discovery costs into a litigation subsidy, which requires a party to fund a portion of its opponent's case.").

[283] *See supra* notes 225–227 and accompanying text.

[284] *See* Jacqueline Hoelting, *Skin in the Game: Litigation Incentives Changing as Courts Embrace a "Loser Pays" Rule for E-Discovery Costs*, 60 CLEV. ST. L. REV. 1103, 1113–14 (2013). Placing discovery costs on defendants in potentially meritless cases encourages plaintiffs to "submit[] overly broad and expensive e-discovery requests to pressure defendants into settling." *See id.*

[285] *See* Lynn, *supra* note 226, at 15.

[286] *See supra* text accompanying notes 228–230.

[287] *See* Véron, *supra* note 159.

[288] *See id.*

[289] *See id.*

efficient fact-finding procedures to ensure that cases are truly decided on the merits.

2. Applying the *Constat* to Government Contracts

Public—that is, governmental—contracts require review, regulation, and occasional lawsuits. Among the tools at hand to combat corruption or other tribulations is the statement of fact (the *constat*). Indeed, while some civil law and common law nations share a reluctance to let private parties hire a judicial officer (*huissier*) to conduct a *constat*,[290] very few would challenge a *constat* if requested by a judge.[291] Before prescribing a remedy, though, one must first understand the problem. Government contracts, from inception to litigation, pose a variety of difficulties. Perhaps the most glaring dilemma is how to confront corruption or other improprieties in the granting of government contracts. Corruption and fraud in the contract procurement process can lead to wasted funds and sometimes sub-par goods and services for the public.[292]

Countless U.S. statutes and regulations work towards deterring government procurement fraud.[293] Despite studies and laws seeking to expose government contract fraud, the issues in rectifying the losses sustained by the government, as well as the public, continue from the moment fraud is discovered through trial and appeal.[294] In litigation, whistleblowers that bring suit are faced with, and thwarted by, high costs and constitutional defenses.[295] Meanwhile, defendants may also be pressured by whistleblowers or the government to settle, or be subject to multiple punishments for a single act.[296] Thus, because government contracts affect a wide range of businesses and individuals, the need for solutions is magnified.

In the United States and internationally, public contract law is aimed at

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[290] UIHJ Survey, *supra* note 3, at para. 16, question 2. Twenty-eight nations, especially in Europe and Africa, provide that a judicial officer can carry out statements of fact (*constats*); a smaller number of countries may bar judicial officers from undertaking such actions. *Id.*

[291] *Id.* at para. 16, question 14 (authorizing a judicially-requested statement of facts in twenty-four countries while only five countries do not so authorize).

[292] *See* ORG. FOR ECON. CO-OPERATION AND DEV., FIGHTING CORRUPTION AND PROMOTING INTEGRITY IN PUBLIC PROCUREMENT 52 (2005) [hereinafter FIGHTING CORRUPTION AND PROMOTING INTEGRITY IN PUBLIC PROCUREMENT].

[293] *See, e.g.*, 18 U.S.C. § 1031 (2012).

[294] Evan Caminker, *The Constitutionality of Qui Tam Action*, 99 YALE L.J. 341, 344-45, 374 (1989).

[295] *Id.*

[296] *See, e.g.*, U.S. *ex rel*. Marcus v. Hess, 317 U.S. 537, 537–62 (1943) (involving a qui tam lawsuit brought against engineers contracted by a local municipality. The engineers, respondents, argued the lawsuit could not properly be brought when the respondents were already criminally punished for their actions. The court upheld the qui tam action).

ensuring a system of integrity[297] and transparency.[298] Despite these efforts, public contracts are often subject to criticism over a lack of transparency or control.[299] Using the statements of fact (the *constat*), a judicial officer (the *huissier*) could avoid these pitfalls by providing real security in this area due to their neutrality, authority, and legal expertise.[300] The judicial officer can investigate and issue findings of fact that could ensure transparency and security in the process of awarding public contracts.[301]

Various statutes and regulations, such as the Federal Property and Administrative Services Act ("FPASA") and the Federal Acquisition Regulation ("FAR"), govern public contracts in the United States.[302] These statutes and regulations give bidders uniform rules in the process of obtaining government contracts.[303] Furthermore, before the rules are promulgated, the public has an opportunity to read and comment on the law, which is published in the *Federal Register*.[304] Unless justified by some compelling reason, the

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[297] *See* 48 C.F.R. § 3.101-1 (1983) ("Government business shall be conducted in a manner above reproach and . . . with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships.").

