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“HACKING” SERVICE OF PROCESS: USING SOCIAL MEDIA TO PROVIDE CONSTITUTIONALLY SUFFICIENT NOTICE OF PROCESS

*Angela Upchurch**

I. INTRODUCTION

On a fundamental level, the Fourteenth Amendment Due Process Clause requires that a defendant be provided with adequate notice of any proceeding to be accorded finality.¹ Since the Supreme Court announced the modern standard for determining the constitutionality of notice in *Mullane v. Central Hanover Bank & Co.*,² there have been many opportunities for courts to determine whether newly conceived methods of service of process are constitutionally sufficient. Entirely new means of communication have been created and put into widespread use.³ As people have changed the way they interact with each other and how they receive information, service methods once perceived to be effective ways to communicate notice seem less so.⁴

As our society has changed, we have witnessed revised application of the principles of due process to court procedures. For example, personal jurisdiction changed from a highly formalistic inquiry, focused on whether a defendant was located within the territorial authority of a state,⁵ to a more pragmatic inquiry focused on fairness and due process rights.⁶ Similar to the evolution of the personal jurisdiction standard, the notice requirement has been stretched since the time of *Mullane* as new communication tools such

* Associate Professor of Law, Southern Illinois University School of Law. Thank you to the University of Arkansas at Little Rock for the opportunity to present this work at its *Law Review Ben J. Alheimer Symposium, “Legal Hacking: Technology and Innovation in the Legal Profession,”* in February 2016, (<http://ualr.edu/lawreview/home/symposium-series/>). Special thanks to Kent Markus and Susan Gilles, for their comments on early drafts, and to Jayci Noble and Tess Shubert, for their valuable research assistance. Finally, thank you to the Southern Illinois University School of Law for its financial support in writing this project.

1. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

2. *Id.* at 314–315.

3. See Trisha Dowerah Baruah, *Effectiveness of Social Media as a tool of communication and its potential for technology enabled connections: A micro-level study*, 2 INT’L J. OF SCI. & RES. PUBLICATIONS 1, 8–9 (2012) (discussing the impact of social media on the way people communicate and process information).

4. See *infra* Part II (discussing the evolution of electronic service of process).

5. *Pennoyer v. Neff*, 95 U.S. 714, 723 (1877).

6. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

as television, telex, and fax became available.⁷ What makes the current environment unique is the speed at which human communication is changing.⁸ Never before has communication changed so quickly and in a way accessible to the general public. Television and fax, while revolutionary in the way they permitted people to send and access information, were largely tools that few people had the ability to harness for purposes of notice.⁹ Social media, by contrast, is a free medium, and the user can both receive and send information. Additionally, when coupled with the advancement of inexpensive mobile devices and ready access to the internet, individuals can access social media tools wherever they go.¹⁰ The widespread accessibility of these new technologies has radically altered the way in which people send and receive information.¹¹

Plaintiffs have long advocated for more efficient means of service of process when a defendant attempts to evade service or when service of process through in-hand personal service would be too expensive or impractical. While in-hand personal service will remain the gold standard service of process method, social media provides new avenues for achieving constitutionally sufficient notice. As such, service rules should be adopted that provide plaintiffs with a default option of service via social media while ensuring defendants' constitutional rights are adequately protected. Additionally, service rules should be adopted that permit the court to order service via social media after considering the individual circumstances of the case. Finally, service rules should be adopted that facilitate securing the defendant's consent to service via social media.

This article explores the principles underlying the notice requirement of the Fourteenth Amendment Due Process Clause.¹² Against this backdrop, this article examines the unique challenges presented by service via social media.¹³ This article proposes several legislative options that permit service

7. See *infra* Part II (discussing the evolution of electronic service of process).

8. See NICK COULDRY, *MEDIA, SOCIETY, WORLD: SOCIAL THEORY AND DIGITAL MEDIA PRACTICE* 1-30 (2012) (discussing the impact of recent changes in the use of media on society), Baruah, *supra* note 3, at 4.

9. For example, while many people own television sets, most people cannot afford to purchase television airtime. Therefore, for this medium, the messaging is only transmitted one way.

10. A 2015 Pew Research Center Report found that "68% of U.S. adults have a smartphone, up from 35% in 2011, and tablet computer ownership has edged up to 45% among adults." Monica Anderson, *Technology Device Ownership*, PEW RES. CTR. (Oct. 29, 2015), <http://www.pewinternet.org/2015/10/29/technology-device-ownership-2015/>. Additionally, "86% of those ages 18-29 have a smartphone, as do 83% of those ages 30-49 and 87% of those living in households earning \$75,000 and up annually." *Id.*

11. See Baruah, *supra* note 3, at 4-5.

12. See *infra* Part II (discussing the evolution of notice jurisprudence in the U.S.); see also *infra* Part III (discussing the principles underlying the due process notice requirement).

13. See *infra* Part IV.

of process on individual defendants¹⁴ via social media,¹⁵ while upholding the principles of due process and ensuring constitutional notice is provided to the defendant. Ultimately, social media provides an efficient “legal hack”¹⁶ because, for some defendants, it is *more likely* to provide notice than other, more traditional, methods of service.

II. THE HISTORY OF NOTICE AND SERVICE OF PROCESS IN THE UNITED STATES

This section explores the evolution of the due process right to notice in the American legal system. After addressing the basic attributes of notice,¹⁷ this section addresses the various methods for service of process that have been adopted to accomplish notice and the constitutional analysis of these methods.¹⁸ Interwoven in this section is an evaluation of the impact that technological advances in communication have made on service of process. Finally, this section compares the methods for service of process embraced in the United States with service methods currently being used abroad.¹⁹

A. The Basic Components of Notice

To enter a binding judgment against a defendant, he must be properly notified of the claims against him.²⁰ Notice is proper only when the method

14. This article is limited to a discussion of the service of process on individual defendants in civil actions. While service of process via social media on a corporation or entity would, in some cases, pass constitutional muster, the pattern of use of social media by individuals differs from that of entities. This article focuses on the use of social media by individuals and argues for service rules built around these patterns of behavior. Additionally, this article does not address service of process in class actions.

15. This article focuses on the use of social media by individuals and recommends service rules premised on the communication supported by social media platforms. This article does not take a larger position on whether other forms of electronic communication, such as email, can or should be used for service of process. However, the reasoning in this article could be used to support more generalized service provisions aimed at all forms of electronic service of process.

16. “Legal hacking” is a cultural reference to the growing movement to find creative solutions to problems that lie at the intersection of law and technology. “Legal hackers spot issues and opportunities where technology can improve and inform the practice of law and where law, legal practice, and policy can adapt to rapidly changing technology.” LEGAL HACKERS, [www. https://legalhackers.org/](https://legalhackers.org/) (last visited June 28, 2016). “Legal hacking” was the focus of the UALR Bowen School of Law’s Ben J. Alzheimer Symposium at which this paper was presented.

17. See *infra* Section II.A.

18. See *infra* Section II.B.

19. See *infra* Section II.C.

20. While more than just proper notice is needed for a binding judgment, notice is an essential part of ensuring that the defendant will be bound to the court’s judgment. *Mullane v.*

for service of process²¹ is authorized by the jurisdiction *and* the service is constitutional under the Fourteenth Amendment Due Process Clause. A defendant who fails to appear after receiving proper notice will have a default judgment entered against him.²² However, without proper notice, that judgment will be subject to collateral attack.²³

In *Mullane v. Central Hanover Bank & Trust Co.*, the Supreme Court announced the modern-day test for the right to notice under the Fourteenth Amendment Due Process Clause.²⁴ Under *Mullane*, notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”²⁵ At a minimum, “the notice must be of such nature as reasonably to convey the required information” including the court where the action is pending, the date by which the defendant must respond, and the consequences for failure to respond.²⁶ Moreover, the notice “must afford a reasonable time for those interested to make their appearance.”²⁷ Finally, the method for notice must amount to more than a “mere gesture;” rather, “[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.”²⁸ When such notice is impossible or is not practicable, “the form chosen [must] not [be] substantially less likely to bring home notice than other of the feasible and customary substitutes.”²⁹ Like other individual due process rights, the defendant may waive his right to receive notice or may consent to a particular form of notice.³⁰

Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950); 4A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE §1074 (4th ed. 2016).

21. In this Article, the term “service of process” will refer generally to the service initiating the lawsuit. In some jurisdictions, this includes service of the complaint and a summons. This also be accomplished through the service of a notice, writ or other order. See Majorie A. Shields, Annotation, *Service of Process Via Computer or Fax*, 30 A.L.R.6th 413 (2008).

22. WRIGHT, *supra*, note 20.

23. *Id.*; *Mullane*, 339 U.S. at 314.

24. *Mullane*, 339 U.S. at 314. While other procedural due process challenges have followed the balancing test announced in *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976), the Court held in *Dusenbery v. United States*, 534 U.S. 161, 167–68 (2002), that the *Mullane* standard was applicable in determining whether notice was constitutional.

25. *Mullane*, 339 U.S. at 314. Because a civil court proceeding that will bind the defendant constitutes a deprivation of his constitutional right to property, the due process clause is triggered. *Id.* at 313.; see also WRIGHT, *supra*, note 20;8 RHONDA WASSERMAN, PROCEDURAL DUE PROCESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION, 22-61 (Jack Stark ed., 2004) (discussing the components of procedural due process analysis).

26. *Mullane*, 339 U.S. at 314-15.

27. *Id.* at 314.

28. *Id.* at 315.

29. *Id.*

30. 62B AM. JUR. 2D *Process* § 288 (2016). Of course, a court may also consider the sufficiency of service sua sponte. *Id.* Other groups of vulnerable defendants may be protected

Applying *Mullane*, the Court has clarified that *actual notice* is not constitutionally required.³¹ It has been accepted practice, following *Mullane*, when the defendant has actual notice, courts are often willing to overlook technical defects in performance of service.³²

B. The Methods of Service of Process Employed by State and Federal Courts

While state laws authorize a variety of methods for service of process on individuals, and even vary in the operation of those methods, there are several common categories of approved service methods that exist across jurisdictions. This section will examine traditional methods of service used in both state and federal courts³³ before exploring new and emerging authorized methods for service of process.

1. Traditional Methods of Service of Process

a. In-Hand Personal Service of Process

In-hand personal service of process has always been considered a constitutional method of service and is commonly referred to as the “gold standard” method.³⁴ As such, every jurisdiction authorizes in-hand personal

from consent to less formal methods of service. Stephanie Francis Ward, *Our Pleasure to Serve You: More Lawyers Look to Social Networking Sites to Notify Defendants*, A.B.A. J. (Oct. 1, 2011 8:49AM), http://www.abajournal.com/magazine/article/our_pleasure_to_serve_lawyers_social_networking_sites_notify_defendants/ (discussing how some jurisdictions might limit the ability to contract away the right to formal service of process in property leases).

31. *Dusenbery v. United States*, 534 U.S. 161, 169–170 (2002).

32. See RESTATEMENT (SECOND) OF JUDGMENTS § 2 cmt. e (AM. LAW INST.1982) (noting that “in most jurisdictions the statutory provisions on notice-giving have gradually been revised and reinterpreted to require less exacting compliance with technical formality. However, the statutes still may be construed as establishing a set of requirements as to notice-giving effort that go beyond those imposed by the Constitution.”); see also RESTATEMENT (SECOND) OF JUDGMENTS § 3 cmt. b (AM LAW INST.1982) (noting that “[t]he modern approach to notice-giving attaches primary importance to actual notice and treats technical compliance with notice procedures as a secondary consideration”).

33. The Federal Rules of Civil Procedure (FRCP) provide a discrete list of approved methods for service of process on an individual located in the United States. FED. R. CIV. P. 4(e). In addition to these methods, the FRCP incorporates any method authorized by the state in which the case is filed or in which the defendant is served. *Id.* at 4(e)(1). Therefore, any alteration made to the state service laws will automatically have some impact on the federal courts.

34. WASSERMAN, *supra* note 25, at 130; *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950) (noting that “[p]ersonal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding.”).

service of process on an individual defendant. It has become widely acknowledged as synonymous with notice, so much so that it has become an event engrained in our cultural experience and is often depicted in movies or television shows.³⁵

To accomplish in-hand personal service, the plaintiff must employ an authorized server. Some jurisdictions limit servers to the sheriff (or other state official) or to a licensed server,³⁶ while other jurisdictions only require that the server be an individual over eighteen-years-old who is not a party to the suit.³⁷ While all jurisdictions require in-hand service be made to the defendant personally,³⁸ some states place limits on where or when service may be made.³⁹ Finally, service is considered valid even if the defendant ultimately does not accept the process papers from the server. Courts have upheld service on a defendant who refused to take physical possession of the summons when the defendant was clearly apprised of the contents of the process and the process papers are left near him or in a space he physically controls.⁴⁰

For the nineteenth and twentieth centuries, in-hand personal service of process was used in all cases where the court exercised *in personam* jurisdiction over the defendant.⁴¹ However, following the landmark Supreme Court decision of *International Shoe Co. v. Washington*,⁴² in-hand personal service of process was no longer required to maintain personal jurisdiction over the defendant.⁴³ Rather, *in personam* personal jurisdiction was established if the defendant had sufficient minimum contacts with the forum.⁴⁴ When in-hand service of process was no longer necessary to achieve *in per-*

35. Ronald J. Hedges et al., *Electronic Service of Process at Home and Abroad: Allowing Domestic Electronic Service of Process in the Federal Courts*, 4 FED. CTS. L. REV. 55, 73 (2010). In-hand service of process has even been the focal point for major motion pictures. See *PINEAPPLE EXPRESS* (Sony Pictures 2008).

36. See ALASKA R. CIV. P. 4(c)(1) (requiring “[s]ervice of all process shall be made by a peace officer, by a person specially appointed by the Commissioner of Public Safety for that purpose or, where a rule so provides, by registered or certified mail).

37. See FED. R. CIV. P. 4(c)(2) (stating that “[a]ny person who is at least 18 years old and not a party” may serve the defendant with the summons).

38. Service on an appointed agent is also appropriate, but is typically considered in separate provisions of service rules. See FED. R. CIV. P. 4(e)(2)(C).

39. Example exclusions include service to a defendant attending a worship meeting of a religious organization, MICH. COMP. LAWS ANN. § 600.1831 (West 2016), or service on a defendant elector on the day of an election. *Id.*

40. See Steve Sowell, *10 Things I Wish Process Servers Knew*, 87-OCT MICH. B. J. 30, 30–31; see 58 AM. JUR. 2D *Notice* § 28 (2016).

41. WASSERMAN, *supra* note 25, at 130. *In personam* personal jurisdiction is necessary to impose personal liability on the defendant himself. *Id.*; *Pennoyer v. Neff*, 95 U.S. 714, 723 (1877).

42. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

43. *Id.*

44. *Id.*

sonam personal jurisdiction, the states began to authorize other, more efficient, methods of service of process.

b. Abode or Dwelling Service of Process

Many jurisdictions also authorized a form of substituted service⁴⁵ of process commonly referred to as abode or dwelling service. In this form of service, the process typically is served on a resident in the defendant's dwelling. What constitutes a defendant's "usual place of abode," residence or dwelling differs considerably across jurisdictions. However, a common trend is to require some permanency by the defendant in the dwelling.⁴⁶ A goal of many service provisions is to ensure the service is delivered to the place the defendant considers to be his "home" or "primary residence."⁴⁷

Another limitation often imposed focuses on who may accept this form of service. For some jurisdictions, any competent resident will suffice.⁴⁸ For other jurisdictions, there is a more limited group of individuals who may be served through dwelling service—often these limits focus on the age of the individual accepting service or on the relationship between the individual and the defendant.⁴⁹

There is also a variation of service on a defendant's dwelling known as "nail and mail" service. Under this variation, the service is affixed to the defendant's dwelling and subsequently mailed to the defendant, usually via certified or registered mail.⁵⁰ For this form of dwelling service, the process papers must be prominently placed at the dwelling so as to sufficiently alert the defendant upon his return.⁵¹

45. Because this is a form of substitute service, some jurisdictions require the defendant to demonstrate that personal service is not availing. *See, e.g.*, CAL. CIV. PROC. CODE § 415.20(b) (West 2016). Other jurisdictions do not require this intermediate showing and permit the plaintiff to perform service on the defendant's dwelling without first attempting service on the defendant personally. *See, e.g.*, FED. R. CIV. P. 4(e)(2)(B).

46. Allen E. Korpela, Annotation, *Construction of Phrase "Usual Place of Abode," or Similar Terms Referring to Abode, Residence, or Domicile, as Used in Statutes Relating to Service of Process*, 32 A.L.R. 3d 112 (1970).

47. For example, in some jurisdictions there is a presumption that the residence that married spouses share is the residence that must be used when serving one of the defendant spouses. *Id.* at § 9.

48. FED. R. CIV. P. 4(e)(2)(B) (noting that service may be left with "someone of suitable age and discretion who resides" at the defendant's dwelling).

49. C.R.C.P. 4(e)(1) (noting that service may be left "with any person whose age is eighteen years or older and who is a member of the [defendant's] family").

50. N.Y. C.P.L.R. LAW § 308(4) (McKinney 2016).

51. *Id.* (requiring the summons to be affixed to the door); *see* J.R. Monaghan, Annotation, *Place or Manner of Delivering or Depositing Papers, Under Statutes Permitting Service of Process by Leaving Copy at Usual Place of Abode or Residence*, 87 A.L.R. 2d 1163 (1963).

c. Service via Mail

Another form of service that has been authorized in many jurisdictions is service via mail. In many jurisdictions, service via mail must be performed by certified or registered mail.⁵² In other instances, service may be performed via first-class mail, especially when the service by mail is being used in conjunction with other forms of service.⁵³

d. Constructive Notice via Publication & Catch-All Provisions

Most jurisdictions provide for a constructive form of notice when it is impracticable or impossible to serve the defendant in any other manner. These methods almost always require court order. Despite being widely recognized as unlikely to provide the defendant with actual notice,⁵⁴ the most common form of constructive notice is publication in a regularly circulating newspaper. Unfortunately, this form of service of process is not only unlikely to reach the defendant, but also is costly for the plaintiff.⁵⁵

Jurisdictions that have recognized the limitations associated with service via publication, have created “catch-all” provisions to strike a balance between the plaintiff’s interest in efficient service methods and the defendant’s constitutional right to receive notice of the lawsuit.⁵⁶ Under a “catch-all” provision, the plaintiff can move the court to authorize any form of service that would otherwise be constitutional.⁵⁷ To trigger these provisions, the court must make a finding that the other methods authorized by the state service rules would not bring home notice to the defendant.⁵⁸

52. 58 AM. JUR. 2D *Notice* § 29 (2016). For a comparison of the operation of certified and registered mail, see Irene A. Blake, *Definitions of Certified Mail and Registered Mail*, THE HOUS. CHRON., <http://smallbusiness.chron.com/definitions-certified-mail-registered-mail-40208.html> (last visited June 22, 2016).

53. CAL CIV. PROC. CODE § 415.20 (West 2016) (permitting service via mail when service is also made at defendant’s office). *But see* Ann Varnon Crowley, Note, *Rule 4: Service by Mail May Cost You More Than a Stamp*, 61 IND. L. J. 217 (1986) (discussing the challenges that ultimately led to the repeal of the former Rule 4 provision, which permitted service via first class mail).

54. Alyssa L. Eisenberg, Comment, *Keep Your Facebook Friends Close and Your Process Server Closer: The Expansion of Social Media Service of Process to Cases Involving Domestic Defendants*, 51 SAN DIEGO L. REV. 779, 810–813 (2014).

55. *Id.*; *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709, 716 (N.Y. Sup. Ct. 2015) (noting that publication of legal notice in “more widely circulated newspaper, like the New York Post or the Daily News, might reach more readers, the cost, which approaches \$1,000 for running the notice for a week”).

