# THE INVISIBLE CIRCUMSTANCES OF NOTICE*

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*The due process right of notice—isolated from its close cousin, the opportunity to be heard—is under-studied and unanalyzed compared to other fundamental rights. For many litigants and class members, notice does not function particularly well. This Article provides a new and comprehensive account of why notice matters as a due process right, why it has been largely ignored, and what can be done to fix it.*

*The Supreme Court announced the modern constitutional notice standard in 1950 with the intent of installing a flexible, case-by-case approach that judges could adapt to the changing circumstances across cases and over time. But this standard has proved insufficient to account for the broader changes in circumstances within which litigation and notice take place. This Article unpacks the invisible circumstances of notice which collectively serve as a benchmark against which judges and lawmakers evaluate the sufficiency of notice. The invisible circumstances of notice are a set of shared assumptions about what "real" or "good notice" is—for example, who serves it and how, who receives it and where, and what "process" is. The extent to which a proposed method of notice deviates from the invisible circumstances determines its constitutional and sub-constitutional acceptability. Once one understands how the new circumstances of notice no longer fit the old framework, it becomes far easier to evaluate and promote newer and more technologically advanced mechanisms of notice because they need not be evaluated against antiquated benchmarks that reflect older circumstances.*

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## INTRODUCTION

The due process right of notice is among the most neglected and understudied of constitutional rights. The judicial rhetoric underpinning the right of notice is lofty, as the Supreme Court periodically invokes its early declaration that it is a "principle of natural justice which requires a person to have notice of a suit before he can be conclusively bound by its result."[1] Despite the rhetorical promise, courts, lawmakers, and commentators have failed to deliver a robust procedural right of notice. The modern constitutional notice right is governed by the standard from *Mullane v. Central Hanover Bank & Trust Co.*,[2] in which the Supreme Court broke notice and service of process free from the stringent and overly formal notice practices once deemed a constitutional necessity by *Pennoyer v. Neff*.[3]

1. Lafayette Ins. Co. v. French, 59 U.S. 404, 406 (1855); *see also* St. Clair v. Cox, 106 U.S. 350, 356 (1882) (quoting *Lafayette*'s "natural justice" language); Pennoyer v. Neff, 95 U.S. 714, 730 (1878) (same).

2. 339 U.S. 306 (1950).

3. 95 U.S. 714 (1878).

Although *Pennoyer* is mostly remembered as a foundational personal jurisdiction case, Neff's jurisdictional travails were, at heart, a story about notice and the service of summons.[4] In addition to setting strict territorial limits on a state's ability to assert personal jurisdiction over a nonresident or absent defendant, *Pennoyer* established the constitutional primacy of personal, in-hand service of process on defendants and put substantial limits on the use of substituted service.[5] *Pennoyer* also enshrined notice as a constitutional due process right.[6] In the traditional telling, *Mullane*[7] displaced the *Pennoyer* regime with a flexible and liberal standard for constitutional notice by establishing the now ubiquitous standard that 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."[8] Under this standard, courts and lawmakers could design and approve rules for service of process and notice plans that accommodated changing social and economic circumstances and adapted to the idiosyncratic cost and notification dynamics of individual lawsuits or mass actions. On closer examination, however, *Mullane* was not so much a displacement of *Pennoyer* as it was a modifier.[9] Unpacking the failures of the modern-day notice reveal that while the due process right of notice is superficially governed by *Mullane*'s flexible "reasonably calculated under the circumstances" standard, constitutional notice is actually ruled by a set of invisible circumstances that the Court entrenched in its 1950 decision.

4. Mitchell, the plaintiff in the original lawsuit, did not serve Neff personally with the summons and complaint. *Id.* at 720. Rather, Mitchell (allegedly) complied with an Oregon statutory requirement that allowed service by publication when the plaintiff provided an affidavit attesting that he could not, after due diligence, find and serve a nonresident and absent defendant within the state. *Id.* After Mitchell served Neff by publishing a notice for six successive weeks in an Oregon newspaper, Neff did not appear in the action and the court entered a default judgment. *Id.* at 719–20.

5. *See id.* at 727 (explaining that service by publication limited to actions *in rem* is acceptable because "[s]ubstituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act"); *id.* at 735–36 (asserting that agents for service of process are constitutionally permitted as substituted service).

6. *Id.* at 730 (quoting *Lafayette Ins. Co.*, 59 U.S. at 406).

7. The parties who required notice in *Mullane* were the beneficiaries of a trust, and the lawsuit was an equitable "accounting" action required by New York statutory law, the results of which would be binding on all parties including the beneficiaries. *Mullane*, 339 U.S. at 307–09. The Supreme Court held that notice by publication would be sufficient for the unknown beneficiaries, both because of the difficulty (if not impossibility) and expense of reaching them, and the concomitant holding that the known beneficiaries receive direct notice. *Id.* at 317–18.