[298] Transparency is maintained in a number of ways, including the posting of all bidding opportunities and requirements in the FebBizOps (FBO), *see FedBizOpps, Fed Biz Ops, FedBizOps, Fed Biz Opps*, COMMERCE BUSINESS DAILY, http://www.cbd-net.com [https://perma.cc/RQ3D-XPZU], and providing a detailed protest procedure for actual or potential government contractors. 28 U.S.C. § 1491 (2011).

[299] *See* OECD, FIGHTING CORRUPTION AND PROMOTING INTEGRITY IN PUBLIC PROCUREMENT 191 (2005).

[300] The expertise may mean that no one else, even an agent of the *huissier*, may investigate and draft the statement of facts. UIHJ Survey, *supra* note 3, at para. 16, question 5 (noting that the *constat* needs to be personally performed by the judicial officers in thirteen countries). On the other hand, in at least twelve countries, the *huissier*'s *constat* activities can be conducted not just personally by the *huissier* but also by an assistant operating under that judicial officer's responsibility. *Id.*

[301] *See* Peter T. McKeen, *The Importance of a Professionally Educated Public Procurement Workforce: Lessons Learned from the US Experience*, *in* INTEGRITY AND EFFICIENCY IN SUSTAINABLE PUBLIC CONTRACTS: POLICING CORRUPTION CONCERNS IN PUBLIC PROCUREMENT INTERNATIONALLY 319 (Gabriella M. Racca & Christopher R. Yukins eds., 2014); Bushra Rahman, Eugene S. Schneller & Natalia Wilson, *Integrity and Efficiency in Collaborative Purchasing*, *in* INTEGRITY AND EFFICIENCY IN SUSTAINABLE PUBLIC CONTRACTS: POLICING CORRUPTION CONCERNS IN PUBLIC PROCUREMENT INTERNATIONALLY, *supra*, at 357.

[302] *See* FIGHTING CORRUPTION AND PROMOTING INTEGRITY IN PUBLIC PROCUREMENT, *supra* note 292, at 25.

[303] *See id.*

[304] *See id.*

rules require agencies to grant an open competition for a contract.[305]

A government agency's acceptance of bids is based on ordinary contract law, and an official accepting a bid is presumed to: (1) have acted in conformance with the applicable local, state, or federal rules; (2) not have prejudiced the rights of any other bidder; (3) have selected the lowest responsible and responsive bidder; (4) have acted honestly and equitably during the course of the bid procedures; and (5) not have acted arbitrarily or capriciously during the course of the bid-award process.[306] Officials have broad discretion to choose which bid to accept, and courts will generally not interfere unless the discretion is exercised "arbitrarily or capriciously, or unless it is based upon a misconception of the law or upon ignorance through lack of inquiry or in violation of law or is the result of improper influence."[307]

While giving government officials such broad discretion does have its benefits,[308] it undoubtedly enables actual corruption and the perception thereof. The use of judicial officers, such as *huissiers*, in the public contract arena could go a long way towards minimizing these problems; that is, *huissiers* could help *prevent* actual or perceived corruption in government procurement contracts. *Huissiers*, acting as neutral judicial officers, could use their extensive knowledge of the law[309] in order to show findings of violation. A *huissier*'s impartiality and objectivity, coupled with the position's inherent neutrality, would make the *huissier* adept at preventing fraud in public contracts. To assist in this understanding, it is helpful to consider examples of the discovery and reporting processes in public contract law.

The False Claims Act[310] ("FCA") is one of the more contentious federal statutes[311] regarding public contracts. Congress enacted the FCA in 1863 in response to frauds perpetrated in connection with Union military procurement during the Civil War.[312] To address the latent problems in

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305 *See id.*

306 *See* 64 AM. JUR. 2D *Public Works and Contracts* § 63 (2017).

307 Vinson Guard Serv., Inc. v. Ret. Sys. of Ala., 836 So. 2d 807, 810 (Ala. 2002).

308 For example, allowing officials this discretion allows them to take into consideration factors other than price, such as likelihood of completion, timeliness, and quality.