56. N.Y. C.P.L.R. LAW § 308(5) (McKinney 2016) (allowing the court to order any manner of service if it first finds that service is impracticable under the traditional methods set forth in the service statute).

57. *Id.*

58. *Id.*

2. *Electronic Service of Process*

Technological advances provide new avenues for delivery of service of process. Surprisingly, while communication through newly developing electronic media has been embraced in many other sectors, the federal and state court systems have been relatively slow to adopt electronic communication as a regular method for notice.⁵⁹ In fact, while there are some state service provisions providing for electronic service of pleadings and papers,⁶⁰ there is no state service provision that permits litigants to provide service of process to individual defendants in the first instance, without a court order, via electronic means.⁶¹ Therefore, the movement towards electronic service of process has been observed primarily in two areas—the judicial application of state catch-all service provisions, and in federal courts, when service is made on a defendant living abroad.

In the context of state catch-all service provisions, the court is permitted to order any method of service that would meet the constitutional standard in *Mullane*.⁶² Because these provisions are structured to operate as backup methods, the court must make a finding that service through traditional routes is impossible or impracticable. As a result, cases applying these provisions in the context of electronic service often focus on this initial finding of impossibility or impracticability with less consideration of the “reasonably certain to inform” aspect of the *Mullane* standard.⁶³

In the context of service on a defendant located in a foreign country, Federal Rule of Civil Procedure 4(f)(3) permits the district court to order any method of service that is not prohibited by international agreement and otherwise meets the constitutional standard in *Mullane*.⁶⁴ Similar to the state “catch-all” provisions, Rule 4(f)(3) requires court approval of the service requested.⁶⁵ However, Rule 4(f)(3) does not require the court to make a find-

59. See *Fortunato v. Chase Bank USA*, No. 11 CIV. 6608 (JFK), 2012 WL 2086950, at *2 (S.D.N.Y. June 7, 2012) (noting that the request to permit service via Facebook was “unorthodox”).

60. NEB. CT. R. PLEADING. § 6-1105 (providing for electronic service of pleadings and other papers).

61. Some jurisdictions are making it easier for plaintiffs to seek court order for electronic service of process. Stephanie Irvine, *How Utah Makes Electronic Service of Process Work*, SERVE-NOW (May 24, 2016), <https://www.serve-now.com/articles/2199/how-utah-makes-electronic-service-of-process-work>.

62. N.Y. C.P.L.R. LAW § 308(5) (McKinney 2016) (allowing the court to order any manner of service if it first finds that service is impracticable under the traditional methods set forth in the service statute).

63. See *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709, 716 (N.Y. Sup. Ct. 2015).

64. FED. R. CIV. P. 4(f)(3).

65. *Id.* (stating that service may include any method “as the court orders”).

ing that service through other methods are impracticable or impossible prior to ordering the requested form of service.⁶⁶

a. Telex and Facsimile

Some of the earliest forms of technology embraced as appropriate methods for service of process include telex⁶⁷ and facsimile transmissions.⁶⁸ In *New England Merchants National Bank v. Iran Power Generation & Transmission Co.*,⁶⁹ an important early decision embracing electronic service of process, a federal court ordered service of process on Iranian defendants via telex when the American plaintiffs' attempts to provide service via other traditional methods were stymied by a breakdown in relations between their respective countries.⁷⁰ Rather than express trepidation at the prospect of ordering this new form of service, the *New England Merchants* court proclaimed:

[c]ourts . . . cannot be blind to changes and advances in technology. No longer do we live in a world where communications are conducted solely by mail carried by fast sailing clipper or steam ships. Electronic communication via satellite can and does provide instantaneous transmission of notice and information. No longer must process be mailed to a defendant's door when he can receive complete notice at an electronic terminal inside his very office, even when the door is steel and bolted shut.⁷¹

Surprisingly, in the time following this key decision, the federal courts were slow to embrace the use of new technologies as methods for providing service of process. In fact, federal courts did not begin ordering service of

66. *Id.* The only limitation under Rule 4(f)(3) is that the method must not be prohibited by international law. *Id.*

67. The telex is an older "system of communication in which messages are sent over long distances by using a telephone system and are printed by using a special machine (called a teletypewriter)." *Telex*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2015).

68. See generally John M. Murphy III, Note, *From Snail Mail to E-Mail: The Steady Evolution of Service of Process*, 19 ST. JOHN'S J. LEGAL COMMENT. 73, 83-87 (2004) (discussing the early evolution of electronic service of process).

69. 495 F. Supp. 73 (S.D.N.Y. 1980).

70. *Id.* at 76 (noting that the plaintiffs' attempts at service were encumbered by the following circumstances: "the political climate in Iran, including what appears to be a breakdown in the postal service of Iran; the severance of diplomatic relations between Iran and the United States and its concomitant tension and almost total lack of cooperation; and, the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 et seq., which the defendants claim provides the 'exclusive' method by which the government of Iran, its agencies and instrumentalities, are to be served with process in a commercial litigation.").

71. *Id.* at 81.

process via facsimile (a technology similar to telex) until the early 2000s.⁷² Even after courts began to embrace the use of facsimile as an acceptable means of providing service of process, it was with some reluctance. For example, while courts were willing to order service by facsimile when the defendants had used facsimile to communicate with the plaintiff on prior occasions, other courts declined to order service by this method when such use had not been established.⁷³

While service rules have been relaxed to permit service of *other* pleadings or papers (such as answers to discovery requests) via facsimile,⁷⁴ *service of process* via facsimile has never enjoyed widespread support in the states. Absent express authorization or the inclusion of a “catch-all” provision, service of the summons via facsimile is not permitted.

b. Email & Social Media

In another landmark decision, *Rio Properties, Inc. v. Rio International Interlink*,⁷⁵ the United States Court of Appeals for the Ninth Circuit held that service of process via email was constitutionally sufficient.⁷⁶ The plaintiff in *Rio* sued the defendant, a foreign internet business entity, for trademark infringement.⁷⁷ After traditional methods for service proved to be fruitless, the plaintiff moved the district court to order alternate service via email, and the district court granted the order.⁷⁸

On appeal, the Ninth Circuit noted the “dearth of authority” supporting service of process by email; but the court ultimately concluded, not only was

72. *Ryan v. Brunswick Corp.*, No. 02-CV-0133E(F), 2002 WL 1628933, at *3 (W.D.N.Y. May 31, 2002); Murphy III, *supra*, note 68 at 83–90 (discussing the early adoption of fax as a method for service of process by state and federal courts).

73. *Nabulsi v. H.H. Sheikh Issa Bin Zayed Al Nahyan*, No. CIV.A. H-06-2683, 2007 WL 2964817, at *8 (S.D. Tex. Oct. 9, 2007) (rejecting the plaintiffs’ request to serve the defendants via facsimile because there was no evidence that the defendants used the fax number “to conduct business or receive important communications on a regular basis”).

74. FED. R. CIV. P. 5(b)(2)(E) (permitting service of pleadings and other papers “by electronic means if the person [being served] consent[s] in writing”); *see also* WASH. SUPER. CT. CIV. R. 5(b)(7).

75. 284 F.3d 1007 (9th Cir. 2002).

76. *Id.* at 1018.

77. *Id.* at 1012.

78. The district court also ordered service on a separate organization not named as a defendant in the suit, IEC. IEC, an international courier, was occupying the last claimed physical address for the defendant in the United States. The plaintiff had originally attempted service on the defendant at the address now maintained by IEC. While IEC was not authorized to accept service on behalf of the defendant, it informed the plaintiff that it would forward the summons and complaint to the defendant’s Costa Rican courier. In addition, the court ordered service via mail on an attorney who had inquired about the lawsuit on behalf of IEC. *Id.* at 1013.

service of process by email proper, “it was the method of service most likely to reach” the defendant.⁷⁹ The court noted that the defendant lacked a physical office and had structured its business around its internet-presence, promoting its email address as its “preferred contact information.”⁸⁰ For these reasons, the court held that service of process via email was reasonably calculated to apprise this defendant of the pendency of the lawsuit.⁸¹

Following the decision in *Rio*, several federal courts have ordered service via email on foreign defendants under Rule 4(f)(3).⁸² In those decisions, the defendant’s prior use of email was an important consideration used to support an order of alternative service via email. The courts reasoned that prior use supports the conclusion that the defendant will likely receive the email containing the summons and complaint.⁸³

Similar results have been reached by state courts utilizing state “catch-all” service provisions. Following the reasoning in *Rio*, a New York family court ordered service of the divorce action via email in *Hollow v. Hollow*.⁸⁴ Under the New York service rules, a court can order any constitutional method of service so long as it finds that the traditional methods of service would prove to be “impracticable.”⁸⁵ The *Hollow* court made the initial finding that service would be impracticable by determining that the plaintiff’s husband had relocated to Saudi Arabia and the wife’s attempts at securing

79. *Id.* at 1017.

80. *Id.* at 1018. The court explained that “RII structured its business such that it could be contacted *only* via its email address. RII listed no easily discoverable street address in the United States or in Costa Rica. Rather, on its website and print media, RII designated its email address as its preferred contact information.” *Id.* (emphasis added).

81. *Rio Prop., Inc.*, 234 F.3d at 1018.

82. *Hydentra Hlp Int. Ltd. v. Porn69.org*, No. CV15-00451-PHX DGC, 2015 WL 8064770, at *3 (D. Ariz. Dec. 7, 2015) (ordering service via email after finding that the defendant “conducts business through the internet” and “service through email will give defendant sufficient notice and opportunity to respond”); *F.T.Comm’n. v. PCCare247 Inc.*, No. 12 CIV. 7189 (PAE), 2013 WL 841037, at *4 (S.D.N.Y. Mar. 7, 2013) (allowing service on the defended via email and Facebook); *Lipenga v. Kambalame*, No. GJH-14-3980, 2015 WL 9484473, at *4 (D. Md. Dec. 28, 2015) (the plaintiff presented evidence that she had “electronically communicated” with the defendant in an attempt to negotiate a settlement of the dispute); *see also F.T.Comm’n. v. Pecon Software Ltd.*, No. 12 CIV. 7186 (PAE), 2013 WL 4016272, at *6 (S.D.N.Y. Aug. 7, 2013) (ordering service via email on those defendants that made “use of [the] email addresses in relation to the alleged scheme” and denying a request to order service via email on a defendant who did not make such use of the proposed email).

83. *Hydentra Hlp Int. Ltd.*, 2015 WL 8064770, at *3.

84. *Hollow v. Hollow*, 747 N.Y.S.2d 704, 708 (Sup. Ct. 2002) (the court found “that service directed to the defendant’s last known e-mail address as well as service by international registered air mail and international mail standard, is sufficient to satisfy the due process requirements”).

85. N.Y. C.P.L.R. LAW § 308(5) (McKinney 2016) (allowing the court to order any manner of service if it first finds that service is impracticable under the traditional methods set forth in the service statute).

international service proved to be fruitless.⁸⁶ While attempting to locate the husband to perform in-hand service of process, the wife communicated with the husband via email. In one email correspondence, the husband informed the wife, "I am a resident of Saudi Arabia and there's nothing anyone can do to me here."⁸⁷ After ruling that the "catch all" provision applied because of the husband's evasive conduct, the *Hollow* court concluded that service by email would be constitutional under *Mullane* because the defendant had continued to contact his family via email after his departure for Saudi Arabia.⁸⁸

Despite the use of service via email following *Rio*, many courts continue to express concern over the use of email as a sole vehicle for service. As a result, decisions granting a request for alternative service of process via email often order a back-up method of service of process, including: regular mail; certified or registered mail; fax; or publication.

In recent years, courts have been faced with requests to order alternative service via social media. In *Fortunato v. Chase Bank U.S.A.*,⁸⁹ the third-party plaintiff, Chase Bank, moved the district court to order alternative service via email and Facebook (along with other service methods) on a domestic third-party defendant who was actively evading service of process.⁹⁰ Chase Bank brought an impleader action against the estranged daughter of the plaintiff, arguing that she was liable to Chase Bank after fraudulently opening a credit card account in the plaintiff's name.⁹¹ Because the Federal Rules of Civil Procedure (FRCP) do not provide for service of process via email or Facebook, the district court relied on the service rules of New York, which are incorporated through Rule 4(e).⁹²

After finding the third-party defendant intentionally evaded service of process, by providing fictional or out of date addresses at various points, the *Fortunato* court considered whether service via email or Facebook would be constitutional. The court expressed its concern about ordering service via Facebook, noting that it was "unorthodox to say the least."⁹³ This concern was heightened for the *Fortunato* court, because Chase Bank was not able to confirm that the third-party defendant, in fact, maintained the Facebook account located.⁹⁴ A similar concern was raised about the email associated

86. *Hollow*, 747 N.Y.S.2d at 705.

87. *Id.* at 705.

88. *Id.* at 707–08.

89. *Fortunato v. Chase Bank USA*, No. 11 CIV. 6608 (JFK), 2012 WL 2086950, at *2 (S.D.N.Y. June 7, 2012).

90. *Id.* at *1–3.

91. *Id.* at *2–3.

92. *Id.* at *1.

93. *Id.* at *2.

94. *Id.* at *2 (the court noted its concern, explaining, "anyone can make a Facebook profile using real, fake, or incomplete information, and thus, there is no way for the Court to

with the Facebook profile; there was no evidence that the email was operational or accessed by the third-party defendant.⁹⁵ Consequently, the court ordered service of process via publication in a local newspaper. Perhaps ironically, the court used the third-party defendant's Facebook account to determine in which newspapers to publish notice.⁹⁶

Other courts have been more willing to consider service via social media when that service has been accompanied by other methods of service of process. In *Federal Trade Commission v. PCCARE247 Inc.*,⁹⁷ the Federal Trade Commission (FTC) moved the district court to order service by email and Facebook on a defendant in a foreign country. The *PCCARE247* court held that service by email alone would be constitutional because the defendant "ran an internet-based business and used email frequently for communication."⁹⁸ The court also specifically noted that the defendant had used the email addresses in connection with the scheme that formed the basis of the FTC's action and had even communicated with the court through one of the email addresses.⁹⁹

After holding that the proposed service via email was constitutional, the *PCCARE247* court turned to the issue of whether service via Facebook was also constitutional. The court explained that the Facebook accounts were connected with the email addresses known to be associated with the defendants and with a website that was connected with the defendants' actions in the underlying dispute.¹⁰⁰ Moreover, the court noted that the Facebook accounts could be connected to the defendants because of the personal information posted on the profile that was linked to known information about the defendants and the connections between the account and other known linked accounts.¹⁰¹ For all of these reasons, the court held that the FTC had "demonstrated a likelihood that service by Facebook message would reach the defendants."¹⁰² Despite these determinations, the *PCCARE247* court cautioned that "service by Facebook is a relatively novel

confirm whether the Nicole Fortunato the investigator found is in fact the third-party Defendant to be served").

95. *Fortunato*, 2012 WL 2086950, at *2.

96. *Id.* at *8–10.

97. *FTC v. PCCARE 247 Inc.*, No. 12 CIV. 7189 (PAE), 2013 WL 841037 (S.D.N.Y. Mar. 7, 2013).

98. *Id.* at *13. (explaining that the "FTC has, therefore, demonstrated a high likelihood that defendants will receive and respond to emails sent to these addresses" and "[s]ervice by email alone, therefore, would comport with due process").

99. *Id.*

100. *Id.* at *16. In fact, the defendants use the Facebook pages to advertise their business. *Id.* at *6.

101. *Id.* (stating the Facebook account was linked via a "friend" request to another known person who was linked to the defendant outside of Facebook).

102. *Id.*

concept, and that it is conceivable that defendants will not in fact receive notice by this means.”¹⁰³ For this reason, the court emphasized that service by Facebook was being used as a way to “backstop the service upon each defendant at his, or its, known email address.”¹⁰⁴ After expressing these words of caution, the *PCCARE247* court encouraged courts to continue to embrace new technology when considering whether to authorize new methods for service of process, saying, “history teaches that, as technology advances and modes of communication progress, courts must be open to considering requests to authorize service via technological means of then-recent vintage, rather than dismissing them out of hand as novel.”¹⁰⁵

Following the *PCCARE247* decision, other courts approved service via social media when it accompanied service via email or mail. In each of these decisions, the court required some proof that the defendant owned the social media account and made regular use of it. For example, in *WhosHere, Inc., v. Orun*,¹⁰⁶ the plaintiff presented evidence that the defendant had referred plaintiff to his social media accounts that bore the defendant’s name and identifying information.¹⁰⁷ Finally, the plaintiff introduced evidence that the defendant had made regular and recent use of the social media accounts, even identifying himself as a “mobile technology enthusiast” on one account.¹⁰⁸ Based on this evidence, the court found that the *collective* service attempts to the defendant’s two email accounts *and* two social networking accounts would provide the defendant with sufficient notice of the litigation.¹⁰⁹

Even when the defendant has not made clear use of email and social media, courts have ordered service via social media as a “backstop” to other service methods. For example, in *Ferrarese v. Shaw*,¹¹⁰ the court authorized service of process via email and Facebook as backstop methods to service by certified mail with a return receipt requested to the defendant’s last known address and to the defendant’s sister at the same address.¹¹¹ The defendant in *Ferrarese* actively evaded service by using multiple fictitious names.¹¹² Those efforts stymied the plaintiff’s ability to verify the email and

103. *PCCare247 Inc.*, No. 12 CIV. 7189 (PAE), 2013 WL 841037 at *5.

104. *Id.*

105. *Id.*

106. *WhosHere, Inc., v. Orun*, No. 1:13-CV-00526-AJT, 2014 WL 670817 (E.D. Va. Feb. 20, 2014).

107. *Id.* at *4. The plaintiff introduced the defendant’s emails, and made explicit reference to his social media accounts.

108. *Id.* at *4–5 n.9.

109. *Id.* at *4.

110. 164 F.Supp.3d 361 (E.D.N.Y. Jan. 20, 2016).

111. *Id.* at 367–68.

112. *Id.* at 363–64, 367.

social media accounts.¹¹³ Because the email and social media account service was only being used to supplement the other forms of service, the court was more willing to authorize its use.¹¹⁴

Recently, courts have addressed whether service through social media *alone* would be constitutional. In 2015, a New York Supreme Court ordered service of a divorce summons via Facebook private message in *Baidoo v. Blood-Dzraku*.¹¹⁵ The *Baidoo* court accepted the plaintiff's affidavits verifying the Facebook account belonged to the defendant by affirming that the photographs associated with the account were that of the defendant.¹¹⁶ Additionally, the plaintiff attached copies of exchanges between herself and the defendant on the Facebook account.¹¹⁷ This collective information about the Facebook account supported the court's determination that the Facebook account belonged to the defendant and that he regularly logged into the account.¹¹⁸ Based on these findings, the *Baidoo* court held that service through the Facebook account was constitutional under *Mullane*.¹¹⁹

In determining whether to order an additional "backstop" method of service, the *Baidoo* court reasoned that the plaintiff did not have any other method available to her.¹²⁰ For example, the defendant did not have an email address¹²¹ and his last known physical address was over four years old.¹²² Finally, the *Baidoo* court addressed why it decided to award service via Facebook rather than publication in a local newspaper. Specifically, the court explained that it determined the Facebook service would be more likely to reach the defendant. It stated, publication "is almost guaranteed *not* to provide a defendant with notice of the action for divorce."¹²³ Additionally, the court was troubled that publication notice would impose significant costs on the plaintiff.¹²⁴

113. *Id.* at 364.

114. *Id.* at 367–68.

115. 5 N.Y.S.3d 709, 716 (N.Y. Sup. Ct. 2015).

116. *Id.* at 714–15.

117. *Id.*

118. *Id.*

119. *Id.* at 716.

120. *Id.* at 712.

121. *Baidoo*, 5 N.Y.S.3d at 714–15. The court did not explain why the plaintiff was not able to identify an email account through the defendant's Facebook account, but it was presumably because Facebook has recently changed to hide this information unless the account holder agrees to release it.

122. *Id.* at 715.

123. *Id.*

124. *Id.* at 716. The court explained that "a more widely circulated newspaper, like the New York Post or the Daily News" would cost approximately "\$1,000 for running the notice for a week" and "the chances of it being [sic] seen by defendant, buried in an obscure section of the paper and printed in small type, are still infinitesimal." *Id.*

To accomplish service, the *Baidoo* court ordered the plaintiff's attorney to send the defendant the divorce summons by using a private message through Facebook. The attorney was instructed to "log into plaintiff's Facebook account and message the defendant by first identifying himself, and then including either a web address of the summons or attaching an image of the summons."¹²⁵ The service was to be repeated "once a week for three consecutive weeks or until acknowledged by the defendant."¹²⁶ After the initial message, "[the] plaintiff and her attorney [were] to call and text message defendant to inform him that the summons for divorce has been sent to him via Facebook."¹²⁷

In 2016, in *St. Francis of Assisi v. Kuwait Financial House*, a federal district court permitted service on a foreign defendant solely through the use of his Twitter account.¹²⁸ The court applied Federal Rule of Civil Procedure 4(f)(3), which permits service on an individual in a foreign country when the service meets the *Mullane* standard and the method of service is not prohibited by international agreement.¹²⁹ The plaintiff was unable to locate the defendant, a Kuwaiti national, despite using a skip trace.¹³⁰ In ordering service via Twitter, the court noted that the defendant made regular use of his Twitter account; his account had a "large following," and he used it to "fundraise large sums of money for terrorist organizations by providing bank-account numbers to make donations."¹³¹ Given the defendant's active use of Twitter to communicate with others and the inability to locate the defendant, the court found that service via Twitter would not only be "reasonably calculated to give notice" to the defendant, it would also be "the 'method of service most likely to reach'" the defendant.¹³²

C. Service via Social Media in Foreign Countries

While service of process via social media may still be viewed as "unorthodox" by courts in the United States, foreign court systems have been more willing to order service of process via social media. In 2008, an Australian court entered a default judgment for a lender against the defendant mortgagees after they defaulted on their loan.¹³³ While under Australian law,

125. *Id.* at 716.

126. *Id.*

127. *Baidoo*, 5 N.Y.S.3d at 716.

128. No. 3:16-CV-3240-LB, 2016 WL 5725002 (N.D. Cal. Sept. 30, 2016).

129. *Id.* at *1.

130. *Id.*

131. *Id.*

132. *Id.* at *2.

133. Nick Abrahams, *Australian court serves documents via Facebook*, THE SYDNEY MORNING HERALD (December 12, 2008), <http://www.smh.com.au/news/technology/web/>

the default judgment was to be served on the defendants through personal service; the lender, however, was unable to effect service on the defendants after eleven attempts.¹³⁴ After the lender's lawyers were able to confirm the defendants' Facebook accounts through personal information posted to the account, the court ordered substituted service on the Facebook accounts.¹³⁵

Citing to the Australian decision, a New Zealand court ordered service via email and Facebook on a defendant who could not be located for personal service.¹³⁶ In its decision, the New Zealand court pointed to the defendant's prior communications with the plaintiff via email and the fact that defendant was known to have a Facebook account as grounds for why substituted electronic service was warranted.¹³⁷

Courts in Canada¹³⁸ and South Africa¹³⁹ have also awarded service of process via Facebook. Recently, a court in the United Kingdom ordered service of an order of injunction via Twitter.¹⁴⁰ These decisions represent a growing consensus that service via social media, at least in certain instances, is a valid and reliable form of notice.

australian-court-serves-documents-via-facebook/2008/12/12/1228585107578.html; CPB Lawyers, *Substituted Service of Legal Documents via Facebook: "Like" or "Unlike" by Australian Courts*, LEXOLOGY (December 13, 2012) <http://www.lexology.com/library/detail.aspx?g=1e184550-fa73-4c6c-bc6d-b5a160fab4b9>.

134. Noel Towell, *Lawyers to service notices on Facebook*, THE SYDNEY MORNING HERALD (December 16, 2008), <http://www.smh.com.au/news/technology/biztech/lawyers-to-serve-notices-on-facebook/2008/12/16/1229189579001.html>.

135. CPB Lawyers, *Substituted Service of Legal Documents via Facebook: "Like" or "Unlike" by Australian Courts*, LEXOLOGY (December 13, 2012) <http://www.lexology.com/library/detail.aspx?g=1e184550-fa73-4c6c-bc6d-b5a160fab4b9>.

However, in *Citigroup v Weerakoon*, an Australian court denied a motion to serve defendant via Facebook after noting lack of certainty that the Facebook was the defendant's account. *Id.*

136. *You've been served—on Facebook*, TECHNOLOGY (March 16, 2009, 2:29 PM), <http://www.stuff.co.nz/technology/2266647/You-ve-been-served-on-Facebook>.

137. *Id.*

138. Lisa McManus, *Service of Process Through Facebook*, LEXISNEXIS LEGAL NEWSROOM, (Nov. 9, 2011) <https://www.lexisnexis.com/legalnewsroom/lexis-hub/b/legal-technology-and-social-media/archive/2011/11/09/service-of-process-through-facebook.aspx?Redirected=true> (discussing a Canadian court's decision to allow service via Facebook and notice to the defendant's HR department where the defendant had formerly worked).

139. Lee Swales, *Serving Legal Process via Facebook and Social Media*, SOC. MEDIA AND REG. L. (Nov. 8, 2012) <http://www.regulatorylawsa.com/2012/11/serving-legal-process-via-facebook-and.html> (discussing the Kwa-Zulu Natal High Court's decision to allow service via Facebook).

140. Matthew Jones, *UK Court orders writ to be served via Twitter*, REUTERS: TECHNOLOGY (Oct. 1, 2009, 5:29 PM) <http://www.reuters.com/article/us-britain-twitter-life-tech-idUSTRE5904HC20091001>.

III. DECONSTRUCTING THE *MULLANE* STANDARD: THE PRINCIPLES UNDERLYING THE NOTICE REQUIREMENT

This section begins with a call to ground any discussion of appropriate methods of service of process in the principles of due process. After presenting the justification for such an approach, this section details the underlying due process principles of the notice requirement.

A. The Need for a Principled Approach in a Time of Technological Advance

Much of the current literature critiquing electronic service of process focuses on how each particular tool—Facebook or Twitter—meets, or fails to meet, the *Mullane* standard.¹⁴¹ This piecemeal approach to examining service of process is largely inefficient and fails to place service via social media in a larger constitutional context.

First, the *Mullane* Court always intended the consideration of new service methods to remain grounded in the larger context of the principles of due process.¹⁴² The *Mullane* Court rejected piecemeal formulation of rules; instead, it provided a test based on the principles of due process, intending that test to be applied to new methods of service.¹⁴³ While the *Mullane* test might invite an overly fact-intensive inquiry into each possible service option, as has been seen in the context of electronic service of process, the *Mullane* Court itself applied the principles of due process to recognize the constitutionality of categories of process methods. For example, the “gold standard” of notice—in-hand personal service of process—was heralded as a

141. See Pedram Tabibi, Esq., *Facebook Notification - You've Been Served: Why Social Media Service of Process May Soon Be a Virtual Reality*, 7 PHX. L. REV. 37 (2013) (focusing on Facebook); William Wagner & Joshua R. Castillo, *Friending Due Process: Facebook as a Fair Method of Alternative Service*, 19 WIDENER L. REV. 259 (2013) (focusing on Facebook); Keely Knapp, Comment, *#serviceofprocess @socialmedia: Accepting Social Media for Service of Process in the 21st Century*, 74 LA. L. REV. 547 (2014) (focusing primarily on Facebook); Eisenberg, *supra* note 54 (focusing on Facebook); Kevin W. Lewis, Comment, *E-Service: Ensuring the Integrity of International E-Mail Service of Process*, 13 ROGER WILLIAMS U. L. REV. 285 (2008) (focusing on email); Svetlana Gitman, Comment, *(Dis)service of Process: The Need to Amend Rule 4 to Comply with Modern Usage of Technology*, 45 J. MARSHALL L. REV. 459 (2012) (focusing on email); Claire M. Specht, Comment, *Text Message Service of Process—No LOL Matter: Does Text Message Service of Process Comport with Due Process?*, 53 B.C. L. REV. 1929, 1929 (2012) (focusing on text messaging).

142. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

143. *Id.* (affirming that “[t]he Court has not committed itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet”).

presumptively constitutional form of service.¹⁴⁴ It is important to note that the *Mullane* Court did not delve into an individualized critique of in-hand service of process, but rather embraced this method as categorically constitutional.¹⁴⁵

Second, a piecemeal approach that focuses on the particular operation of an individual social media tool has limited application. Technology is rapidly changing; not only are new social media tools being created, but the ways in which “standard” tools, such as Facebook, are used, is constantly changing. As an example, in recent years, Facebook has changed aspects of its messaging service. Now users can receive “read receipts” alerting them when another user reads their private message.¹⁴⁶ For scholars and courts concerned with the existence of a “read receipt,” this change could radically impact their recommendations or future opinions.¹⁴⁷ By focusing on the operations of current electronic tools, any recommendation or holding has a short-lived utility. Additionally, the jurisprudence of notice is deprived of useful analysis that is not confined to the features of a particular communication tool. Because the law of notice is being made in a time where the medium of communication is changing at record pace,¹⁴⁸ it is more advantageous to focus on identifying the principles underlying the due process notice requirement. Using these guiding principles, generalized recommenda-

144. *Id.* at 313 (noting that “personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding”).

145. *Id.* For example, the Court did not examine limitations to personal service of process that may exist in a particular case such as fraudulently luring a defendant into the forum to achieve service. While service under these circumstances would not be constitutional, the Court focused on a more generalized view of personal service in the context of the principles of due process.

146. *How do I know if a friend has seen a message I sent?*, FACEBOOK, <https://www.facebook.com/help/ipad-app/316575021742112> (last visited June 22, 2016).

147. Early commentary on the propriety of service via email focused on the ability to confirm receipt of the email via a “read receipt.” See Yvonne A. Tamayo, *Catch Me If You Can: Serving United States Process on an Elusive Defendant Abroad*, 17 HARV. J.L. & TECH. 211, 229 (2003); Matthew R. Schreck, *Preventing “You’ve Got Mail” from Meaning “You’ve Been Served”*: How Service of Process by E-Mail Does Not Meet Constitutional Procedural Due Process Requirements, 38 J. MARSHALL L. REV. 1121, 1135–36 (2005); Hedges, *supra* note 35, at 63.

148. There are over 1.5 billion monthly active users of Facebook. *Number of monthly active Facebook users worldwide as of 1st quarter 2016 (in millions)*, STATISTICA, <http://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/>. In the U.S., twenty percent of all time spent on personal computers and thirty percent of time spent on mobile devices is spent on social media. Helen A.S. Popkin, *We spent 230,060 years on social media in one month*, CNBC: TECHNOLOGY (Dec. 4, 2012) <http://www.cnbc.com/id/100275798>. People are spending on average 1.72 hours on social media each day. Jason Mander, *Daily time spent on social networks rises to 1.72 hours*, GLOBALWEBINDEX (Jan. 26, 2015) <http://www.globalwebindex.net/blog/daily-time-spent-on-social-networks-rises-to-1-72-hours>.

tions can be derived which then can be applied to future possible electronic service methods. This approach will provide more guidance to courts in the changing technological climate and permit the development of a more cohesive body of law.

Finally, by failing to take a principle-driven approach, judicial committees and legislatures are deprived of guidance on how to revise the service rules, and courts are left to wade in uncertain waters. As a result of this uncertainty, courts have expressed strong reservation in approving new methods of service of process.¹⁴⁹ While there have been some isolated legislative revisions to service rules to account for electronic service of process,¹⁵⁰ these advances have generally not included newer tools such as social media.¹⁵¹ The vast majority of cases addressing electronic service of process have been on a case-by-case approach under a “catchall provision” included in service rules.¹⁵² While “catchall provisions” are useful for courts attempting to create a method of service in an unusual situation, the widespread use of electronic communication such as email and social media suggest that they will become a common way to locate and communicate with proposed defendants.¹⁵³ As such, there should be more guidance in the service rules on how to appropriately effectuate service through these methods.

For these reasons, the following section offers an approach to analyzing the due process notice requirement that is grounded in the underlying principles of procedural due process. These shared notions of due process, though sometimes implicit, are present throughout modern notice jurisprudence.¹⁵⁴ In this section, the principles underlying the due process notice

149. *Fortunato v. Chase Bank USA*, No. 11 CIV. 6608 JFK, 2012 WL 2086950, at *2 (S.D.N.Y. June 7, 2012) (noting that the request to permit service via Facebook was “unorthodox”); *F.T.Comm’n. v. PCCare247 Inc.*, No. 12 CIV. 7189 (PAE), 2013 WL 841037, at *4 (S.D.N.Y. Mar. 7, 2013) (rejecting service via social media as a sole means of providing notice because of its novelty); *WhosHere, Inc. v. Orun*, No. 1:13-CV-00526-AJT, 2014 WL 670817, at *4 (E.D. Va. Feb. 20, 2014).

150. While Rule 4 of the Utah Rules of Civil Procedure, permits parties to move the court for alternative service methods, the court webpage explains that this can include social media. *Motion for Alternative Service*, UTAH COURTS (April 26, 2016) https://www.utcourts.gov/howto/service/alternate_service.html (last visited June 23, 2016).

151. While catch-all provisions permit the court to fashion any form of constitutional service, they are not specifically directed at social media. In 2013, Texas legislators introduced a bill that would have affirmatively provided for service of process via social media so long as the parties sought prior court approval. H.B. 1989, 83rd Leg., Reg. Sess. (Tex. 2013). Ultimately, the bill was unsuccessful.

152. *Supra* Section II.B.2 (discussing the use of catch-all provisions to order service via social media).

153. *See Baruah, supra* note 3, at 1–10 (discussing the impact of social media on the way people communicate and process information).

154. Wasserman, *supra* note 25, at 132–33 (describing the *Mullane* test as based on “general principles” gleaned by the Court from precedent and “disjunctive”).

requirement are identified, examined, and applied to the context of service of process via social media.

B. The Underlying Principles of Notice

Common throughout modern constitutional analysis of the notice requirement are several recognizable principles which serve as benchmarks to judge the sufficiency of the proposed method of service of process. While these norms are not always clearly articulated by courts, they are woven throughout notice jurisprudence.

1. *The Method of Service Must be Directed at the Correct Defendant*

The due process clause provides an individualized right to notice of a proceeding that will bind the individual to an adverse judgment.¹⁵⁵ The purpose of this notice is to provide the individual with an opportunity to be heard and present a case in opposition to the claims asserted against him, or choose not to do so and accept the judgment.¹⁵⁶ Given the individualized nature of the right to be heard, the plaintiff must serve the correct defendant *and* direct service (or provide service directly) to the named defendant.¹⁵⁷ Service provided to an incorrect defendant, either by misnaming the defendant or providing service incorrectly directed at the defendant, is insufficient.¹⁵⁸ When the plaintiff becomes aware of these errors, the service rules often provide ways for her to correct the service by amending her summons or requiring her to get a new summons and perfect service of process.¹⁵⁹ For example, a plaintiff might become aware that she named the wrong defendant or that the address at which she was attempting service was incorrect (either because the server was unable to locate the defendant or her attempt to serve by mail was returned).¹⁶⁰ In each of these situations, the plaintiff must work to correct the service or she will not be able to secure a binding

155. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

156. *Id.*

157. See J.E. Keefe, Jr., Annotation, *Necessity, in Service by Leaving Process at Place of Abode, etc., of Leaving a Copy of Summons for Each Party Sought to be Served*, 8 A.L.R. 2d 343 (1949) (noting that even when serving multiple defendants who reside at the same dwelling, "a copy of the summons must be left for each defendant").

158. See 62B AM. JUR. 2D *Process* § 88 (explaining that while a misnaming of the defendant can be corrected by amendment of the summons even after a judgment is entered, the court cannot amend the summons after judgment to include the name of a defendant who *was not named* and not served).

159. *Id.*

160. See 62B AM. JUR. 2D *Process* § 83 (explaining "the test is whether the plaintiff had in mind the person who was actually served and merely made a mistake as to the name or whether the plaintiff actually meant to serve and sue a different defendant").

judgment against the defendant. The fact that service rules provide for these types of alterations reinforces the need to provide sufficiently directed individualized service—the mere fact that such service may be difficult to accomplish is not enough to obviate the importance of this aspect of notice.

While individualized notice directed at the defendant is clearly constitutional, the *Mullane* Court offered some instances where less individualized and less directed notice would also be considered constitutional.¹⁶¹ The *Mullane* Court focused on the balance of interests at play, a hallmark of procedural due process review. The individual's right to notice of the proceeding on the one hand, is essential to the exercise of his opportunity to be heard.¹⁶² On the other hand, the state has a strong interest in providing a final, binding remedy to the plaintiff.¹⁶³ The *Mullane* Court reasoned that the individual's right to notice is sufficiently weighty that some costly or time consuming processes are warranted to guarantee proper notice.¹⁶⁴

There are times, however, when this type of individualized notice is not possible or practicable. The *Mullane* Court recognized this possibility and provided some room for a less individualized form of notice to pass constitutional muster.¹⁶⁵ The Court cautioned against a relaxed interpretation of the procedural due process clause by mandating the plaintiff must use good faith in securing proper service to the defendant.¹⁶⁶ Namely, the Court coun- tenanced against service that amounted to a "mere gesture."¹⁶⁷ Rather, the service must be that which "one desirous of actually informing the absentee might reasonably adopt to accomplish it."¹⁶⁸

In addition to the challenge of identifying the defendant, there are also times when being able to *direct service at the defendant* poses a significant hurdle to a plaintiff. Sometimes a defendant may not be easy to locate. For example, some defendants do not have a permanent address or have recently moved. Other times, defendants actively work to conceal their whereabouts

161. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950).

162. *Id.* at 314.

163. *Id.* at 311 (explaining that the state was interested in "the right of its courts to adjudicate at all against [those defendants] who reside" outside of the state).

164. *Id.* at 315–18 (requiring more than publication for defendants that could be identified).

165. Sometimes a defendant may not be identifiable, making individualized notice impossible. In *Mullane*, several of the beneficiaries were not identifiable because they only had interests that would have vested at a future event or they were not sufficiently identified to enable individualized notice. *Id.* at 317. Other times, the identification of the defendant may be impracticable. For example, in *Mullane*, the very nature of the common trust drew many smaller trusts, many with numerous beneficiaries that were too difficult to identify by name because of the sheer volume of potential beneficiaries and the cost and labor that such identification would require. *Id.* at 317–18.

166. *Id.* at 315.

167. *Mullane*, 339 U.S. at 315.