309 *Huissiers* are required to "have a Master degree (4 years of university studies) of law, have completed a trainee's program of 2 years' duration at the practice of a [*huissier*], have followed specialised [sic] courses organised [sic] by the profession, and have successfully passed a professional examination." *The Judicial Officer in the European Union: France*, INT'L UNION OF JUDICIAL OFFICERS, http://www.uihj.com/en/ressources/10148/54/france-en.pdf [https://perma.cc/9RQS-KTNA].

310 31 U.S.C. § 3729 (2012).

311 In addition to the federal act, most states have adopted their own versions of the False Claims Act that mirror the federal version. *See* James F. Barger, Jr., Pamela H. Bucy, Melinda M. Eubanks & Marc S. Raspanti, *States, Statutes, and Fraud: An Empirical Study of Emerging State False Claims Acts*, 80 TUL. L. REV. 465, 465 (2005).

312 Act of Mar. 2, 1863, ch. 67, §1, 12 Stat. 696, 696-99 (1863). *See also* Daniel C.

government procurement, the FCA sought "to indemnify the government—through its restitutionary penalty provisions—against losses caused by a defendant's fraud."[313] Congress amended the FCA in 1986 to encourage *qui tam* enforcement of the statute.[314] *Qui tam* actions allow a private citizen, also known as a "relator," to bring suit on behalf of the government for violations of the FCA for collection of statutory forfeiture.[315] A relator or informer is the person who pursues the action and potentially receives a portion of any amount recovered on the government's behalf.[316]

While allowing *qui tam* actions has undoubtedly led to stricter enforcement of the FCA, those actions come at a cost. Foremost, *qui tam* actions are a huge risk to private citizens, who must expend a significant amount of time and money to bring suit on the government's behalf.[317] Thus, not only would the use of *huissiers* help with oversight and enforcement of the FCA, it would also help reduce some of the risk to relators,[318] consequently leading to stricter enforcement of the FCA.

In order to establish a prima facie claim under the FCA, a relator must prove three things: "(1) the defendant presented or caused to be presented to an agent of the United States a claim for payment; (2) the claim was false or fraudulent; and (3) the defendant knew the claim was false or fraudulent."[319] Under the FCA, there are two categories of false claims: factually false claims and legally false claims.[320] A factually false claim involves misrepresentation of what goods or services were provided to the government; a legally false

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Lumm, *The 2009 "Clarifications" to the False Claims Act of 1863: The All-Purpose Antifraud Statute with the Fun Qui Tam Twist*, 45 WAKE FOREST L. REV. 527, 528–29 (2010).

[313] United States *ex rel.* Mikes v. Straus, 274 F.3d 687, 696 (2d Cir. 2001); 31 U.S.C. § 3729(1)(A)–(G) (2012). Under the FCA, the informer can file a FCA action, but has to provide the supporting evidence to the Justice Department, which ultimately has 60 days in which to intervene and take exclusive control of the suit. 31 U.S.C. § 3730(b)(2).

[314] *See* Lumm, *supra* note 312, at 529.

[315] 31 U.S.C. § 3730(b).

[316] *See* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 263 (1765). *See also* James Roy Moncus III, *The Marriage of the False Claims Act and the Freedom of Information Act: Parasitic Potential or Positive Synergy?*, 55 VAND. L. REV. 1549, 1551–52 (2002). The author defines a relator as a modern translation of the Latin qui tam phrase, meaning one "who pursues this action on our Lord the King's behalf as well as his own." *See id.*

[317] However, relators stand to make significant gains from a successful action, as they are entitled to receive between 15%-25% of the proceeds of a successful action or settlement. 31 U.S.C. § 3730(d) (2012).

[318] The *constat* would render it unnecessary for the relator to complete a large portion of the discovery process, thus reducing the time and money involved.

[319] United States *ex rel.* Wilkins v. United Health Grp., Inc., 659 F.3d 295, 305 (3d Cir. 2011).

[320] *Id.*

claim occurs when an individual or business "knowingly falsely certifies that it has complied with a statute or regulation the compliance with which is a condition for Government payment."[321] These categories are further divided into either express or implied "false certification"[322] as the basis for a legally false claim.[323]

The process for bringing a claim under the FCA is extremely fact intensive, and the potential benefits from the use of *huissiers* and *constats* are obvious. A *constat* can be used to replace the traditional discovery process, which is subject to extensive cost and delays, with one written document drafted by a trained professional. While the *constat* would provide these cost and timesaving benefits in almost any instance, this would be even truer in the context of FCA claims because they are so dependent on the facts. Using a factually false claim as an example, a *constat* would simply outline the goods or services actually provided to the government, as well as the represented goods or services.