168. *Id.*

to avoid being served with process. When the failure to locate the defendant is occasioned by the defendant's own evasive or deceptive behavior, courts have been more willing to permit the plaintiff to use alternative, less directed methods of service.¹⁶⁹ However, when the defendant has simply been difficult to locate, the courts have been reticent to relax the obligations imposed by individualized and directed service of process.¹⁷⁰ This restrictive interpretation of the constitutional obligation of notice means that, at times, the court has rejected the plaintiff's attempts at service.¹⁷¹ Other times, this means a plaintiff with a difficult to locate defendant will be required to either petition the court to approve another form of service of process or will be required to provide ineffective and expensive service via publication.¹⁷²

When considering how much to relax the requirement that notice be both individualized and directed at the defendant, courts have also acknowledged the protective measures that are present in certain cases that bolster the defendant's opportunity to be heard. For example, when the defendant's interests are sufficiently aligned with other named parties who can be more easily provided sufficient service of process, there is less concern that the defendant who is not provided with individualized and directed service of process will not have his defense presented to the court.¹⁷³ This is because the defendants served with more reliable methods of service of process are likely to come to court to present the very arguments the difficult to locate defendants might have presented. When this is coupled with challenges to providing the individual with direct service of process, the constitutional balance present in *Mullane* is met.¹⁷⁴

169. *Lavery v. Lopez*, 517 N.Y.S.2d 182, 183 (1987) (holding the defendant was estopped from challenging deficiency in service when the defendant intentionally provided plaintiff with an incorrect address at the scene of the accident which was the basis of the action).

170. *Mullane*, 339 U.S. at 317 (rejecting service through publication on defendants who could be identified and served via mail); *Steward v. Kuettel*, 2014 Ark. 499, at 9, 450 S.W.3d 672, 677 (rejecting service through email even though defendant was an out of state resident who allegedly libeled plaintiff online and could not be located to serve via mail).

171. *Kuettel*, 2014 Ark. 499, at 9, 450 S.W.3d at 677.

172. *Fortunato v. Chase Bank USA*, No. 11 CIV. 6608 JFK, 2012 WL 2086950, at *2 (S.D.N.Y. June 7, 2012) (rejecting electronic service of process request and ordering service by publication).

173. *Mullane*, 339 U.S. at 319 (noting that the interests of the defendants who would not receive more directed service "[did] not stand alone but [were] identical with that of a class").

174. *Id.*; see also Wasserman, *supra* note 25, at 148–154 (discussing notice in the context of class actions); Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2036 (2008) (discussing notice after the Class Action Fairness Act).

2. *Notice Must Be Conspicuous*

Another key principle underlying the constitutional jurisprudence of notice is the conspicuousness of service of process. In addition to ensuring that the proper information is conveyed to the defendant, it must be conveyed in a *manner* that is “reasonably calculated” to “apprise” him of his rights.¹⁷⁵ The *Mullane* Court opted to avoid a rigid test on what this actually requires of a plaintiff. However, when one observes the aggregate of case law on the sufficiency of manner of notice, it is clear, to “apprise” a defendant of a proceeding against him, the notice must make him aware of the proceeding *and* must prompt him to seize his opportunity to be heard on the matter.¹⁷⁶

Awareness of a proceeding can be accomplished so long as the manner utilized for service of process provides the necessary components of notice—providing the name and location of the court, the statement of the claims asserted against the defendant, and the date and time he is to appear. A plaintiff could fail to make a defendant aware of the proceeding if she provides service of process in a manner that the defendant will not, or cannot, receive.

The awareness of the notice itself is often the focal point of cases discussing constructive methods of service of process such as publication or service via postings to a structure. In part, this is because constructive methods are likely to never make their way to the defendant. Even the *Mullane* Court noted how unlikely it is for a defendant to observe a printed notice in a circulating publication.¹⁷⁷ As readership in printed publications continues to decline, this method of notice will become an even less effective way to ensure a defendant is made aware of a proceeding against him.¹⁷⁸

The inability to make the defendant aware of a proceeding is not a defect limited to notice via publication. In *Greene v. Lindsey*,¹⁷⁹ the Court struck down service in an eviction proceeding as unconstitutional when it was provided via posting on the tenants’ doors.¹⁸⁰ While this method was statutorily approved, the Court explained that it was not constitutional be-

175. *Mullane*, 339 U.S. at 314.

176. *Id.* (holding that all relevant required information about the proceeding should be included); 62B AM. JUR. 2D *Process* § 59 (summons should “clearly inform[] the defendant that he or she is the intended defendant” and “inform[] the defendant of the nature of the proceedings and of the court where the hearing will be held”).

177. *Mullane*, 339 U.S. at 315 (noting that it would be “idle to pretend that publication alone . . . is a reliable means of acquainting interested parties of the fact that their rights are before the courts”).

178. Eisenberg, *supra* note 54 (discussing the challenges to print publication as a method of service).

179. 456 U.S. 444 (1982).

180. *Id.* at 453.

cause it was not likely that the notice would come to the attention of the defendant.¹⁸¹ These types of postings could be easily removed by other tenants; this had, in fact, occurred on prior occasions at this building.¹⁸² The concern that the defendant would never be made aware of the proceeding because the notice would not come to his attention and the fact that other more reliable means of service were available to the plaintiff rendered this method of notice unconstitutional.¹⁸³

In *Dusenbery v. United States*,¹⁸⁴ Justice Ginsburg's dissent revealed that she was concerned with the majority's endorsement of service on a prisoner via mail as constitutional when the prisoner did not sign for the mail.¹⁸⁵ While the statutorily approved method of service did not require such a signature, it was the practice of the prison to require prisoner signatures when mail was delivered to a prisoner.¹⁸⁶ Justice Ginsburg raised the concern that the defendant would not be made aware of the service; however, while the majority did not share her concern, it did recognize that awareness of the notice itself is an essential aspect of notice.¹⁸⁷

Beyond making the defendant aware of the proceeding, notice must be able to prompt the defendant to seize his opportunity to be heard in court.¹⁸⁸ This aspect of apprising a defendant of his rights or "attract[ing] [his] attention to the proceeding"¹⁸⁹ is essential as it motivates him to look deeper into the claims against him and maybe even consult with a lawyer. As service of process methods are evolving, this is becoming more of a concern. However, this aspect of notice has always been an underlying theme in the constitutional analysis of notice and is even present in the unwavering endorsement of in-hand personal service of process as a "gold standard" method of notice.

181. *Id.* at 453–54. (The Court explained, "As the process servers were well aware, notices posted on apartment doors in the area where these tenants lived were 'not infrequently' removed by children or other tenants before they could have their intended effect. Under these conditions, notice by posting on the apartment door cannot be considered a 'reliable means of acquainting interested parties of the fact that their rights are before the courts.'").
Id.

182. *Id.* at 453.

183. *Id.* at 453–456.

184. 534 U.S. 161 (2002).

185. *Id.* at 173 (Ginsburg, J., dissenting).

186. *Id.* at 171–72.

187. *Id.* at 168 (noting that the issue was whether "the notice in this case 'reasonably calculated under all the circumstances' to apprise petitioner of the pendency of the cash forfeiture").

188. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 316 (1950) (discussing the challenge with notice via publication in this case was its inability to "attract the parties' attention to the proceeding" and failure to "reasonably be expected to convey a warning").

189. *Id.*

One way we can ensure notice will provide this prompting is by ensuring the process is sufficiently formal. Formality in legal proceedings serves an important purpose; it sets the moment apart from other mundane activities, defining the very event as significant. In-hand personal service of process carries with it many formal attributes that serve to set it apart as important.¹⁹⁰ In many states, the process server is a designated official (such as a sheriff or marshal).¹⁹¹ Even receiving a hand-delivered document is a more formal way to obtain information than everyday communication.¹⁹²

Beyond the formality associated with it, in-hand service of process is sufficiently conspicuous simply because of its traditional role in the U.S. legal system.¹⁹³ Like its procedural due process counterpart, personal jurisdiction, traditional forms of notice are arguably constitutionally sufficient because of their widespread adoption at the time of *Mullane*.¹⁹⁴ The Supreme Court addressed the constitutionality of asserting personal jurisdiction by way of serving a non-resident defendant while he was in the forum, a process known as tag or transient jurisdiction, in *Burnham v. Superior Court of California, City of Marin*.¹⁹⁵ While the Court unanimously agreed that the assertion of personal jurisdiction was constitutional, the justices disagreed as to why tag personal jurisdiction was proper. Justice Scalia, writing for a plurality, argued that tag jurisdiction was a constitutionally acceptable way of asserting personal jurisdiction over the defendant because it had been traditionally regarded as such.¹⁹⁶ Justice Scalia explained that the only consideration for the Court should be the historical pedigree of the method.¹⁹⁷ Justice Brennan, in a separate opinion, disagreed that history alone could serve as the litmus test for whether tag jurisdiction was constitutional.¹⁹⁸ However, in applying the *International Shoe* test to tag jurisdiction, Justice Brennan explained that the act of getting tagged in the forum created an expectation in the defendant that he would be hailed into the forum for the claim that was the basis of the suit for which he was tagged.¹⁹⁹ This expectation arose, in part, *because of* the accepted practice of tag jurisdiction and its accepted meaning.

190. Hedges, *supra* note 35, at 73 (discussing the importance of the ritual function of in-hand service of process).

191. See *supra* notes 36–37 and accompanying text (discussing who may serve notice).

192. Hedges, *supra* note 35, at 73.

193. *Id.*

194. See WRIGHT, *supra* note 20 (discussing the connection between notice and personal jurisdiction).

195. 495 U.S. 604 (1990).

196. *Id.* at 629 (Brennan, J., concurring).

197. *Id.* at 621 (plurality opinion) (explaining that “for our purposes, its validation is its pedigree, as the phrase ‘*traditional notions of fair play and substantial justice*’ makes clear.”).

198. *Id.* at 629 (Brennan, J., concurring).

199. *Id.* at 635–38.

While the tests for procedural due process in the context of personal jurisdiction and notice have evolved along different paths following the modern tests of *International Shoe* and *Mullane*, the constitutional analysis in the context of personal jurisdiction has significant points of overlap with notice. Namely, the Court's reliance on the perceived expectations from the practice of being served suggests that the shared understanding of its legal significance contributes to its acceptance as constitutional. Viewing in-hand service through the lens of *Burnham*, one can appreciate why in-hand service of process has consistently been supported as a constitutionally sufficient form of notice. By the very fact of it being built into the fabric of our litigation process, through a common understanding of its meaning²⁰⁰ developed by its historic use, in-hand service of process is a sufficiently proper way to "apprise" a defendant of his opportunity to be heard. Personal service is highly conspicuous—the act itself is notable and imbued with enough meaning²⁰¹ that it will spur the defendant to seize his opportunity to be heard on the matter.

Methods less formal and less engrained in our cultural understanding must achieve conspicuousness in another way. One example of a method for service of process that has garnered widespread support is service via mail. While there are multiple variations on how states permit service via mail, a common requirement is for the mail to be sent via certified²⁰² or registered mail.²⁰³ This type of mailing requires a signature upon delivery and ensures that undeliverable mail will be returned to the sender. By requiring a signature, the state is accomplishing two goals—ensuring the defendant actually receives the mail and increasing the likelihood that the defendant will be signaled to the importance of the contents of the mail.²⁰⁴

Few states permit service of process via ordinary mail absent some additional considerations. For example, for those states that do permit service via mail, they require the plaintiff to couple service via ordinary mail with another method of service.²⁰⁵ The additional limitations present on the use of service via ordinary mail reflect the concerns with its conspicuousness. The requirement of a back-up service method increases the likelihood that the defendant will take note of the notice he receives. Alternatively, if other

200. Hedges, *supra* note 35, at 73.

201. See *supra* notes 33–34 and accompanying text (discussing the cultural significance of in-hand service of process).

202. 62B AM. JUR. 2D *Process* § 195 (2016) (explaining the restrictions on certified mail).

203. 58 AM. JUR. 2D *Notice* § 29 (2016).

204. Arguably, even if a signature were not required, the receipt of certified or registered mail is considered to be sufficiently conspicuous to apprise the defendant of the importance of the contents of the mail.

205. See, e.g., CAL CIV. PROC. CODE § 415.20 (West 2016) (permitting service via mail when service is also made at the defendant's office).

methods are not available, the service by ordinary mail becomes acceptable as a method that is “not substantially less likely to bring home notice” than other available methods.²⁰⁶

Many states permit service of process via service on a defendant’s dwelling. This typically occurs when the plaintiff serves a statutorily approved person who resides at the defendant’s dwelling.²⁰⁷ Again, present in this recognized method of service is an appreciation of the conspicuousness of the service. By serving the defendant at his dwelling, we accept that the plaintiff has brought the notice home to the defendant—to the place where we expect him to be found, and he expects to receive important information.²⁰⁸ The limitation on who can receive the service at the dwelling is similarly linked to conspicuousness and awareness. Most states, and the FRCP, require the individual to be a resident of the dwelling.²⁰⁹ This ensures that the person also views the dwelling as a home and takes heed of important notice delivered to the dwelling. Moreover, the person served must be of a suitable age and discretion to appreciate the importance of the notice and the need to provide it to the defendant.²¹⁰ Some states set specific age limits while others have a more flexible consideration of suitability.²¹¹ Under either approach, the rules establish these precautions to ensure the notice *will be brought to the attention of* the defendant.

As courts have considered less traditional methods of service, the desire to ensure that the method of service will be sufficiently conspicuous so as to “attract the parties’ attention to the proceeding”²¹² predominates the notice analysis. For example, one common thread of analysis is the desire to identify whether the defendant has used the proposed method for service as a mode of communication in other important matters.²¹³ Arguably, by relying on a method of communication that the defendant himself had used to conduct his business (and other important affairs) the court ensures that the defendant would be likely to see the notice *and* that he would be sufficiently

206. See *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950).

207. See *supra* Section II.B.1.b.

208. This is in part, because the definition of “dwelling” or “abode” denotes a place of permanence akin to one’s home. *Id.*; 62B AM. JUR. 2D *Process* § 178 (2016) (noting that while there is some disagreement of how to define “dwelling” or “abode” there is consensus that “the person [must be] living [there] at the particular time” of service).

209. 62B AM. JUR. 2D *Process* § 191(2016).

210. See *supra* Section II.B.1.b.

211. 62B AM. JUR. 2D *Process* § 192 (2016).

212. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 316 (1950).

213. For example, in *Rio Properties v. Rio Intern. Interlink*, the court permitted service via email after noting, among other considerations, that the defendant had repeatedly used email to communicate with the plaintiff in relation to matters that formed the basis of the suit. 284 F.3d 1007, 1018 (9th Cir. 2002).

apprised of his need to respond to information received this way.²¹⁴ After all, if the defendant is in the habit of responding and acting on information received by a certain method, he will do the same with notice sent by this route.

In many of the above methods of service of process—service via in-hand, mail, dwelling and email—the importance of the conspicuousness of the notice is implicit in the endorsement of the method or in the limitations added to the method. In the context of service via publication or posting, conspicuousness of the notice is often explicitly addressed in the service rules or by the court when ordering the notice.²¹⁵ The concern over conspicuousness only highlights the importance of this principle of notice, despite its often implicit assumption into constitutional analysis.

3. *The Delivery of Service Must Be Verifiable*

The next key principle underlying the constitutional jurisprudence of notice is the need to ensure that the method of service can be independently verified. This is an important aspect of notice and is necessary to preserve the defendant's opportunity to be heard.²¹⁶ To ensure the integrity of its process, the court must be able to ensure that the service of process was actually made.²¹⁷ This cannot be done unless there is an independent way to verify the act of service of process through independent and authenticated evidence.²¹⁸ Additionally, in most jurisdictions, a defendant has a sufficient opportunity to challenge faulty service of process.²¹⁹

Proof of service of process can be accomplished in a variety of ways. When the server is not an official (such as a sheriff or marshal), most jurisdictions require the individual who performed service file an affidavit with the court describing how and when service was accomplished.²²⁰ The defendant can challenge the affidavit and have an evidentiary hearing in

214. *Id.* (noting that “[i]f any method of communication is reasonably calculated to provide [the defendant] with notice” it is “the method of communication which [the defendant] utilizes and prefers”).

215. N.J. ADMIN. CODE § 5:70–2.11(a)(4)(ii) (2016) (requiring posted notice to be posted in a “conspicuous” manner).

216. *Koster v. Sullivan*, 160 So.3d 385, 388, (Fla. 2015) (holding that “the return of service is the instrument a court relies on to determine whether jurisdiction over an individual has been established”).

217. *Id.*; 62B AM. JUR. 2D *Process* § 260 (2016).

218. *Id.* at § 262 (2016).

219. *Id.* at § 274 (2016) (discussing the process by which a defendant challenges the sufficiency of service; *but see id.* at § 270 (2016) (discussing the presumption of sufficiency given to service by a state official, and removing it from challenge by extrinsic evidence).

220. *See* FED. R. CIV. P. 4(1)(1) Jurisdictions also permit a plaintiff to present evidence in addition to the server's affidavit if service is challenged by the defendant. *Crabtree v. City of Durham*, 526 S.E.2d 503, 505 (N.C. Ct. App. 2000).

court.²²¹ This aspect of service of process legitimizes the methods used, and it allows the court to remain impartial and rule on any alleged service deficiencies by relying on evidence of service.²²²

Verification of service of process also provides certainty that the notice requirements have been met. For example, many states have sample form affidavits that describe the components of service.²²³ These forms create uniformity and minimize the chance that service will be performed in error. Intentionally insufficient service (or “sewer service”) is also curbed by the requirement that the person performing service must swear to the service in the affidavit.²²⁴

In addition to requiring service to be supported by some proof (such as an affidavit), the service rules also ensure service can be verified by limiting *who* can perform service. Many jurisdictions require service to be performed by a sheriff, marshal, or other approved official. Other jurisdictions permit a broader group of individuals to perform service, including anyone over the age of eighteen.²²⁵ The only limit placed on the person performing service is that he or she must not be a party to the suit. This requirement serves to ensure that the individual performing service will be independent from the lawsuit, increasing the ease to question this individual in court on a matter that should be separate from the merits of the underlying lawsuit.²²⁶

When service is performed via mail, the preference for registered or certified mail also demonstrates a preference for service that can be offered along with the server’s affidavit as proof of service.²²⁷ For ordinary mail, most states require the sender to submit an affidavit demonstrating where and when the mail was sent and acknowledge that the mail had not been returned as undelivered.²²⁸

221. See *Termite & Pest v. Ones*, 792 So.2d 1266, 1268 (Fla. Dist. Ct. App. 2001) (reasoning “where the contents of an affidavit supporting a defendant’s contention of insufficiency of service would, if true, invalidate the purported service and nullify the court’s personal jurisdiction over the defendant, the trial court should hold an evidentiary hearing before deciding the issue”).

222. 62B AM. JUR. 2D *Process* § 208 (2016).

223. For an example of a forum that permits the server to affirm to service via social media. See *Serving Papers*, UTAH COURTS, https://www.utcourts.gov/howto/service/service_of_process.html (last visited June 23, 2016).

224. Some jurisdictions permit the party injured by a false affidavit to bring a claim against the affiant. See *ex rel. Seals v. McGuire*, 608 S.W.2d 407, 409 (Mo. 1980).

225. See Fed. R. Civ. P. 4(c).

226. Credibility is not in question and you do not have to make a party testify and raise a challenge to his credibility.

227. *In re Cox*, 244 S.E.2d 733, 735 (N.C. App. 1978).

228. See CAL. CIV. PROC. CODE § 417.10(e) (West 2016) (when service is permitted, in part, by ordinary mail, the server is required to submit “an affidavit showing the time and place copies of the summons and of the complaint were mailed to the party to be served, if in fact mailed”).

4. *Notice Must Provide Sufficient Access to the Summons and Complaint*

As notice jurisprudence has evolved, the requirement that the method of service provide sufficient access to the summons and complaint has not been a focal point. Primarily this is because, until recent years, service of process was almost always reduced to hard copy form. As long as the service of process provided the requisite components, it would sufficiently provide access to the materials necessary to achieve constitutional notice.²²⁹ In *Mullane*, the Court distinguished the components of notice; treating challenges to manner of service separately from challenges to the content of service.²³⁰ While these remain separate components, the method of service places potential encumbrances on the ability to access the content of service. When considering the appropriateness of the service method, the method should provide the contents of notice in a format that is both readable and facilitates the defendant's ability to secure legal counsel.²³¹ The challenges to readability are associated closely with the other concern regarding the format of notice—whether the format will facilitate assistance by legal counsel. At its core, the service of process can preserve the defendant's opportunity to be heard only to the extent it allows him to present a defense to the claims brought against him. In order to seize his opportunity to be heard, the defendant will need to be able to provide the summons and complaint to his lawyer.

IV. EXPLORING THE IMPACT OF SOCIAL MEDIA ON THE PRINCIPLES OF NOTICE

After examining the accepted principles underlying the constitutional jurisprudence of notice, this section turns to a discussion of how changes in technology pose challenges to, along with new opportunities for, providing notice to defendants. Each underlying principle is discussed in light of the operation of social media in turn. Finally, this section examines some pragmatic considerations that support the use of social media as a service of process method.

229. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). Often the required materials include the summons and complaint. FED. R. CIV. P. 4.

230. *Mullane*, 339 U.S. at 314.

231. See Schreck, *supra* note 147, at 1140 (discussing the challenges with electronic discovery, including the limits on sending and receiving files); Tamayo, *supra* note 147, at 229 (discussing the limits in transferring files).

Technology has radically altered the way in which we communicate and receive important information.²³² At the time of *Mullane*, the only methods for transmitting service of process consisted of in-hand service of process, mail, publication in a printed newspaper, and posting on physical structures. The advance of communication through electronic methods created entirely new ways to communicate with others, and significantly altered some of these traditional methods. For example, when information became digital we could track its transmission. There are now ways to verify messages are delivered by an independent electronic receipt.²³³ Additionally, we can verify the identity of the online users.²³⁴ Finally, with the advent of mobile devices and their widespread use in our culture, we can more easily direct communications to an individual.²³⁵ This section addresses each of the principles previously identified and analyzes how these norms would be applied to service through social media.

To date, most courts have addressed newly proposed methods for achieving notice by focusing on the specific technology being used, while neglecting to look at these overarching principles.²³⁶ At a minimum, there

232. See *supra* notes 1–11 and accompanying text (discussing the impact of technology on communication). A 2014 study conducted by the Pew Research Center found that [r]oughly two-thirds (64%) of U.S. adults use Facebook, and half of those users get news there—amounting to 30% of the general population. YouTube is the next biggest social news pathway—about half of Americans use the site, and a fifth of them get news there, which translates to 10% of the adult population and puts the site on par with Twitter. Twitter reaches 16% of Americans and half of those users say they get news there, or 8% of Americans. And although only 3% of the U.S. population use reddit, for those that do, getting news there is a major draw—62% have gotten news from the site.

Monica Anderson, et al., *How Social Media is Shaping News*, PEW RES. CTR. (Sept. 24, 2014), <http://www.pewresearch.org/fact-tank/2014/09/24/how-social-media-is-reshaping-news/>.

233. See Adam Zuckerman, *How to: Use google docs to Stealth Read Receipt*, SOCIAL MEDIA TODAY (May 11, 2011) <http://www.socialmediatoday.com/content/how-use-google-docs-stealth-read-receipt> (discussing how to encode a read receipt into any file to track when it is read); Hannah Jane Parkinson, *Message Read. But what kind of weirdo keeps read receipts on?*, THE GUARDIAN (Aug. 17, 2015) <https://www.theguardian.com/technology/2015/aug/17/message-read-but-what-kind-of-weirdo-keeps-read-receipts-on> (discussing the various ways social media captures automated “read receipts” and how to disable these features).

234. See Tilo Kmieckowiak, *How to Verify Your Social Media Accounts*, SOCIAL MEDIA ANALYTICS BLOG (March 1, 2016) <https://www.quintly.com/blog/2013/08/how-to-verify-your-social-media-profiles/> (discussing how to verify a social media account to prevent others from using your persona).

235. See Anderson, *supra* note 10 (discussing use of mobile devices in the U.S. today); see also Caddie Thompson, *Social media apps are tracking your location in shocking detail*, BUSINESS INSIDER: TECH, (May 28, 2015) <http://www.businessinsider.com/three-ways-social-media-is-tracking-you-2015-5> (discussing how various social media apps on mobile devices utilize GPS location information).

236. See *supra* Section II.B.2 (discussing the evolution of electronic service of process).

has been inconsistent application of prior constitutional theories in the context of new technology. As a result, courts and legislators have utilized an unnecessarily constrained approach when considering new methods for achieving notice.²³⁷ This limits the ability of our legal system to better reflect the way in which people become apprised of important information. Consequently, by limiting notice to more traditional modes of communication, we may be eliminating possible methods for service that are *more likely* to reach certain defendants while professing to protect the right to know of one's opportunity to be heard in court. Conversely, simply because a new social media platform has grown in popularity, does not mean that it will provide constitutionally sufficient notice for all defendants. The operation and typical use of social media platforms must be analyzed to ensure that they would provide constitutional notice. This section seeks to expand the dialogue surrounding new technologies by closely analyzing communication through social media and highlighting areas where the operation of social media creates tension with the principles of *Mullane*.

A. How Social Media Impacts the Ability to Direct Notice to the Defendant

One key principle underlying notice is that it must be directed to the correct defendant. As previously discussed, this has two aspects: that the notice must be provided to the correct defendant *and* be sufficiently directed at him as an individual.²³⁸

1. Is the Notice Directed at the Correct Defendant?

Social media creates challenges and provides new opportunities to ensure that service of process reaches the correct defendant. The first challenge is the possibility the account being served is a fictitious or fraudulent account.²³⁹ To create an individual account, most social media platforms require a person to provide an email and some basic identifying information.²⁴⁰ The account holder typically has to agree to the user policy,

237. *Fortunato v. Chase Bank USA*, No. 11 CIV. 6608 JFK, 2012 WL 2086950, at *2 (S.D.N.Y. June 7, 2012) (noting that the request to permit service via Facebook was "unorthodox").

238. *See supra* Section III.B.1.

239. *Fortunato*, 2012 WL 2086950, at *2 (rejecting Facebook as a method for service, in part, because of the possibility that "anyone can make a Facebook profile using real, fake, or incomplete information").

240. *Signing up with Twitter*, TWITTER, <https://support.twitter.com/articles/100990> (last visited June 23, 2016); *How do I sign up for Facebook?*, FACEBOOK, <https://www.facebook.com/help/188157731232424> (last visited June 23, 2016); *Getting Started*, SNAPCHAT, <https://support.snapchat.com/en-US/about/getting-started> (last visited

which typically forbids the creation of an account for an improper purpose.²⁴¹ However, because there is no method to ensure that the person creating the account is, in fact, who he says he is, using the account to achieve service of process creates a risk that the notice will not be provided to the actual defendant.

While this might be seen as a troubling phenomenon, further investigation into fraudulent accounts minimizes the concern. Facebook, the most popular social media platform, reports that anywhere from 5.5% to 11.2% of Facebook profiles are “fake.”²⁴² However, many accounts are labeled “fake” by Facebook because they do not comply with the Facebook account rules.²⁴³ For example, an account is considered fake if the creator misclassifies the account.²⁴⁴ Such accounts are typically created for things like a family pet—while obviously running afoul of the Facebook rules, these types of accounts would not create the kind of concern envisioned by courts that have rejected the prospect of serving a defendant via social media.²⁴⁵

Accounts created to mirror those of actual adults are more troubling.²⁴⁶ These accounts are particularly troublesome because of the anonymity afforded to the account holder—the fraudulent creator can operate behind the web, at a keyboard. Fraudulent accounts are often created by using photos and information from a real account, though they often are hosted on webpages with odd links containing misspellings to avoid Facebook security.²⁴⁷

Fraudulent accounts created as a mirror of a real person are typically created to either phish for information from the real account holder’s connections on the social media platform²⁴⁸ or are created to fraudulently influ-

June 23, 2016); *Creating an Account & Username*, INSTAGRAM, <https://help.instagram.com/182492381886913/> (last visited June 23, 2016); *Signing Up to Join LinkedIn*, LINKEDIN, https://help.linkedin.com/app/answers/detail/a_id/2964/~/-signing-up-to-join-linkedin (last visited June 23, 2016).

241. See *Facebook User Agreement*, FACEBOOK, <https://www.facebook.com/terms> (last visited June 23, 2016).

242. Emil Protalinski, *Facebook estimates between 5.5% and 11.2% of accounts are fake*, THE NEXT WEB (Feb. 3, 2013) <http://thenextweb.com/facebook/2014/02/03/facebook-estimates-5-5-11-2-accounts-fake/#gref>.

243. *Id.*

244. *Id.*

245. *Id.* Approximately, 0.8 percent to 2.1 percent of the “fraudulent” accounts fit this category. *Id.*

246. See *Id.* Of the remaining “fraudulent” accounts, only 4.3 percent to 7.9 percent of accounts were duplicates of an individual account, and not all of these were created with an intent to create a “fraudulent” account. *Id.*

247. *Beware of Socially Engineered Phishing Attacks on Facebook*, FACECROOKS (Aug. 1, 2012) <http://facecrooks.com/Scam-Watch/beware-of-socially-engineered-phishing-attacks-on-facebook.html/>

248. *Id.*

ence the way social media analytics work.²⁴⁹ For example, interested parties who want to artificially enhance how information or news trends on some social media platforms will use numerous fictitious accounts to react to the social media page, driving the analytical tool.²⁵⁰ On Facebook, fake accounts have affected the popularity of Facebook pages by generating enormous numbers of fake “likes” on those pages.²⁵¹ Fraudulent accounts, whether created to phish for information or generate false analytics, generally do not operate similar to real accounts.²⁵² Therefore, while the existence of fraudulent social media accounts should be considered when carefully crafting a service rule, the mere presence of some fictitious accounts should not operate as a prohibitive bar on the use of the social media platform as a method of service.

Even when one considers service of process via in-hand service, there is always the possibility that the person served is the not the actual defendant. Most service providers, who lack first-hand knowledge of the defendant’s identity, find ways to ensure that the person being served is the named defendant.²⁵³ However, the named defendant might not be the one who actually accepts service. The challenge in a system embracing service via social media is that the traditional approaches used by servers performing in-hand service of process to verify the identity of person accepting service are not applicable. For example, a process server may call out the name of the defendant when providing in-hand service to see if he responds—obviously this is not possible on a social media platform.²⁵⁴

Additionally, we have endorsed service provided to a co-resident at the defendant’s dwelling. This form of service provides alternative assurances that the correct defendant will be served. First, the service must be provided to the defendant’s known permanent dwelling.²⁵⁵ Even when we identify the correct dwelling, we do not require service on the defendant himself because we accept that the forum is sufficiently identified with the defendant and the

249. Jennifer Abel, *Like-Farming Facebook Scams: Look Before You Like*, CONSUMER AFFAIRS (April 22, 2015) <https://www.consumeraffairs.com/news/like-farming-facebook-scams-look-before-you-like-042215.html>.

250. *Id.*

251. *Id.*

252. *Id.*; *Beware of Socially Engineered Phishing Attacks on Facebook*, FACECROOKS (Aug. 1, 2012) <http://facecrooks.com/Scam-Watch/beware-of-socially-engineered-phishing-attacks-on-facebook.html/>

253. *How to Identify Someone Who May Be Evading Service*, SERVER-NOW (March 9, 2011) <http://www.serve-now.com/articles/18/evading-process-server>.

254. *Id.* It would be hard to catch the online fake account holder “off guard” with a posting, like yelling to someone in a public place.

255. *See supra* Sections II.B.1.b, III.B.

person provided with service will be inclined to provide the service to the defendant.²⁵⁶

Verification of the defendant through a social media platform could be analogized to ensuring the defendant receive service via service on his dwelling. In the context of social media, for defendants with regular substantial use of a social media account,²⁵⁷ the account is more like the defendant's virtual "dwelling." The platform, like the resident in a physical dwelling, operates as a reliable agent forwarding the information received in the account to the defendant.

Through analogy to service via a defendant's physical dwelling, the service rules can be modified to ensure that service provided via social media reaches the named defendant. The account should have the hallmarks of a "dwelling." It should contain information known to be associated with the defendant, such as a known email address and personal identifying information, along with photos of the defendant.²⁵⁸ To ensure the account is valid, the account can be examined for recognizable patterns of behavior.²⁵⁹ Moreover, the social media account should be a place where the defendant "dwells" or can be regularly found by those who know him. The defendant should make regular and consistent use of the account, regularly receiving information there.²⁶⁰ If these attributes are present, notice directed to the defendant's social media account would be directed at the correct defendant.

2. *Is the Notice Directed at the Defendant in his Individual Capacity?*

More generalized methods of communication—like publication—are generally reserved for the less-favored back-up approach to service of pro-

256. *See supra* Sections II.B.1.b, III.B.

257. *See infra* Section V (discussing the type of user that could be considered to have a virtual "dwelling").

258. *See* Tabibi, *supra* note 141, at 56–7 (noting that "[A] party seeking to assure a court that a social media account belongs to a hard-to-find defendant may potentially have a treasure trove of facts and information to present to a court to help authenticate an account" including "photos, videos, relationship status, birthday, hometown, current city, education, work, languages spoken, and websites").

259. By looking at patterns of behavior known to be associated with the defendant (such as prior communications on social media with the parties to the lawsuit) or connections between the defendant's account and other users known to associate with the defendant, the account can be verified. *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709, 714 (N.Y. Sup. Ct. 2015) (using defendant's prior communications as a basis for verifying the account); *F.T.Comm'n. v. PCCare247 Inc.*, No. 12 CIV. 7189 (PAE), 2013 WL 841037, at *5 (S.D.N.Y. Mar. 7, 2013) (using known connections on defendant's Facebook account as a basis for verifying the account).

260. *See infra* Section IV.B. (analyzing the level and nature of activity on a social media account that would support providing notice via social media).

cess. In other words, only when the notice cannot be directed to the individual through more traditional methods, will the court consider these constructive forms of service. This bears on the use of social media as a method to perform service of process because most platforms have aspects that provide more individualized methods of communication and other aspects that provide more generalized information sharing.

The first way in which social media platforms differ from more traditional ways of receiving information is that most social media platforms have two pathways for receiving information—individualized paths that allow for the transmission to and from a very limited group of people and more generalized pathways that allow for the transmission of information between the account holder and large groups of people. Individualized pathways can include private messaging offered on a variety of social media applications.²⁶¹ Generalized pathways can include posting on a Facebook page or a Tweet linked to an individual's Twitter handle.²⁶²

In examining the more generalized pathways of transmitting information via social media, it might be tempting to analogize the transmission of information to that of publication.²⁶³ However, this is not an apt analogy. Providing information to a defendant via publication has always been regarded as an ineffective means of service because of how unlikely it would be that the defendant would actually see the notice.²⁶⁴ After all, how likely is it that information posted in a generally circulating paper would come to the attention of any particular defendant? However, generalized social media posts are more directed. In fact, the unique ability to tag, link, or post in a

261. For example, under the current operation of Twitter, a user can send a direct message to anyone regardless of whether the user sending the message follows the other user or not. However, if the recipient of the message does not follow the sender, the recipient will only receive the message if they have selected the "Receive Direct Messages From Anyone" in their "Security and Privacy" settings. *About Direct Messages*, TWITTER HELP CTR., <https://support.twitter.com/articles/14606?lang=en> (last visited June 24, 2016). Similarly, the current operation of Facebook includes direct messaging. By default, any Facebook account holder can send any other Facebook account holder a message. The message may be filtered into a separate file until the recipient accepts the message. *Sending a Message*, FACEBOOK HELP CTR., <https://www.facebook.com/help/326534794098501/> (last visited June 24, 2016). Other social media platforms have various direct messaging capabilities, including LinkedIn, SnapChat, and Instagram.

262. *How do I post on a Page that I visit?* FACEBOOK HELP CTR., <https://www.facebook.com/help/424946150928896> (last visited June 24, 2016); *Posting Replies or Mentions*, TWITTER HELP CTR., <https://support.twitter.com/articles/20169871> (last visited June 24, 2016).

263. See Wagner & Castillo, *supra* note 141, at 273 (drawing an analogy between Facebook wall posts and publication in a newspaper and ultimately finding Facebook to be a more reliable method of conveying notice than publication).

264. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950) (criticizing notice through publication); see Eisenberg, *supra* note 54 (criticizing notice through publication).

way that associates the message with the intended recipient, is one of the advantages afforded by social media.²⁶⁵ It is this capability that has made these tools such powerful vehicles of spreading messages.²⁶⁶ This aspect of social media makes it *more* likely for messages sent through generalized pathways to reach the intended audience than through traditional publication.

However, the more generalized pathways for communication via social media—like postings on a Facebook wall or a Tweet—are not as directed as traditional methods of service like in-hand service of process or service via one's dwelling. While the defendant may instantly see a message posted through a generalized tool on social media (if, for example, he sees it on his mobile device after being instantly notified of the communication),²⁶⁷ the content might not be sufficiently directed at the individual defendant so as to bring home notice. Generalized messages may link the content to the intended recipient, but may also link the same message to many people.²⁶⁸ This diffuse aspect of social media poses possible challenges to its use as a vehicle for service of process.

The high volume of messaging and the impact this volume has on how one receives information only adds to the diffuse nature of social media platforms.²⁶⁹ As discussed above, the social media platform might be most likened to one's dwelling because it is tailored to the individualized account holder and is a place where he consistently returns to or can be found.²⁷⁰

265. See *Social Networking Fact Sheet*, PEW RES. CTR. (Dec. 27, 2013), <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/> (summarizing research on the social impact of social media).

266. See *id.* (summarizing research on how individuals use social media to interact with others); Lee Rainie, *Social Media and Voting*, PEW RES. CTR. (Nov. 6, 2012), <http://www.pewinternet.org/2012/11/06/social-media-and-voting/> (examining the impact of social media on voting behavior in the 2012 presidential election).

267. See Maeve Duggan, *Mobile Messaging and Social Media 2015*, PEW RES. CTR. (Aug. 19, 2015), <http://www.pewinternet.org/2015/08/19/mobile-messaging-and-social-media-2015/> (examining the growing use of mobile apps to engage with social media).

268. For example, the use of a hashtag can connect a message to a trending topic. Assuming a privacy setting was not used, all those following the hashtag can view the message. See *Using Hashtags on Twitter*, TWITTER, <https://support.twitter.com/articles/49309> (last visited Oct. 19, 2016); *How Do I Use Hashtags?*, FACEBOOK HELP CTR., https://www.facebook.com/help/587836257914341?helpref=faq_content (last visited Oct. 19, 2016); *Who Can See My Posts When I Use Hashtags?*, FACEBOOK HELP CTR., https://www.facebook.com/help/134343280099148?helpref=faq_content (last visited Oct. 19, 2016).

269. It is estimated that every 60 seconds there are 243,000 photos shared, 50,000 links shared, and 3 million likes on Facebook. *Just One Minute on Facebook*, WE ARE SOC. MEDIA (June 11, 2014), <http://wersm.com/just-one-minute-on-facebook-infographic/>; see also *Social Networking Fact Sheet*, PEW RES. CTR. (Dec. 27, 2013), <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/> (reviewing the way "power users" engage with social media).

270. See *supra* Section II.B.1.b (discussing the service on physical dwellings).

However, unlike providing information to a person by serving an approved resident at his dwelling, providing information to a defendant via his social media platform does not assure transmission of the service in that same way; it is less certain the served “resident” will provide the service to the defendant. For example, when a plaintiff provides service at the defendant’s physical dwelling by serving someone who resides at the dwelling, there is generally some assurance that the service will reach the defendant because there are, presumably, a limited number of people who reside at the dwelling and a limited source of information flowing to the defendant in this manner. When the resident is served, he is alerted to the importance of the information and we are comfortable that he will pass the notice on to the defendant.