A *constat* would also be useful in dissolving a common criticism that informers are tempted to file false or unfounded accusations in hopes of misleading the court or intimidating the defendant into settlement.[324] Accordingly, the *constat* would significantly contribute towards either reaching a settlement or dropping the suit, because the *huissier* would discover whether there was a misrepresentation or a fraudulent claim for payment.[325] Not only would the use of the *constat* lead to greater efficiency through its facilitation of settlement, it would do so at a lower cost for the parties involved.[326] Additionally, as the *constat* is given great evidentiary

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[321] *Id.*

[322] *Id.*

[323] *See* David S. Torborg, *The Dark Side of the Boom: The Peculiar Dilemma of Modern False Claims Act Litigation*, 26 J.L. & HEALTH 181, 184-85 (2013). "In 2011, 638 new qui tam suits were filed and nearly $3 billion was collected through settlements and judgments . . . . All told, since 1987, over $30 billion has been collected through FCA settlements or judgments." *Id.* at 185.

[324] *See generally* Jonathan H. Gold, *Legal Duties That Qui Tam Relators and Their Counsel Owe to the Government*, 20 GEO. J. LEGAL ETHICS 629, 631–33 (2007) (discussing the ability of the relator to structure a retaliation claim to grant a favorable payout to the relator and make broad allegations that he will likely not litigate).

[325] While a prima facie case would still require proof that the defendant knew the claim was false or fraudulent, more often than not this knowledge would be inferred from the facts and circumstances of the case and thus would be addressed in the *constat*. Additionally, a *constat* could monitor and prevent informers from purposefully encouraging favorable settlement by filing *qui tam* litigation in a location that makes defense impossible and inconvenient. *See* Margaret Gay Davies, THE ENFORCEMENT OF ENGLISH APPRENTICESHIP: A STUDY IN APPLIED MERCANTILISM 1563–1642, at 18–19 (1956).

[326] *See generally* Moncus, *supra* note 316, at 1587-88 (discussing, in part, the prohibitive cost of bringing a qui tam lawsuit); Tipton F. McCubbins & Tara I. Fitzgerald, *As False Claim*

weight in court and its facts are hard to refute,[327] it would provide a disincentive to lawyers to engage in extensive discovery, further reducing costs.

Another area where the *huissier* could be useful is in investigations of initial allegations. Currently, the FCA requires that the Attorney General (or a Department of Justice attorney) investigate any allegations of violations.[328] Essentially, the Department of Justice has three choices: intervene in the action, decline to intervene,[329] or move to dismiss the relator's complaint.[330] The investigation may consist of subpoenas for documents or electronic records, witness interviews, and compelled oral testimony from one or more individuals or organizations, among other things.[331] This would be an excellent place for a *huissier* to become involved because, as it stands now, we essentially have one government agency investigating another agency's action. The use of a neutral *huissier* would effectively eliminate any perceived improprieties within the investigation, thus leading to a system with greater trust from the public. Use of a *constat* or a *huissier*-equivalent could therefore make the litigation process for a FCA cause of action more standardized and cost-effective.

E. *Who Would Perform the American Constat?*

1. Potential *Huissier* Analogues in the American System

The American justice system uses bailiffs to keep order within the courts, enforce writs, and serve process.[332] Debt collection is completed by lawyers, collection agencies, and companies in the business of purchasing debt.[333]

Penalties Mount, Defendants Scramble for Answers Qui Tam Liability, 62 BUS. LAW. 103, 103-04 (2006) (discussing the rising costs of litigation and penalties for defendants in a qui tam lawsuit).

[327] Fricero, *supra* note 13, at 11.

[328] *See* DEP'T OF JUSTICE, *False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits*, http://www.justice.gov/sites/default/files/usao-edpa/legacy/2012/06/13/InternetWhistleblower%20update.pdf [http://perma.cc/AK6M-9F35].

[329] When the DOJ declines to intervene, it usually results in the relator dismissing the action. *See id.*

[330] *Id.*

[331] *Id.*

[332] *Bailiff,* BLACK'S LAW DICTIONARY (10th ed. 2014).