A “virtual” dwelling on social media, however, differs in key ways from a defendant’s physical dwelling. First, there are multiple “residents” at the dwelling. For example, there are generally several possible pathways for generalized communications, from direct postings on a person’s account,²⁷¹ to a variety of ways to link someone to a message or image.²⁷² The more “residents” at the home, the more concern that the defendant will miss the communication. Even more problematic is the amount of messages coming through these “residents.” There might be unlimited numbers of social media users who can create posts or send generalized messages that are associated with the account holder. To handle the volume of information, most social media pages employ sophisticated analytics to judge the significance of more generalized posts on the account.²⁷³ While there is a perception that service made on a resident at the defendant’s physical dwelling will find its way to the hands of the defendant, the flow of information on social media is more difficult to predict.

By contrast, the individualized communication pathways present on social media provide a highly directed form of communication. In these routes, the message is sent directly to the account holder.²⁷⁴ Oftentimes, these messages are not filtered by the social media platform, which creates a highly individualized and direct path of communication. However, social media platforms have employed filters that limit this type of access to the

271. An example of this communication include posting on another person’s Facebook wall.

272. Examples of this communication include linking or tagging another person’s social media account in an image or post shared on any social media platform.

273. For example, Facebook controls the messages that are displayed in the account holder’s “news feed.” *How does News Feed decide which stories to show?*, FACEBOOK: HELP CTR., <https://www.facebook.com/help/166738576721085> (last visited June 24, 2016).

274. See generally Protalinski, *supra* note 242.

account holder (even without the knowledge of the account holder).²⁷⁵ Therefore, while most social media platforms provide a highly individualized and direct path of communication to an account holder, the actual operation of the platform should be considered before *carte blanc* acceptance of it as a method for service of process.

For these reasons, courts and legislators should endeavor to look at the distinguishing features of social media platforms—how they offer unique forms of communication different from traditionally accepted methods for service of process—and consider their operation in connection with the goal of providing notice. First, service rules and orders providing for service of process via social media should have as a key component some mechanism to verify the identity of the defendant as the social media account holder.²⁷⁶ Second, there should be some assurance that the message is delivered through a sufficiently individualized path and no known blocks have been added to prevent delivery of service.²⁷⁷

B. How Social Media Impacts the Conspicuousness of Notice

Despite initial resistance, the legal system has begun to embrace the use of electronically stored information and has permitted once formalized events to occur through less-formal electronic means.²⁷⁸ Namely, the federal courts²⁷⁹ and several state courts²⁸⁰ have moved to a system of e-filing for court documents. Within these systems, courts have embraced the electronic service of documents other than the complaint. In addition, discovery rules have been amended to account for the storage and maintenance of relevant

275. *How can I check if I have message requests on Facebook?*, FACEBOOK HELP CTR., <https://www.facebook.com/help/936247526442073> (last visited June 24, 2016) (explaining the filtering of messages).

276. *See infra* Part V (providing a legislative proposal for a default option for social media service of process); *see also* Eisenberg, *supra* note 54, at 805–06 (discussing using “pictures, personal information such as birth date and name, and even crosscheck lists of Facebook friends with the defendant’s known associates”); and Tabibi, *supra* note 141, at 56–57.

277. *See infra* Part V (providing a legislative proposal that mandates “conspicuous” postings and requires a confirmation of delivery).

278. *See* Roger Winters, *Controversy and Compromise on the Way to Electronic Filing*, NAT’L CTR. FOR STATE COURTS 125–127 (2005), <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/tech/id/586>.

279. *Electronic Filing (CM/ECF)*, U.S. COURTS, <http://www.uscourts.gov/courtrecords/electronic-filing-cmecf> (last visited June 24, 2016).

280. *See* Rob Tricchinelli, *State courts continue move toward electronic filing, docketing*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (Summer 2013), <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-summer-2013/state-courts-continue-move->

information in a purely electronic format.²⁸¹ These changes have been brought about for pragmatic reasons—namely, the ease and efficiency afforded by electronic distribution of information.²⁸² However, electronic communication would not be embraced in e-filing or in e-discovery if it were perceived that the significance of these electronic communications would escape those involved in the process.²⁸³ The fact that electronic communication has been embraced as a part of these legal processes lends support to extending recognition of service of process through newer electronic means.²⁸⁴ Therefore, service methods that, as a practical matter, sufficiently apprise the defendant of his need to seize his opportunity to be heard, should be considered constitutional even though they lack traditional or formal indicia of conspicuousness.

There are some practical limitations on the conspicuousness of information shared through social media that must be addressed before it can be embraced as a method for service of process. First, most social media platforms operate in a manner that may actually serve to bury the information distributed through it.²⁸⁵ Some information may be immediately brought to the attention of the user while other information may be relegated to a placement on the platform (akin to a spam folder in an email system) that is less likely to be noticed by the intended recipient.²⁸⁶ Even information shared through more direct pathways (such as a private messaging) can be filtered away from the account holder's immediate view.²⁸⁷

Moreover, the account holder himself can establish filters to prevent communication from certain individuals or from non-pre-approved individuals.²⁸⁸ Even beyond platform-imposed or account-user-selected filters, the sheer volume of content shared on social media platforms limits the conspicuousness of any individual message. When notice could be communi-

281. See FED. R. CIV. P. 26(b)(2)(B) (defining the scope of discovery to account for the challenges attendant to electronically stored information).

282. See Hedges, *supra* note 35, at 58–59, 73–74 (discussing the movement to e-filing in federal court).

283. *Id.* at 56–57.

284. *Id.* at 73–74.

285. As discussed, posts on more generalized information sharing pathways (such as posts or Tweets which can be generated and viewed by many people) are often filtered by the platform itself. See *How do I post on a Page that I visit?* FACEBOOK HELP CTR., <https://www.facebook.com/help/424946150928896> (last visited June 24, 2016).

286. *Id.* Even placement on the social media platform, such as at the bottom of a long list of posts, may prevent it from being seen.

287. Many social media platforms filter even private messages when the account holder does not have an established connection or pattern of communication with the sender.

288. For example, an account holder on Facebook can alter the settings on the account to prevent filtering or to prevent other users getting access to the account. *Basic Privacy Settings & Tools*, FACEBOOK HELP CTR. <https://www.facebook.com/help/325807937506242/> (last visited June 24, 2016).

cated as part of a flurry of messages, the notice is not likely “to attract the [recipient’s] attention to the proceeding.”²⁸⁹

Finally, electronic notice presents a unique challenge to conspicuousness; users may fail to open, or receive, notice transmitted on social media out of a generalized fear of receiving electronic files from users unknown to them.²⁹⁰ Even when messages containing files are not filtered out by the account holder, the account holder may be leery in opening a message because of the popularly-held belief that messages from unknown senders are likely to contain corrupted files.²⁹¹ While there is always the fear that the defendant might not accept service being provided him, the defendant might have a legitimate reason to reject opening or accepting service sent via an electronic method. For this reason, there must be a sufficient mechanism to prevent the defendant from taking steps to evade service while providing for alternative service options when there are concerns that the defendant may not have received service due to a legitimate fear of opening a file.²⁹²

Despite these recognized impediments to conspicuousness inherent in service of process via social media, there are some features of social media that would make notice delivered through it *more* conspicuous than that delivered through more traditional methods. Social media platforms are oftentimes accessed via mobile devices, meaning that the defendant could be served anywhere.²⁹³ Additionally, most mobile devices have applications that instantly notify the user when a social media posting or message has been sent.²⁹⁴ Again, while users can alter their devices to prevent instant notifications, the possibility of instant notification is typically not possible when service is provided through mail, service on defendant’s dwelling, by posting, or by publication.

Moreover, service via social media can be approved in such a manner as to ensure that the notice will be sufficiently conspicuous so as to apprise the defendant of his rights. For example, the service rules or order could target users who have patterns of behavior suggesting they will likely receive notice in this manner.²⁹⁵ Users who have strong patterns of use of the social media tool—through frequent and regular use of the tool in sending and receiving information—are more likely to find notice sent via that tool.

289. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 316 (1950).

290. Schreck, *supra* note 147, at 1136–1138.

291. *Id.*

292. See *infra* Part V proposing a mechanism to provide alternate service when a defendant’s receipt of the service is not apparent from behavior or automated transmissions.

293. See Anderson, *supra* note 10 (discussing use of mobile devices in the U.S.).

294. See *Facebook Mobile*, FACEBOOK, <https://www.facebook.com/mobile/> (last visited October 20, 2016); *Notifications on mobile devices*, TWITTER, <https://support.twitter.com/articles/20169887> (last visited October 20, 2016).

295. See *infra* Part V (proposing a defined user on whom social media service could be a default option).

Additionally, the service rule or order could require the confirmation of the receipt of notice.²⁹⁶ This could be obtained through behavior of the recipient. The commenting, forwarding, responding to, or even deletion of the message²⁹⁷ containing appropriately and conspicuously designated notice, could serve as a method of verification that the notice was received and is sufficiently conspicuous. To the extent the social media tool provides an acknowledgement that a message is read by the recipient, it would serve as a means to ensure the notice is conspicuous. Alternatively, the service rule or order could mandate the use of an additional traditional method of service of process if, after a designated period of time, the content of the notice is not acknowledged.

C. How Social Media Impacts the Verifiability of Notice

One primary concern by those reluctant to embrace service through social media is the concern that the platforms are inherently unreliable.²⁹⁸ There is growing data that demonstrates the wide-spread use of these tools as an important source of information for a growing number of people.²⁹⁹ One challenge is the lack of familiarity many judges and lawmakers have with the functionality of these tools—³⁰⁰enhancing the skepticism of their use in a key aspect of legal process. Additionally, the fast-paced evolution of social media platforms out-paces the rate of changes in our law. Decisions or rules reliant on a particular feature of the social media quickly become irrelevant or unworkable.

296. See Knapp, *supra* note 141, at 578 (noting that service via Facebook is more reliable than publication because receipt of notice can be verified through a read receipt).

297. See Hedges, *supra* note 35, at 74 (arguing that the “very act of deletion [of electronic service of process] would validate the fact that the defendant was aware of being served”).

298. *WhosHere, Inc. v. Orun*, No. 1:13-CV-00526-AJT, 2014 WL 670817 at *4 (E.D. Va. Feb. 20, 2014); *F.T.Comm’n. v. PCCare247 Inc.*, No. 12 CIV. 7189 (PAE), 2013 WL 841037, at *5 (S.D.N.Y. Mar. 7, 2013).

299. One recent reported stated:

Roughly two-thirds (64%) of U.S. adults use Facebook, and half of those users get news there—amounting to 30% of the general population. YouTube is the next biggest social news pathway—about half of Americans use the site, and a fifth of them get news there, which translates to 10% of the adult population and puts the site on par with Twitter. Twitter reaches 16% of Americans and half of those users say they get news there, or 8% of Americans. And although only 3% of the U.S. population use reddit, for those that do, getting news there is a major draw—62% have gotten news from the site.

Monica Anderson & Andrea Caumont, *How Social Media is Reshaping News*, PEW RESEARCH CTR. (Sept. 24, 2014) <http://www.pewresearch.org/fact-tank/2014/09/24/how-social-media-is-reshaping-news/>.

300. *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709, 711, fn.1 (N.Y. Sup. Ct. 2015) (noting that members of the New York State judiciary were not likely to be among the 157,000,000 people who check their Facebook accounts daily).

When one looks past these initial reservations it is clear that the law has never demanded a fool-proof method of service of process. The law has acquiesced to methods like service by mail even when documents sent via mail might be mislabeled, misdelivered, or even lost.³⁰¹ Similarly, service to dwellings might be misplaced by the resident served or not ultimately provided to the actual defendant. Service via social media, which in some instances may be more reliable than traditional methods of service, should not be outright rejected because it cannot assure actual notice.³⁰²

Recognizing that service might be deficient has given rise to methods that verify the act of service. These verifications also provide courts with an independent source who can be examined in court under oath if service is later challenged. While using social media as an approved method for service might not have widespread support in the legal community, there are ways to modify our current verification processes to ensure proper service.

First, service by social media could be verified by affidavit in much the same way as other forms of service of process are verified. The service rules in Utah permit plaintiffs to move the court for service via publication or “by some other means” when traditional methods of service become impracticable or when the defendant’s identity or whereabouts are unknown or when he avoids service.³⁰³ While the rule does not specifically address what is included in “other means,” the Utah courts have been permitting service via Facebook and Twitter for the past six years.³⁰⁴ To verify that the service occurred, the server must file an affidavit detailing the service, checking a box as to which social media tool (Facebook or Twitter) was used, and listing the “name” of that account.³⁰⁵

A similar approach could be used to verify service through any social media platform. To allay the concerns of those skeptical of service via social media, the affidavit could require more information than that required by the Utah form. For example, it could require the affiant to specify the method used to communicate the notice (e.g., whether the server used a generalized pathway of communication such as a wall post or a more individualized

301. Kevin W. Lewis, Comment, *E-Service: Ensuring the Integrity of International E-Mail Service of Process*, 13 ROGER WILLIAMS U. L. REV. 285, 302 (2008) (noting that traditional “means of service have their flaws. The United States Postal Service is vulnerable to human error, resulting in lost mail and deliveries to wrong addresses. Notice by publication also carries imperfections because it can be misprinted.”).

302. See Hedges, *supra* note 35 at 67–68 (reasoning that traditional methods of service have “serious flaws” and yet are still considered proper methods for achieving notice; therefore, electronic service of process should not be held to higher standard).

303. UTAH R. CIV. P. 4(d)(4)(A).

304. See Irvine, *supra* note 61 (discussing the implementation of Utah’s alternative service of process rule).

305. *Id.*; *Proof of Alternative Service Form*, UTAH COURTS, http://www.utcourts.gov/how-to/service/docs/06_Proof_of_Alternative_Service.pdf (last visited June 25, 2016).

pathway of communication such as a private message). Additionally, the affiant could be required to specify how many times the service was distributed. The affiant could also be required to submit additional documentation in support of his affidavit—including screen shots of the posting and any screens that demonstrate the defendant received or opened the notice.³⁰⁶

These methods would serve to verify the delivery of service and diminish the concern that courts or legislators adopting these methods were endorsing categorically unreliable forms of service. Additionally, the court would be provided with an independent verification of service that could be tested in court should the service be challenged.

D. How Social Media Impacts the Access to the Content of Notice

Because technology necessitates transmission of information in an electronic medium, the notice must be sent electronically. Initially, concerns expressed around service of process via email focused on whether the information sent could be downloaded and read by the recipient.³⁰⁷ With the creation of portable document format (PDF) files, recipients can receive information in a manner that does not require he use the same software, hardware, or operating system as the sender. Most, but not all, social media platforms permit the sharing of PDF files. Alternatively, JPEG files, which can be used by capturing an image of the document, are also universally readable. These types of files may be transmitted on most social media platforms.³⁰⁸

306. Examples could include dated screen shots of the defendant's removal of the post, of the defendant's comment on the post, or of the read receipt notification automatically displayed by the social media platform. *See Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709, 714 (N.Y.Sup. Ct. 2015) (relying on the plaintiff's affidavit and attachment of screenshot of communications on Facebook to order service via Facebook).

307. *See Hedges*, *supra* note 35, at 67 (discussing initial concerns raised by courts and others when service via email was first being considered).

308. The present capacities of Facebook and LinkedIn permit users to transmit information via link or attachment of a wide variety of files, including PDF. *How do I add an attachment to my message?* FACEBOOK: HELP CTR., <https://www.facebook.com/help/121288674619000> (last visited June 25, 2016); *Attaching Files to Messages*, LINKEDIN HELP, https://help.linkedin.com/app/answers/detail/a_id/53703/~-/attaching-files-to-messages (last visited June 25, 2016). Other social media platforms, such as Twitter, SnapChat and Instagram currently permit transmission of information via JPEG file. *How do I use Instagram direct?* INSTAGRAM HELP CTR., <https://help.instagram.com/684926628219030> (last visited June 25, 2016); *Posting photos or gifs on Twitter*, TWITTER HELP CTR., <https://help.instagram.com/684926628219030> (last visited June 25, 2016); *Share saved photos from your device*, SNAPCHAT SUPPORT, <https://support.snapchat.com/en-US/a/photo-gallery> (last visited June 25, 2016). Presumably, if a defendant is a regular user of a social media platform, he is able to read and exchange the types of files frequently found there. For example, a defendant would not make regular and consistent use of social media platform that only permitted exchange of JPEG files if he did not have the ability to download these files.

To avoid any concern about the format of notice, service of process could be more directly linked to the e-filing process already in use in many state courts and in the federal courts.³⁰⁹ Documents are already served between parties participating in these e-filing regimes. Service of process could simply convey information via PDF or JPEG, or it could include a link to the court e-filing system with information to direct the defendant to the case.

In addition to the file format, the notice must also be capable of being provided to one's legal counsel. One feature of some social media platforms is to "emulate the best parts of face-to-face conversation" by not storing information for very long after the recipient views the communication.³¹⁰ Obviously, if information is programmed to disappear not long after being viewed, this would pose a substantial impediment to the constitutionality of the notice. A defendant must be able to easily deliver the contents of the notice to his lawyer so that he can prepare his defense and seize his opportunity to be heard on the case. While recipients of electronic information can always preserve the communication they receive by taking a screenshot of the shared information, the onus should not be placed on the defendant to realize the need to create such content.³¹¹ Rather, service rules and court orders permitting service through social media should ensure that the method used does not have a default in which shared information is quickly erased after being used.

E. Pragmatic Considerations Supporting the Use of Social Media as a Vehicle for Service of Process

The majority of this section has made the argument that service through social media will provide notice that will meet the constitutional standard set forth in *Mullane* by upholding the integral principles of due process. Service of process via social media should also be embraced because it is a pragmatic solution that will ensure our legal system embraces efficient and affordable legal processes.

First, the use of social media as a mechanism for service of process is more efficient than more traditional methods of service. Unlike in-hand service of process, the defendant who regularly uses social media may not even

309. See Jennifer Lee Case, Note, *Extra! Read All About It: Why Notice by Newspaper Publication Fails to Meet Mullane's Desire-to-Inform Standard and How Modern Technology Provides A Viable Alternative*, 45 GA. L. REV. 1095, 1120-24 (2011) (recommending a court database be created to promote electronic service of process).

310. *Chat 2.0*, SNAP CHAT, <http://snapchat-blog.com/post/141902878020/chat-20> (last visited June 25, 2016).

311. See *Retrieve a copy of a snap*, SNAPCHAT SUPPORT, <https://support.snapchat.com/en-US/a/snap-content> (last visited June 25, 2016) (discussing the limitations of SnapChat).

need to be physically located.³¹² Many social media users receive updates to their mobile devices from their social media platforms, making it more efficient to “locate” and serve the defendant. For those users who do not possess a mobile device or do not receive updates from their social media accounts on their mobile device, location of the defendant is still more efficient than through traditional service methods. A regular user of social media is likely to frequent the social media account and be “found” there.

Second, service via social media is also less expensive than traditional methods of service.³¹³ Service via in-hand personal service can be quite costly if the defendant is difficult to locate or if service must be attempted multiple times. Additionally, even service to a dwelling or service via mail, requires the expense of employing a courier. At present, social media accounts are free to register for and dispatch with the need to have a paid courier service. While service via social media might necessitate multiple service attempts or require more by the server to ensure service is proper, these steps do not necessarily come with additional expense.³¹⁴ Service via social media will likely save both the time and expense associated with delivery via process server or via mail courier.

Finally, social media should be approved as a mechanism for service because it is a reliable way to receive and transmit information. What is particularly noteworthy is that social media is a much more reliable source for information that pertains directly to the user. For example, an individual may be more likely to turn to his social media account to receive important updates about his personal network of friends or to retrieve messages directed to him than to any other source.