[333] *Debt Collection FAQs: A Guide for Consumers,* FEDERAL TRADE COMMISSION, http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre18.shtm [https://perma.cc/2FZ4-LXB8]. Public auctions are conducted by career auctioneers sometimes required to be licensed by the state. *Auctioneer Licensing Summary*, NAT'L AUCTIONEERS ASS'N, http://auctionlaw.wordpress.com/state-auction-laws-auctioneer-licensing-requirements/ [https://perma.cc/HZJ7-3ECF].

However, no profession focuses on producing statements of fact exactly like the *constats* produced by *huissiers*. Police officers are public officials who prepare factual written reports, but their reports are generally focused on crimes and traffic infractions rather than civil matters, and the officers usually lack extensive legal education.[334]

Perhaps the closest equivalent to the *constat* in the United States (at least the private version) is the report prepared by insurance claims adjusters. Adjusters combine their observations and other forms of information, including photographs and witness statements, into reports.[335] Adjusters are often employees of insurance companies, though the subset known as public adjusters, who make their services available to private individuals, are closer to *huissiers*.[336] When filing a claim (usually for property insurance), an individual can hire a public adjuster to prepare an independent report and negotiate with the insurance company to both maximize and speed up recovery.[337] Unlike a *huissier*, who does not represent a client as an agent, a public adjuster is authorized to actively represent the client's interests in dealing with the insurance company.[338] Also unlike *huissiers* and more like American lawyers, public adjusters often charge a contingency fee based on a percentage of the recovery they obtain from the insurance company.[339]

The report prepared by adjusters is similar to the *constat* in that adjusters are trained to record their objective observations and to focus on facts that have legal significance.[340] Like *huissiers*, adjusters are ethically bound to be objective and can have their license revoked for falsifying information.[341]

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[334] *Occupational Outlook Handbook: Protective Service*, BUREAU OF LAB. STAT., U.S. DEP'T OF LABOR, http://www.bls.gov/ooh/protective-service/police-and-detectives.htm [https://perma.cc/RPE4-HQVM].

[335] *Occupational Outlook Handbook: Claims Adjusters, Appraisers, Examiners, and Investigators*, BUREAU OF LAB. STAT., U.S. DEP'T OF LABOR, https://www.bls.gov/ooh/business-and-financial/claims-adjusters-appraisers-examiners-and-investigators.htm#tab-2 [https://perma.cc/X77W-U5HC] [hereinafter *Claims Adjusters*].

[336] *Id.*

[337] *Id.*

[338] *Id.*

[339] Gina Roberts-Grey, *Should You Hire a Public Insurance Adjuster?*, INSURANCE.COM (Jan. 19, 2011), http://www.insurance.com/home-and-renters-insurance/home-insurance-basics/hire-a-public-insurance-adjuster-.html [https://perma.cc/9NXX-WBXN].

[340] *Claims Adjusters*, *supra* note 335. An insurance adjuster is only required to have a high school diploma or its equivalent, although greater qualifications may be required in certain situations. *Id.* For example, auto damage adjusters are usually required to have a postsecondary non-degree award or extensive work in the field. *Id.* If an adjuster is working in a highly specialized area or at a higher level of practice, his employer may require him to have a bachelor's degree or more extensive training. *See id.*

[341] *See generally* John J. Pappas, *Adjuster's Code of Ethics,* 19 MEALEY'S LITIG. REPORT: INSURANCE BAD FAITH 12 (2005).

However, adjusters undoubtedly have more incentive to be biased in their reports than do *huissiers,* who are not affiliated with any of the parties involved in a dispute. Adjusters who work for insurance companies represent primarily the interests of their employer.[342] The contingency fee received by public adjusters gives them a strong incentive to exaggerate the client's entitlement to recovery. Adjusters also differ significantly from *huissiers* in their educational requirements. While *huissiers* require extensive legal training, adjusters are not even always required to have college degrees, though they are usually required to be licensed in their state.[343] So, while claims adjusters perform a function roughly analogous to the private *constat* performed by *huissiers*, adjusters differ by the much narrower scope of the circumstances in which they are called upon, their close association with the interests of their employer, and their limited educational requirements.