V. PROPOSED LEGISLATIVE SOLUTIONS FOR SERVICE OF PROCESS VIA SOCIAL MEDIA

Having established that service of process via social media can meet the standard for constitutionality set out in *Mullane*, this section sets forth several legislative proposals designed to strike the delicate balance between providing an efficient and cost-effective method for service of process with the need to ensure adequate protection of the defendant’s constitutional rights. First, this section provides guidance to legislatures by offering rule language that creates an “automatic” avenue to service via social media, one

312. See *Rio Properties v. Rio Intern. Interlink*, 284 F.3d 1007, 1018 (9th Cir. 2002) (reasoning that electronic service of process permits service that is “aimed directly and instantly” at the defendant).

313. See *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709, 716 (N.Y. Sup. Ct. 2015) (discussing the high costs associated with service via publication); Eisenberg, *supra* note 54, at 810-813.

314. If a private server is used, expenses might be associated with these additional steps; arguably, this would still be less expensive than service through traditional methods.

that permits service without prior court approval. Second, this section provides suggested rule language that creates intermediate legislative options, through waiver of service provisions and service through court order, which will serve to introduce social media as a method for service of process in a uniform way. Lastly, this section will provide direction to courts considering whether to grant a request to serve a defendant via social media under a current “catch all” service provision.

A. A Legislative Proposal for an “Automatic” Pathway to Service via Social Media

1. *The Need for an “Automatic” Avenue*

Service via social media should be included as an “automatic” avenue to achieve notice because the principles underlying the constitutional requirement for notice can be achieved through service via social media. As such, legislators should strive to provide a direct pathway to service via social media, free from any conditions or case-by-case court approval.³¹⁵ By limiting service via social media to a “back-up” option, for use only when the traditional methods prove to be impracticable or impossible, or by requiring prior court approval to serve defendants via social media, some of the inherent benefit of this service method is lost. Getting court approval requires additional litigation, including the drafting, filing and possible hearing on a motion for alternative service, and its attendant costs. These expenses, both in terms of effort and finances, are not insignificant. However, while there is a great need for efficient methods for service of process, these pragmatic considerations must yield to procedural mechanisms that are necessary to ensure protection of the defendant’s constitutional rights. Consequently, any approved “automatic” avenue must be both efficient and easy for the plaintiff to implement while providing adequate procedural safeguards to ensure protection of the defendant’s due process rights.

2. *Proposed Legislative “Automatic” Avenue to Service via Social Media*

The following proposed legislation integrates limitations on service via social media to ensure that it will be “reasonably calculated to inform” the defendant of the proceedings. As such, the proposed service rules in this section provide for service via social media without the need for prior court approval.

315. To date, no jurisdiction in the U.S. permits service of process via social media on individuals without prior court approval.

(a) Service via Social Media: An individual may be served by electronic communication of the summons, in a readily accessible format, to the defendant's qualifying social media account as defined in section (b). Service made to the defendant's qualifying social media account will constitute valid service if the communication of the summons is made in a conspicuous manner and service is confirmed under section (c). Service is made in a conspicuous manner if it is likely to apprise a reasonable recipient of the pendency of the hearing.

(b) Qualifying Social Media Account: A qualifying social media account is any account:

- (i) operated solely by the defendant;
- (ii) accessed by the defendant on at least 15 of the 30 days immediately preceding communication of service under section (a); and
- (iii) hosted on any communication platform designed to transmit information electronically that does not have a systemic default operation of erasing shared information within the time period for confirmation of receipt under section (c).

(c) Confirmation of Receipt of Service: Service under section (a) is confirmed through activity of the defendant that evidences receipt of the summons, including, but not limited to: postings, or other response, by the defendant, on the account served, referencing the content of the summons, postings, or other response, by the defendant, on any other account (including a different social media account, email account, or through other recorded communications), referencing the content of the summons; erasing of the summons that can be attributed to the defendant; retransmission of the summons by the defendant; or the creation of automated electronic receipts confirming that the defendant accessed the summons or opened a link containing the summons. Confirmation of receipt of service must be made within 30 days of the delivery of service under section (a). If confirmation of receipt of service is not made within 30 days of delivery of service under section (a), service of summons must be made via first-class mail to the defendant's last known address.

(d) Affidavit of Service: Proof of service must be made to the court through a server's affidavit. The server must affirm to the best of the server's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (i) the account served was a qualified social media account under section (b); and

(ii) that service was confirmed under section (c).³¹⁶

3. *The Proposed Language Ensures the Service Will Be Directed to the Defendant*

To ensure that a service rule that permits service via social media without the need for case-by-case court approval passes constitutional muster, the rule needs to ensure that service is provided to the correct defendant. Under section (b), the service must be made to a social media account “operated solely by the defendant.” Because technology can obscure the identification of the defendant, the rule requires that the plaintiff take affirmative steps to verify that the account being served is that of the defendant. Specifically, section (d) of the proposed rule mandates that the person accomplishing service perform a “reasonable inquiry” into the identity of the account holder and requires that the server affirm in his affidavit that, “to the best of the server’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,” the account served is operated by the named defendant.³¹⁷ These are necessary steps for the server to be able to affirm that the account served was a “qualified social media account” under section (b) of the proposed rule.

In addition to this affirmation, the service provision³¹⁸ could require the server to provide detailed information about how the defendant’s identity was confirmed and append supporting documentation. Examples of information could include the following: cross-reference to known information about the defendant (including personal information, background, and other electronic accounts known to be used by the defendant); images of the defendants; virtual associations between the defendant and others known to associate with the defendant in real life; and patterns of behavior on the so-

316. A jurisdiction adopting the proposed language would also need to determine the date by which service will be deemed to be made. To accommodate service via social media, current timing provisions might need to be amended. For example, service via social media may be considered made when confirmation of receipt of service is made by defendant action or by mail (whichever occurs later). *See* N.Y. SURR. CT. PROC. ACT LAW § 309 (McKinney 2000) (designating the timing of service under snail and mail as being complete when the later of the posting or mailing occurs). Alternatively, service may be deemed made when the service of affidavit is filed. Regardless of approach, the jurisdiction should attempt to utilize current timing provisions to the extent possible.

317. This language mirrors that of FED. R. CIV. P. 11. Like Rule 11, this aspect of the proposal requires the affiant to make a reasonable inquiry before certifying the service in an attempt to dissuade fraudulent service.

318. This aspect of the proposal could also be accomplished through modification of the court’s forms for the server’s affidavit.

cial media tool by the defendant that can be corroborated as the defendant's use.³¹⁹

In addition to requiring some process to verify the identity of the defendant, section (b) of the proposed service rule requires that the account be operated "solely" by the defendant. Because many social media platforms enable multiple users to create jointly-held accounts,³²⁰ there is a chance that service made on the social media platform will not be sufficiently directed at the defendant. When service is made on an individual residing in the defendant's physical dwelling, the server must ensure that the dwelling is that of the defendant and that the person served also uses the dwelling as her own residence. Similar reasoning should apply to service on a social media account. Service must be directed to the defendant's *own* account—just as service must be directed to the defendant's *own* dwelling. However, unlike service on a dwelling, where the service can be provided to a joint-occupant, information delivered to a jointly held account cannot be presumed to be shared with the defendant, as it would be in a physical dwelling. There are less norms governing how people interact with each other when jointly sharing a social media account than with people jointly occupying a dwelling. For example, it is unclear whether information delivered to the jointly owned social media account will be shared between the account-holders. Therefore, service under this statutory option, should not be made on an account known to be jointly held by more than one user.

4. *The Proposed Language Ensures the Service Will Be Conspicuous and Will Apprise the Defendant of His Opportunity to Be Heard*

To ensure that the service is "reasonably calculated to inform" the defendant in this virtual forum, section (a) of the proposed service rule requires service to be sufficiently "conspicuous." Not every user of social media makes regular use of his account. The inconsistent use of social media by account holders warrants a more circumscribed rule when there is no judicial pre-approval of the service method. While others have suggested that service could be provided on any account (or electronic medium) that

319. Courts have considered these factors in approving service via email and or social media. *Rio Properties v. Rio Intern. Interlink*, 284 F.3d 1007, 1017–18 (9th Cir. 2002); *Lipenga v. Kambalame*, No. GJH-14-3980, 2015 WL 9484473, at *4 (D. Md. Dec. 28, 2015); *WhosHere, Inc. v. Orun*, No. 1:13-CV-00526-AJT, 2014 WL 670817 at *4 (E.D. Va. Feb. 20, 2014); and *F.T.Comm'n. v. PCCare247 Inc.*, No. 12 CIV. 7189 PAE, 2013 WL 841037, at *4 (S.D.N.Y. Mar. 7, 2013); *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709, 714-15 (N.Y. Sup. Ct. 2015)..

320. For example, Facebook permits "pages" that are used for groups such as businesses or brands. It can also be used by celebrities that want a different type of interactivity with fans. *What is a Facebook page?* FACEBOOK: HELP CTR., (last visited June 25, 2016), <https://www.facebook.com/help/174987089221178>.

was “accessed by the defendant within 60 days” of the delivery of service,³²¹ such a measure would not provide assurance that the service will be sufficiently conspicuous to bring home notice in a “reasonably calculated” way. Service would be “reasonably calculated to inform” the defendant if the defendant makes regular use of the social media account.

Because this article has argued that service on a social media account can be likened to service at one’s dwelling, the service rule should more closely mirror that form of service. Therefore, the account holder must utilize his social media account in such a manner as to make it a place where he can regularly and reliably be found—something akin to his virtual dwelling. For purposes of service on one’s dwelling, most service rules require that the dwelling be a “usual place of abode” or a “primary residence.”³²² To be considered a “dwelling,” the defendant must be more than just “passing through.”³²³ In the context of a social media account, presence should be measured both in terms of frequency (e.g., how many days the defendant uses the account over a set period of time) and activity (e.g., how the defendant engages with the account). To ensure the service rules adequately protect the defendant’s right to notice, the defendant should make frequent use of the page in a measurable way.³²⁴ Section (a) of the proposed service rule requires that the defendant make use of his account on fifteen of the thirty days immediately preceding the service. The types of activity that should count are any interaction with the account that demonstrates his use of the platform (including posting, sharing, commenting, deleting, or otherwise reacting to content). The server is required to affirm, in his affidavit of service under section (d), that the defendant is this type of regular user.

5. *The Proposed Language Ensures the Social Media Account Has the Capacity to Bring Home Notice*

One challenge transmission of service via social media presents is that the content must be delivered in an electronic format. To minimize the chance that the defendant will not be able to access the actual electronic files that contain the summons and complaint, section (a) of the proposed service rule mandates delivery in a “readily accessible format.” This language focuses on the policy behind the rule—that the defendant should be able to easily access the contents of the service. The proposed rule uses flexible

321. Hedges, *supra* note 35, at 74–76.

322. Korpela, *supra* note 46 at §2(a) (summarizing service on the defendant’s dwelling).

323. *Id.*

324. See Melodie M. Dan, *Social Networking Sites: A Reasonably Calculated Method to Effect Service of Process*, 1 CASE W. RES. J.L. TECH. & INTERNET 183, 216–18 (2010) (recommending courts consider whether the defendant had logged onto his account within two weeks of the motion for alternative service of process).

terms, rather than a specific file type, to account for the variety of ways this could be achieved. For example, the service could be provided in a universally readable format³²⁵ or in a format that is universally exchanged on that social media platform. If the defendant makes regular use of the platform, he should have ways to access the files regularly exchanged on the platform. Alternatively, a court using e-filing could modify the e-filing system to permit service of process. For example, the plaintiff could be required to provide the defendant with the information traditionally contained in the summons—the name of the court, the date by which defendant must respond and the consequence of failure to respond—and then provide a link to the summons and complaint in the court’s e-filing system.³²⁶ As drafted, the proposed language allows for many different types of electronic communication while still requiring that the service provided gives the defendant notice of his opportunity to be heard and permits him to deliver the notice to his lawyer to facilitate his ability to respond to the claims against him.

Another challenge for service via social media is the potential that the social media platform has a default operation to automatically erase information after it is viewed.³²⁷ There is always some concern that a message will be filtered, either by the platform or the account holder, to a less-conspicuous part of the social media platform.³²⁸ These challenges can be addressed by putting confirmation safeguards in place that seek to ensure that the defendant receives the notice. However, platforms that are designed, by default, to erase information transmitted to the account holder, present unique constitutional challenges. For these platforms, unless the account holder takes affirmative steps to capture and save the information, it will be lost. Service provided through these channels is likely to be lost, minimizing the chance that the defendant will be apprised of his opportunity to be heard and eliminating his ability to transmit the notice to his lawyer. Therefore, section (b) excludes such platforms as acceptable vehicles for service of process.

A final aspect of social media platforms that must be considered is the way in which information can be shared. Because many platforms have both generalized pathways (those which provide for information sharing in a

325. Service should be made through files that can be read regardless of the operating system, software, and hardware being accessed by the defendant.

326. See Case, *supra* note 309, at 1122–24 (recommending a court database to facilitate service via electronic service of process).

327. For example, SnapChat operates with a default operation that erases shared information shortly after it is received by the recipient. *Retrieve a copy of a snap*, SNAPCHAT SUPPORT, (last visited June 25, 2016) <https://support.snapchat.com/en-US/a/snap-content> (discussing the limitations of SnapChat).

328. See *supra* Section V.A.2.d (discussing methods to ensure service is received by the defendant).

more public way) and individualized pathways (those which provide for information sharing between the sender and recipient only or between a small group of people), the service rule should aim to accommodate the various forms of operation while ensuring the notice is sufficiently conspicuous to apprise the defendant of his rights. This can be achieved in section (a) by requiring that the service be displayed in a “conspicuous manner” on the defendant’s social media account. Such a requirement permits a variety of transmissions while aiming to ensure the best option is chosen. For example, conspicuous service could include postings that most closely resemble private messages, as these might alert the account holder of the message. Additionally, this could include posts to an account holder’s page, like his Facebook wall, that were sufficiently prominent. Service that would not likely satisfy this standard would include the burying of the summons and complaint in unrelated messaging. For example, service posted as a comment to other posts on an account holder’s Facebook wall would not be “conspicuous” as there would likely be no distinguishing feature of such post to bring it to the attention of the account holder. Because a defendant could later challenge the “conspicuousness” of a posting, the plaintiff would have a sufficient incentive to transmit the service in a conspicuous manner.

6. *The Confirmation of Delivery Increases the Likelihood the Defendant Will Receive Notice*

As an additional safeguard to ensure service is sufficiently conspicuous, section (c) requires that the service be verified in some manner, and if it cannot be verified within thirty days of service, that another method of service be used as a backup. Under section (c), service is valid when there is some activity by the defendant that demonstrates his receipt of the service. This would operate similarly to limits placed on service via mail, which often require a signature upon delivery. Examples of activity which operate as a verification of receipt include comment on the service; forwarding or sharing of the service; electronically tracked receipt of the service (by a read receipt or the tracking of the opening of a link); and even deletion of the service by the defendant (so long as it was apparent that the deletion was due to an affirmative act of the defendant and not an automated response of the platform).

In lieu of a verification of receipt via defendant conduct, section (c) requires delivery of service via first class mail to the defendant’s last known address. To promote efficiency, this back-up option is required only when service cannot be confirmed via the defendant’s activity within thirty days after the service via social media is made. However, for jurisdictions that are more apprehensive about service via social media, this back-up option might

be required simultaneously with the service via social media.³²⁹ Notably, because the recommended back-up method is only first class mail, this additional step would not be overly cumbersome to the plaintiff nor operate to nullify the advantages of providing service via social media.

B. Proposed Legislative “Non-Automatic” Routes to Service via Social Media

This section presents additional legislative solutions for service of process via social media. Unlike the initial proposal that permits service of process as long as the conditions of the statute are met, these solutions condition service on pre-approval by the court or the consent of the defendant. For jurisdictions hesitant to embrace service of process via social media, these proposals may provide important intermediate steps towards achieving service of process via social media. Moreover, these proposals would be helpful in instances where the defendant is difficult to serve through traditional methods of service and does not otherwise meet the strict requirements of the proposed “automatic” route to service via social media.

1. *Proposed Legislation: Service Conditioned on Court Approval*

The following proposed service rule permits the plaintiff to move the court to order service of process via social media.

(a) Motion for Substituted Service of Process via Social Media: Upon motion, a court may order service of process via a social media account, maintained by the individual defendant, and hosted on any communication platform designed to transmit information electronically, if the court determines that the proposed service is reasonably calculated to apprise the defendant of the opportunity to be heard after considering the following:

- (1) whether the account is operated solely by defendant or in conjunction with others;
- (2) whether the defendant has made substantial prior use of the account;
- (3) whether the proposed communication of service would be sufficiently conspicuous, considering the defendant’s prior use of the account and the operation of the platform;

329. See Dan, *supra* note 324 at 216 (recommending that service via social media “should be supplemented with another inexpensive and reliable method of service, such as postal mail, to increase the likelihood that a defendant will receive notice of a lawsuit”).

- (4) whether the defendant had accessed or used the account in connection with the underlying dispute;
- (5) whether the defendant's receipt of the summons could be verified; and
- (6) whether service of the defendant through traditional methods would be impossible or impracticable.

Under the proposed conditional service rule, a plaintiff may move the court to order service via social media. The proposed rule then mandates that the court consider a variety of factors³³⁰ when determining whether to grant a motion to serve a defendant via social media. The factors should be balanced together with no factor receiving more weight than any other. Additionally, the court need not find that every factor would support the motion. Rather, the court should find that, on balance, the factors favor the use of a social media platform to provide service. The listed factors should be interpreted in a manner consistent with the discussion included in Part IV of this article.

Just as through the "automatic" route to service, the social media account must be that of the named defendant. However, unlike in the "automatic" route, the court may order service to a social media account that is not operated solely by the defendant. The court must consider "whether the account is operated solely by defendant or in conjunction with others." There may be instances where a defendant maintains a social media account with another person or persons, and there is good reason to believe the defendant would learn of any service posted to the account. While these types of accounts would not qualify under the "automatic" service provision, a court could examine the attributes of the social media account and the use of the account by the defendant to ensure that service would reach the defendant.

330. David Bell, *Texas Bill Would Make Service via Facebook Law*, HAYNES & BOONE BLOGS, (March 1, 2013) <http://blogs.haynesboone.com/index.php/2013/03/firm/firm/texas-bill-would-make-service-via-facebook-the-law/> (In 2013, Texas House Bill 1989 proposed to permit service via social media upon court approval. Texas House Bill 1989 provided the most guidance to courts of any proposal to date, directing courts to consider whether the defendant "regularly accessed" the social media account and whether the defendant "could reasonably be expected to receive actual notice" through service on the defendant's social media account. Even Texas House Bill 1989, however, did not give specific guidance to the court on what "regular access" by the defendant would look like or how to assess the reasonability of one's expectation that the defendant would receive actual notice through the proposed service. Ultimately Texas House Bill 1989 was not enacted into law); *see also*, Tabibi, *supra* note 141, at 54–56 (discussing Texas House Bill 1989).

The defendant's use of the account and the capacity of the platform must be considered. These factors ensure that courts determine whether the defendant is likely to be apprised of the service because he will be likely to visit and retrieve the service, and because the social media platform enables the service to be conspicuously displayed.³³¹ A court can make this determination by considering the nature of the defendant's "prior use of the account," including "whether the defendant had accessed or used the account in connection with the underlying dispute." As observed by courts that have permitted service via social media, when a defendant that has made use of social media on prior occasions, especially to communicate with the plaintiff or others in connection with the matters that form the basis of the case, there is reasonable assurance that the defendant will be made aware of the service.³³² After all, he has already "expressed" a preference for receiving important information (or at least information from the plaintiff) via this method.