Educational requirements are one of the most significant differences between *huissiers* and the professions mentioned above who perform *huissier*-like functions, and it is clear that a law degree contributes to the *huissier*'s credibility as an objective and credible public official. If an American version of the *constat* were to carry the same weight as it does in the French legal system, the profession tasked with performing it would need to be one requiring a law degree. It is not surprising that members of the legal profession would most appropriately perform the new American *constat*, but what is the best way to incorporate this new role into the framework of the Federal Rules of Civil Procedure? The solution may be found in an adapted version of the master.

2. Adapting the Master to Perform *Constats*

The current function of masters[344] originally evolved from a "rather limited role and purpose . . . focusing primarily on the use of trial masters who heard trial testimony and reported recommended findings of fact."[345] The 2003 amendments to the Federal Rules of Civil Procedure ("FRCP") governing masters expanded their role to encompass pre-trial and post-trial matters and allowed them to be appointed "on an as-needed basis with the parties' consent, or when exceptional conditions require, by court order."[346] As a result, "[j]udges now appoint pre-trial masters to undertake an active, managerial role in the discovery process" and delegate tasks to post-trial

[342] *Claims Adjusters*, *supra* note 335.

[343] *Id.*

[344] BLACK'S LAW DICTIONARY, *supra* note 23 (providing the definition of a "master").

[345] Shira A. Scheindlin & Jonathan M. Redgrave, *Special Masters and E-Discovery: The Intersection of Two Recent Revisions to the Federal Rules of Civil Procedure*, 30 CARDOZO L. REV. 347, 348 (2008).

[346] *Id.* at 352.

masters that require them to play an investigatory role.[347] This expanded role played by masters is closer to that of a French judge than that of a French *huissier*, especially the managerial and investigatory functions. Moreover, the use of masters seems to be reserved mainly for complex cases or those requiring difficult computations.[348] Indeed, it is suggested that the appointment of masters should be reserved for "[c]omplex cases involving multiple parties, multidistrict litigation . . . proceedings, and class actions . . . [involving] parties and lawyers with the resources to pursue and defend these cases."[349] Since the current master has broader powers than necessary to perform the *constat* and has been banned from the "common, routine cases"[350] in which the *constat* would be most useful, it would therefore be essential to create a limited version of the master, more similar to the *huissier*, which we will call the "limited master."

Although contemporary masters do not fit the bill for performing simple reports of facts, the rule providing for their appointment is as close as the FRCP has come to replicating the French CPC provisions authorizing judges to request the assistance of *huissiers* and other experts.[351] It is therefore appropriate to craft a framework for a new legal career in order to provide an American version of the *constat*. To begin with, masters are usually lawyers, but a law degree would be a requirement for the limited master just as it is for a *huissier*.[352] This requirement would hopefully give the new American officer credibility similar to that enjoyed by the *huissier*; but if not, a mandatory training program and a national or jurisdictional certification program could also be implemented.[353]

The new limited masters would practice independently, as do current masters, rather than becoming state employees.[354] This is said to increase their efficiency and would allow the members of the profession to support

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[347] Kessler, *supra* note 255, at 1194.

[348] *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, 1301 (2005).

[349] 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, 1271 (2005).

[350] *Id.*

[351] *Compare* FED. R. CIV. P. 53, *with* C.P.C., *supra* note 80, arts. 232–55.

[352] BLACK'S LAW DICTIONARY, *supra* note 23 (providing the definition of a "master"). A master is a "parajudicial officer . . . specially appointed to help a court with its proceedings. A master may take testimony, hear and rule on discovery disputes, enter temporary restraining orders, and handle other pretrial matters, as well as computing interest, valuing annuities, investigating encumbrances on land titles, and the like." *Id.*

[353] Fricero, *supra* note 13, at 11; Chardon, Address at Ministry of Justice, *supra* note 118, at 5.