Several state "catch-all" service provisions permit a court to order service through any method, so long as it comports with the Constitution. This proposal differs in significant ways from these "catch-all" provisions. First, unlike most "catch-all" provisions, the proposed language does not require the plaintiff to make a showing that service was not possible or practicable under traditional methods of service. While the proposal includes this as a factor to consider, the proposed rule does not *require* this initial showing.

Some plaintiffs might need to resort to service via social media even when there are substantial reasons to believe the defendant will in fact receive the service. For example, a defendant might make regular use of his social media account, but have more clustered activity and not, therefore, have verifiable use of his account in fifteen of the last thirty days preceding the proposed service. While this would disqualify use of the proposed "automatic" route to service, the court could examine the defendant's use of his social media account and determine that service would be "reasonably cal-

331. When considering the capacity of the social media platform, the court should consider whether it will permit for the exchange of information in a universally readable format or can permit the transmission of a link to the court's e-filing system with the ability to obtain the information needed to apprise the defendant of his opportunity to be heard on the matters against him. Also, the court should consider whether the platform has a default mechanism that deletes shared information prior to the date by which the defendant must respond.

332. *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709, 716 (N.Y. Sup. Ct. 2015) (relying on defendant's prior use of Facebook to communicate with the plaintiff to validate the defendant's Facebook account); *F.T.Comm'n v. PCCare247 Inc.*, No. 12 CIV. 7189 (PAE), 2013 WL 841037, at *4 (S.D.N.Y. Mar. 7, 2013) (considering the defendant's prior use of email and Facebook before ordering service); *see also Rio Properties v. Rio Int'l. Interlink*, 284 F.3d 1007, 1018 (9th Cir. 2002) (discussing the defendant's prior use of email as support for granting service via email).

culated to apprise the defendant” of his opportunity to appear and defend himself.

By contrast, other plaintiffs may be inclined to motion the court for service via social media because, after considering all other methods of service, it becomes clear that the defendant will be difficult to physically locate or that he is actively evading service. For these defendants, service via social media would be warranted because it is “not substantially less likely” than any other method to bring home notice. The proposed service rule must be sufficiently flexible to permit the court to order service via social media in either circumstance, as both are constitutionally sound.

Second, the proposed factor-based test is superior to the traditional “catch-all” provisions as those provisions give little to no guidance to courts in determining whether service via social media is appropriate in a given case. With more guidance, the court can be assured that it has considered the unique constitutional challenges presented by service of process via social media. Additionally, requiring courts to consider listed factors creates consistent treatment in the handling of motions for service via social media. This, in turn, promotes the development of a uniform application of this important due process right.

2. *Waiver of Service Provisions*

The final proposal in this section provides an opportunity to seek consent from the defendant to service of process via social media. This specific proposal is fashioned off of the waiver of service provisions contained in the FRCP, though any state could adopt or modify a similar waiver provision. The federal waiver provision permits a plaintiff to request that the defendant waive his right to formal service of the summons.³³³ The plaintiff must deliver a copy of the complaint to the defendant along with the request to waive service and a prepaid method for the defendant to respond.³³⁴ Under this process, if the defendant agrees to waive formal service of the summons he gains additional time to answer and the plaintiff need not move forward with formal service.³³⁵

It could be argued that the current FRCP waiver provisions already permit waiver to be delivered via methods such as social media. Arguably, FRCP 4(d)(1)(G), which states that the waiver may be delivered “by first-class mail or other reliable means,”³³⁶ already includes delivery of the waiv-

333. FED. R. CIV. P. 4(d).

334. *Id.* at 4(d)(1)(C); see *Wavier of the Service of Summons Form*, U.S. Courts, <http://www.uscourts.gov/forms/notice-lawsuit-summons-subpoena/waiver-service-summons>, (last visited June 25, 2016).

335. FED. R. CIV. P. 4(d)(3).

336. *Id.* at 4(d)(1)(G).

er via social media. However, it is not clear if everyone agrees that social media constitutes a “reliable means” through which to deliver a request for waiver of process.³³⁷ At a minimum, the waiver rule should be clarified to dispel this confusion.

Another wrinkle under the current waiver of service language in Rule 4 is the requirement under subsection 4(d)(1)(C) that the request for waiver form must “be accompanied by a copy of the complaint, 2 copies of the waiver form appended to this Rule 4, and a prepaid means for returning the form.”³³⁸ Those who argue that social media is not an available method to deliver a request for waiver of service point to this provision, arguing that there is no process by which to deliver a prepaid means to deliver the signed waiver.

The current waiver of service rules contained in Rule 4 could easily be modified to clarify that waiver of service can be accomplished via social media. First, Rule 4(d)(1)(G)³³⁹ should be modified to specifically include delivery via social media. For example, the provision should read:

The notice and request must: . . . (G) be sent by first-class mail or other reliable means, *including through social media or other reliable electronic methods of communication*.³⁴⁰

This additional language would remove any remaining doubt that social media provides a reliable means of delivery of the request for waiver of service.

Second, a version of Rule 4(d)(1)(C) should be adopted which accounts for delivery of a request for waiver of service via a non-paper-copy method. For example, the current phrasing refers to the need to deliver two copies of the waiver form.³⁴¹ Presumably, this is to allow the defendant to retain one copy for himself and to return the other to the plaintiff without carrying the burden of making extra copies. In a digital context, there is no burden associated with making additional copies. Further, the reference to providing a prepaid means of returning the signed waiver to the plaintiff is because the

337. See Hedges, *supra* note 35, at 75 (recommending the FRCP be amended to clearly provide for delivery of the waiver of service be sent via any electronic means).

338. FED. R. CIV. P. 4(d)(1)(C).

339. FED. R. CIV. P. 4(d)(1)(G).

340. See Hedges, *supra* note 35, at 74–75. (proposing that waiver provisions should be expanded to permit transmission of the request to waive through any electronic means). This article proposes making delivery of the request to waiver possible via social media. However, a jurisdiction could adopt broad waiver provisions. There is less concern about the reliability of the method chosen for delivery of the request to waive service of the summons. The plaintiff must complete formal service if the waiver is not signed and returned by the defendant, incentivizing the plaintiff to choose the most reliable means available for delivery of the request to waive service.

341. FED. R. CIV. P. 4(d)(1)(C).

Rule was initially designed to operate in a paper-copy context. The prepaid return presumes that the defendant will use some form of mailing service to return the form to the plaintiff. With the ease by which a person can add his signature to an electronic document and send that document back to the plaintiff, the language needs to be adjusted to reflect the digital context. As long as the context does not create an additional burden (like the expense of mailing a signed waiver form to the plaintiff), it meets the spirit of Rule 4. To clarify the Rule and avoid any perception that it might prohibit the transmission of waiver of service via social media, the Rule should read as follows:

The notice and request must: . . . (C) be accompanied by a *hard-copy or digital copy* of the complaint, 2 *hard-copies or 1 digital copy* of the waiver form appended to this Rule 4, and, *if delivered in hard-copy*, a prepaid means for returning the *a hard-copy* form.

With these changes, Rule 4 would operate to provide for delivery of a waiver of service as it has when that waiver has been transmitted in hard copy. When delivered via social media, the defendant would still have the same time to return the signed waiver form. The digital waiver form signed by the defendant could be transmitted by any electronic method (including social media or email) or could be filed on the court's e-filing system. To clarify the process and ensure that the plaintiff receives the signed waiver (and avoids the expense of attempting traditional service of process), the waiver of service form could be modified to include a provision where the plaintiff could designate how the signed form should be returned. For example, the form could include a line that specifies where and how the signed waiver is to be returned, including appropriate links to the court e-filing system or to a designated email or social media account. Finally, the waiver of service process would continue to provide the incentives for the defendant to waive, including additional time to file his answer and the potential award of costs when he refuses to waive in bad faith. The plaintiff would also continue to be obligated to turn to another method of service of process if the waiver is not returned in the designated time.

C. Service of Process Under Current Catch-All Provisions

Until such time as service rules can be adopted, which provide clear routes to service of process via social media, some states may continue to permit service via social media on a case-by-case basis under "catch-all" provisions. As discussed in this article, some states permit courts to fashion service methods on a case-by-case basis so long as the approved method

meets the *Mullane* test.³⁴² While the court is empowered to reach its own decision on whether service via social media is warranted, they are often hesitant to grant these motions.³⁴³ Either courts deny the plaintiff's request outright, or require some additional method of service be utilized simultaneous with the service via social media.³⁴⁴ The considerations raised in this article can be drawn upon to remove some of the uncertainty for courts wading into this new and uncertain terrain in notice law.

Courts operating under "catch-all" service provisions should rely on the same factors identified in the proposed legislative provision articulated in Section V.A.3. of this article. Because plaintiffs in these jurisdictions are operating without a favored route to service of process via social media, courts should be mindful that the plaintiff may be motioning the court for a method of service that might be the *most likely* to bring home notice. As such, the court might consider whether the defendant would otherwise meet the strict requirements of the proposed "automatic" route to service of process via social media set forth in this article. When faced with these facts, courts should not require additional service via alternate methods. Such a requirement creates an additional burden on the plaintiff while offering little additional protection for the defendant's due process rights.

VI. POSSIBLE CHALLENGES TO THE IMPLEMENTATION OF THE PROPOSED LEGISLATION

This section addresses some of the impediments a state might encounter when attempting to revise its current service of process rules to implement the proposed legislation offered in this article. In addition to raising these concerns, this section offers some suggestions to assist in the implementation of the proposed legislation.

A. Lawyers, Judges, and Legislators May Not Be Familiar with the Operation of Social Media Platforms

One challenge to the implementation of the proposed legislation is the lack of familiarity many lawyers have of social media platforms. In particular, lawyers and judges lack familiarity with the operation of newer forms of social media. Lawyers and judges may attribute this to ethical limitations

342. *See supra* Section II.B.

343. *Fortunato v. Chase Bank USA*, No. 11 CIV. 6608 JFK, 2012 WL 2086950, at *2 (S.D.N.Y. June 7, 2012) (noting that the request to permit service via Facebook was "unorthodox").

344. *F.T.Comm'n. v. PCCare247 Inc.*, No. 12 CIV. 7189 (PAE), 2013 WL 841037, at *6 (S.D.N.Y. Mar. 7, 2013) (emphasizing the need to couple service via social media with service by email).

imposed by a variety of local bar associations or state supreme courts on use of social media. In jurisdictions with more ambiguous ethics rules regarding the use of social media, the fear of possibly violating professional ethics rules may create a substantial disincentive for lawyers and judges to use, and thereby become familiar with, social media.³⁴⁵ When this understandable reluctance to use social media is coupled with the fast-paced evolution of these tools, the lack of familiarity becomes a true encumbrance for those seeking to have social media adopted as a method of service. Finally, there is a long-standing acceptance of service conveyed in a hard-copy form. Because lawyers have long embraced the significance of formal service, it may be difficult for them to embrace new (and less familiar) methods.

To overcome the feelings of unfamiliarity, those seeking to encourage service via social media should ground the discussion in the principles of due process. By focusing on the underlying principles of due process, the decision on whether and how to implement service via social media will be premised on the constitutional right to notice and not on the operation of any particular social media platform. This serves to center lawyers and judges in more familiar territory and avoids the possibility that any proposed solution will be too dependent on a particular view of social media. Moreover, those advocating for service via social media should capitalize on the movement towards e-filing in the federal courts and in many state systems. As lawyers and judges begin to embrace an electronic system, they may be more inclined to embrace service via electronic medium.

B. Limitations on “Who” Is Authorized to Provide Service

One practical limitation to consider in using social media platforms as a vehicle for service is the accessibility of the account by a “would be” server. While anyone can register for an account on a social media platform, most platforms limit access to any individual account holder’s page. For example, account holders may need to accept or approve a request to interact with the server before any information can be shared. Each social media platform operates in different ways; some require an approved connection before sharing of information via individual pathways (like private messaging options) and others require an approved connection before sharing of

345. *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709, 711 n.2 (N.Y. Sup. Ct. 2015) (noting that members of the New York State judiciary were not likely to be among the 157,000,000 people who check their Facebook accounts daily); see also John G. Browning, *Keep Your “Friends” Close and Your Enemies Closer: Walking the Ethical Tightrope in the Use of Social Media*, 3 ST. MARY’S J. LEGAL MAL. & ETHICS 204 (2013) (discussing the ethical challenges lawyers face when using social media in the context of litigation).

information on even more generalized pathways (like posts on a Facebook wall).

Connected with this limitation is the limit placed on who may serve the defendant under the jurisdiction's service rules. While many state service rules broadly define "who" may serve a summons on the defendant, some impose significant limitations requiring service to be made by a sheriff or licensed official. These types of limitations may minimize the efficiency offered by service via social media. For example, if a party needs to hire the sheriff or a private licensed server, it might be costly for the server to gather the information needed to validate the defendant's social media account. In addition to generating extra expense, the process of validating a defendant's social media account might prove to be too cumbersome for a sheriff (or other official server).

In considering the adoption of the proposed legislation presented in this article, additional revision to a state's service rules may be warranted. For example, the state could consider permitting more individuals to serve a summons via social media. To enhance the reliability of service by these individuals, the state could require more information to be provided in the affidavit of service and could encourage the enforcement of penalties for knowingly submitting a falsified affidavit.³⁴⁶

Another hurdle to effectuating service via social media that might not be apparent when considering the language of the statute, is the practical and ethical limitations on "who" can serve a summons. Even in a state that permits service by anyone over the age of 18 who is not a party to the suit, service might not be possible by lawyers or others due to ethical limitations on their use of social media platforms. In states with broad service provisions, lawyers can perform service. However, restrictions placed on the lawyer's use of the opposing party's social media account may make this impossible.

One can consider New York's service rules to understand the potential hurdle ethics limitations pose to service via social media. New York's service rules permit any non-party over the age of eighteen to serve a defendant, including an attorney.³⁴⁷ The New York State Bar Association's Social Media Ethics Guidelines provide guidance on how a lawyer may review a person's social media page; a critical step to serving a defendant through his social media account. While these guidelines explain that a lawyer may

346. In addition to contempt of court and statutory penalties, some jurisdictions recognize legal claims against the server. See Michael Geibelson, *Serving Process on the Process Server*, ROBINS KAPLAN BLOG, (Oct. 1, 1998), <http://www.robinskaplan.com/resources/articles/erving-process-on-the-process-server> (discussing a wide range of penalties available when a server files a false affidavit).

347. *Baidoo*, 5 N.Y.S.3d at 716 (ordering the attorney to perform service by accessing the plaintiff's social media account).

view the public portion of a represented person's social media account,³⁴⁸ the lawyer may not view a private portion of the social media account unless the represented person has furnished an express authorization.³⁴⁹ Moreover, the lawyer cannot have another person access a represented person's social media account in a manner that the lawyer is prohibited from doing himself.³⁵⁰ While the lawyer can request access to a private portion of an unrepresented person's social media account, the lawyer must "use her full name and an accurate profile, and she may not create a different or false profile in order to mask her identity."³⁵¹

In jurisdictions with more restricted use of social media accounts, a lawyer may not be able to provide service via social media because he (or his agents) might not be able to access the individual's account to verify the account and receipt of service. While jurisdictions like New York provide more latitude to lawyers accessing unrepresented person's accounts (a typical scenario when initiating a lawsuit),³⁵² some revision to the access of social media accounts of represented person's accounts may be warranted. To facilitate service via social media, ethics guidelines could be clarified to account for the access of the social media account for the limited purpose of serving the summons. For example, the ethics guidelines could specifically exclude a private server as an "agent" of the lawyer – disconnecting the server's actions from the lawyer and enabling the private server to verify the account through access to private aspects of the account (like a private messaging feature of the social media account).

A related issue arises in jurisdictions that offer little to no guidance on how lawyers are to ethically use social media accounts of opposing parties. The lack of guidance acts as a deterrence to otherwise appropriate use of the defendant's social media account. In such jurisdictions, the ethics rules should be clarified to permit lawyers to access public and private aspects of an unrepresented person's social media account for the purpose of performing service of summons, so long as they do so in a manner that is not deceptive.³⁵³

C. Potential for Abuse or Need to Limit Public Nature of Notice

While service via social media provides an efficient and reliable method to serve many defendants, there are some situations where this method

348. *Social Media Ethics Guidelines*, N.Y. STATE BAR ASSN 15 (2015), <http://www.nysba.org/socialmediaguidelines/>.

349. *Id.* at 17.

350. *Id.* at 18.

351. *Id.* at 16.

352. *Baidoo*, 5 N.Y.S.3d at 716.

353. *See* Browning, *supra* note 345.

might be abused by plaintiffs who are disinterested with providing defendants with sufficient service. For example, courts may refuse to enforce waiver of service provisions in contracts when there is a power-imbalance between the contracting parties.³⁵⁴ This restriction on limiting service method options arises out of a concern that the landlord and tenant are not in equal bargaining power, such that the waiver of service or limitation on the method is not valid. States may identify other types of claims that raise similar concerns in the context of service via social media. Further, there are situations where the litigation process itself might be prone to abuse and statutes have been enacted to protect the rights of would-be defendants. For example, the Fair Debt Collections Practices Act could be interpreted to prohibit the collector from publically posting notice to a debtor on a Facebook account.³⁵⁵ To account for these situations, the proposed legislative solutions contained in this article could include the following caveat clause: “*unless state [or federal] law provides otherwise, an individual may be served. . . .*” With such an exclusion, the jurisdiction would be able to limit the use of service via social media when it deems the balance to tip in favor of excluding this method.

While the above examples focus on a jurisdiction’s desire to limit service methods for a particular group of vulnerable defendants, there may be instances in which an individual plaintiff attempts to give flawed service via social media, rendering a particular defendant in need of protection. For example, the plaintiff might choose an inconspicuous place to post the service on the social media account to obtain a default judgment. While the defendant can move to vacate the default judgment on the grounds that the notice was not compliant with the service rules, this can be a costly and unnerving process for the defendant. To prevent this type of conduct by plaintiffs, the service rule or statute could include a provision for the award of costs associated with a successful motion to vacate a default judgment when there is a finding that the service was provided in bad faith. These costs could be levied against the plaintiff and/or his legal counsel. Additionally, the penalties suggested above for knowingly filing a false affidavit of service could be instituted. These penalties could act in concert to deter the party, lawyer, and service provider from using the service rule to provide “bad” notice. Finally, additional penalties may be warranted when a plaintiff has provided “bad” service via social media in *multiple* cases. For example, the court may make a finding that a plaintiff has made repeated flawed ser-

354. Stephanie Francis Ward, *Our Pleasure to Serve You: More Lawyers Look to Social Networking Sites to Notify Defendants*, A.B.A. J. (Oct. 1, 2011, 8:49 AM), http://www.abajournal.com/magazine/article/our_pleasure_to_serve_lawyers_social_networking_sites_notify_defendants/ (discussing limits on service in the context of landlord-tenant disputes).

355. *Id.*

vice via social media in more than one case and order that the plaintiff be precluded from using the service via social media provisions without prior approval of court.³⁵⁶

VII. CONCLUSION

The way in which we receive information is in a state of rapid change, brought about in large part by the growth of social media. These technological leaps forward have created the potential to transform some of our most traditional legal processes, including the method by which we deliver service of process. Our legal systems should be “legally hacked,”³⁵⁷ and we should capitalize on the opportunities created by technology, especially when the use of technology will enable our legal processes to better conform to the constitutional principles on which they were built.

356. For example, states could enact provisions regulating a plaintiff who has been found to use repeated bad service in a manner similar to vexatious litigant statutes. *See* OHIO REV. CODE ANN. § 2323.52 (West 2016).

357. *See* LEGAL HACKERS, *supra* note 16 (describing “legal hacking” as a cultural reference to the growing movement to find creative solutions to problems that lie at the intersection of law and technology).