[354] *See* FED. R. CIV. P. 53(g).

themselves with other legal pursuits as well.[355] The limited masters would only be empowered to record their purely material observations, supplemented with photographs and video, and any voluntary statements made by persons present during the recording.[356] The current rule providing for the use of masters requires that the appointee's duties and any limits on his authority be stated in the order by which he is appointed.[357] It also requires time limits and information on how the master will be compensated to be included in the order.[358] These conditions should also be applied to the limited master when his services are requested by a judge and are similar to the CPC provisions governing the fact-finding process behind the *constat*.[359]

Of all the modifications necessary to craft an American version of the *huissier*, the most drastic one would be allowing, or even requiring, the limited master to accept missions from private individuals and companies.[360] The tasks could include, *inter alia*, reports about the condition of property,[361] observations as to what a website contained at a particular time,[362] or reviews of (and limited reports on) the hiring and other employment practices of the employer related to employees similarly situated to the ex-employee complainant. Indeed, several *constats* cited and annexed to this paper demonstrate their usefulness in such situations.[363] Masters are currently only authorized to act when appointed by a judge,[364] but in order for the new report to be as useful as in France, it would have to be available to private parties. However, as with the *constat*, a master working on the order of a judge would have more power than one working at the request of an individual.[365]

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[355] Jacques Isnard, President, Int'l Ass'n of Judicial Officers, Opening Remarks at the 19th Congress of the UIHJ (Apr. 26-28, 2006), *in* THE HARMONIZATION OF ENFORCEMENT PROCEDURES IN AN AREA OF JUSTICE WITH NO BOUNDARY 142 (2007).

[356] Just like *huissiers* performing *constats*. *See* Fricero, *supra* note 13, at 4.

[357] FED. R. CIV. P. 53(b)(2).

[358] *Id.*

[359] *See* C.P.C., *supra* note 80, at arts. 236–39, 249–51, 255.

[360] *See id.* arts. 236–39, 249–51, 255. One may perform a *constat* with one of a few accepted reasons. *See* Fricero, *supra* note 13, at 3. When the *huissier* faces a physical or legal obstacle, such as illness or illegal mission, he has a duty to refuse to perform the *constat*. *Id.* A *huissier* is also not permitted to perform a *constat* on a family member. *Id.*

[361] For example, in real estate a report concerning a dispute about a commercial or residential lease, or a report about utility and appearance in the case of goods. *E.g.*, *supra* text accompanying notes 17 & 231.

[362] That can be done for a case of alleged intellectual property infringement, breach of contract, or any number of other claims.

[363] *E.g.*, Emerson, *The French Huissier*, *supra* note 12, at 1049; Cour de cassation [Cass.] [supreme court for judicial matters] soc., June 19, 2013, Bull. Civ. V, No. 12-12138, 1081 (Fr.).

[364] *See generally* FED. R. CIV. P. 53.

[365] Fricero, *supra* note 13, at 3. In keeping with the French model, the limited master

F. *Placing the Constat Within the American System of Evidence*

The last matter of concern with introducing an American *constat* is how it would fit into the adversarial legal system. In France, emphasis falls primarily on the finished report, which serves as the official document for the court and 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.[366] However, U.S. courts will have a different perspective based on the American rule of evidence prohibiting hearsay.[367]

This potential conflict between the American evidentiary rule prohibiting hearsay and using a French *constat* in litigation was demonstrated in a dispute between the McDonald's Corporation and a French franchisee.[368] In *Dayan I*, an Illinois court was asked to consider whether several *constats* performed in Paris by French *huissiers* were admissible into evidence.[369] After hearing the *huissiers*' testimony regarding the facts they recorded, the trial court admitted portions of their reports, as well as supporting photographs, as evidence.[370] The admissible sections were those transferred directly to the reports from the notes the *huissiers* made at the time of their observations.[371] On appeal, the franchisee challenged the statements from the *constats* allowed into evidence as violating the hearsay prohibition.[372]

The appellate court, however, found that the selected facts were properly admitted because they met the past recollection recorded exception.[373] There are four requirements for the past recollection recorded exception:

> (1) the witness must have had firsthand knowledge of the event recorded;
>
> (2) the written statement must be an original statement made at or near the time of the event;
>
> (3) the witness must lack any present recollection of the event; and

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would have greater rights to access privately-owned property and request documents when executing the order of a judge. *See id.* at 6; C.P.C., *supra* note 80, at art. 243. This protects the privacy of the public from the requests of individuals.

[366] *See* Dayan v. McDonald's Corp., 466 N.E.2d 958, 970 n.3 (Ill. App. Ct. 1984).

[367] Hearsay is defined as "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." FED. R. EVID. 801(c).

[368] *Dayan*, 466 N.E.2d at 968.

[369] *Id.*

[370] *Id.* at 969–70.

[371] *Id.* at 970.

[372] *Id.* at 969.

[373] *Id.* at 970.

(4) the witness must vouch for the accuracy of the memorandum.[374]

Since the French *constats* involved in the McDonald's case were not performed with hearsay or the above exception in mind, only certain parts of the reports were admissible as evidence.[375]

Nonetheless, the American report could be precisely designed to fit into the past recollection recorded exception. The new, legally educated judicial officer would easily meet the first and fourth requirements. The third requirement, the lack of a present recollection, does not seem to be absolute because the reports of the *huissiers* in the McDonald's case were admitted even though they testified about their recollections as well.[376] On the other hand, the second requirement appears to be essential.[377] The reason for requiring an original recording made during or shortly after the event observed is to ensure the reliability of the evidence.[378] The second requirement could be satisfied and its underlying purpose fulfilled simply by mandating that the new limited masters record their observations in an acceptable format as they are made. The judicial officers could either take down the observations in full written form and use that original document as the report, or videotape the entire process with oral commentary. Additionally, the legal education and experience of the judicial officers would bolster the credibility of either form of report, just as the education and experience of the *huissiers* augments the trustworthiness of their reports.[379]

IV. CONCLUSION

Constats, and the *huissiers* that perform them, are currently foreign to the American legal system. However, if introduced with a few alterations, a *constat*-like instrument, with a long history of success in France and dozens of other countries, could help solve two of the U.S. system's greatest problems: cost and delay. Although French *huissiers* suffer from the conflicted views of the public, the negative feelings toward *huissiers* spring largely from one of their functions: debt collection.[380] Indeed, they generally continue to be respected, with the educational pursuit of *huissier* positions a

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[374] *Id.* (citing Johnson v. City of Chicago, 431 N.E.2d 1105 (Ill. App. Ct. 1981)).

[375] *Id.* at 969–70.

[376] *Id.*

[377] *See id.* at 970–71. The second requirement was the most disputed one in the McDonald's case because the *huissiers*' reports were made after the actual observations, based on field notes that were later destroyed. *Id.*

[378] *Id.* at 970.

[379] *Id.* at 969-71.

[380] Mathieu-Fritz, *supra* note 25, at 499.

highly competitive, difficult process.[381]

Huissiers are judicial officers with an extensive legal education,[382] and their nearly undeniable credibility gives the reports *huissiers* prepare a high value as proof for two primary reasons.[383] First, the reports themselves, which can be created for a variety of factual situations, are available to both judges and individuals, but have more force behind them when ordered by a judge.[384] Second, the execution of a *constat* is always governed by rules designed to protect privacy and fairness[385] and is limited to the objective observations of the *huissier* without any opinion.[386] Consequently, *constats* are valuable investigatory tools for judges and almost a form of insurance for individuals and companies.

With the creation of a new, limited American master to fill the *huissier* role, and some limitations on its performance to avoid the hearsay prohibition and infringement on the responsibilities belonging to attorneys, the *constat* could provide similar benefits in the United States as it does in France and many other nations. The *constat* belongs in the dispute resolution arsenal of U.S. judges and arbitrators. The future American litigant's private tool chest can therefore encompass each individual party's right to independently seek pre-lawsuit, neutral, professional documentation, i.e., a *constat*, in the event of litigation, arbitration, or other resolution processes. The option to order this simple, yet credible, report would add to the judges' ability to encourage efficiency by allowing them to perform a portion of the fact-finding process outside of discovery. In doing so, potentially wasteful discovery practices and abuses would decrease,[387] as this fact-finding would further enable efficient litigation without significant changes to the rules governing discovery.

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381 *See* GUINOT, *supra* note 10, at 158-62 (discussing pedagogy, renewal of the profession, practical training of students training to be *huissiers*).

382 FRENCH JUDICIAL OFFICER, *supra* note 33, at 3.

383 Chardon, Address at Ministry of Justice, *supra* note 118, at 5; Fricero, *supra* note 13, at 11.

384 Fricero, *supra* note 13, at 1, 3.

385 *Id.* at 8; *see* Baker, *supra* note 149 and accompanying text.

386 Fricero, *supra* note 13, at 4.

387 In effect, as discussed previously, *see supra* notes 220-221 and accompanying text, there is the added benefit of reducing the time and expense of American litigation.