8. *Id.* at 314.

9. *See* Andrew C. Budzinski, *Reforming Service of Process: An Access-to-Justice Framework*, 90 U. COLO. L. REV. 167, 170 (2019) ("The barriers erected by stringent service of process rules pose an access-to-justice problem for pro se plaintiffs."); Judith Resnik & David Marcus, *Inability To Pay: Court Debt Circa 2020*, 98 N.C. L. REV. 361, 361 (2020) ("Commitments to 'access to justice' abound. So do economic barriers that undermine that premise.").

Despite *Mullane*'s promise of flexibility and innovation, courts and lawmakers have been slow to adapt to modern communications and embrace mechanisms of notice that harness new technologies. *Mullane* thus sits at the center of the puzzle of modern-day notice and service of process.[10] The standard was designed to be flexible and enduring, but innovations in notice practices have proceeded, at best, in fits and starts.

Compounding the benign neglect by lawmakers, jurists, and commentators is the sense that the due process right of notice is a back-burner issue. Why worry about this aspect of procedural due process when so much else in our procedural house is on fire—shrinking pleading standards and expanding use of summary judgment, stingy definitions of personal jurisdiction and the broad enforcement of forum selection clauses and arbitration clauses. When access to a forum is so imperiled, is this really the moment to cry foul about poor notice practices? The answer is an emphatic yes, and judges, lawmakers, and commentators should consider notice to be a core access-to-justice issue.[11] Unpacking *Mullane*'s illusory promise of adaptability is not enough to truly move notice rights and practices into the twenty-first century. Instead, we must uncover and challenge the invisible circumstances of notice that are a barrier to bold and creative reform.

In the past decade, a few scholars have started to reinvigorate notice and service of process as a civil procedure topic worthy of independent and serious consideration. These articles have made important contributions to assorted problems with notice and service of process such as problematic service by and on natural persons,[12] the difficulties in designing and executing successful class action notice plans,[13] and even proposals to reform how businesses and other entities are served with process.[14] But it is important to pull together these insightful diagnoses and calls for reform into a larger picture because it is not simply isolated notice practices that are in need of reform. Nor is it sufficient

10. *Mullane*, 339 U.S. at 314; *see also* Dusenbery v. United States, 534 U.S. 161, 168 (2002) ("Since *Mullane* was decided, we have regularly turned to it when confronted with questions regarding the adequacy of the method used to give notice."); Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 797 (1983) ("[T]his Court has adhered unwaveringly to the principle announced in *Mullane*.").

11. *See* Budzinski, *supra* note 9, at 170; Resnik & Marcus, *supra* note 9, at 361.

12. Budzinski, *supra* note 9, at 169–70 (discussing notice and service of process as an access-to-justice issue for *pro se* plaintiffs); Adrian Gottshall, *Solving Sewer Service: Fighting Fraud with Technology*, 70 ARK. L. REV. 813, 816–818 (2018) (describing notoriously bad practices associated with personal in-hand service of process).

13. Amanda M. Rose, *Classaction.gov*, 88 U. CHI. L. REV. 487, 491 (2021); Christine P. Bartholomew, *E-Notice*, 68 DUKE L.J. 217, 219–20 (2018).

14. *See* Carliss N. Chatman, *Judgment Without Notice: The Unconstitutionality of Constructive Notice Following* Citizens United, 105 KY. L.J. 49, 83–84 (2016) (arguing that corporate withdrawal statutes violate procedural due process for service to corporations on the secretary of state in light of *Citizens United*); Andrew K. Jennings, *Notice Risk and Registered Agency*, 46 J. CORP. L. 75, 89–90 (2020) (suggesting a framework by which business entities may be served by email instead of by designating a registered agent for service of process).

to plead with state and federal courts to update their understandings of *Mullane*. What is truly required is a comprehensive rethinking of the due process nature and structure of the notice right.

The due process right of notice is relatively understudied and under-analyzed compared to other fundamental rights. Moreover, most of the existing normative justifications of notice are instrumental. That is, according to these accounts, notice derives nearly all of its normative power as the facilitator of the opportunity to be heard. It is the bulwark against the ability of a powerful sovereign to effect changes to a person's rights and obligations. While people are not always entitled to the legal outcome of their choosing or to resist participating in the adjudicated process altogether,[15] there is a sense that they are entitled to some ability to register discontent and participate in whatever process is at hand.[16] These instrumental accounts of notice are important and powerful. The rich literature and jurisprudence addressing the opportunity to be heard is evidence thereof, and I do not mean to suggest that these lines of inquiry are unimportant. But procedural theorists, it seems, have all but forgotten to examine whether notice is anything more than an instrumental right. While the question of *when* notice is due is clearly foundational, the "how" and "why" of notice outside of this justification are of equal importance.[17]

This analytical deficit would be less troubling if the modern American execution of notice and its mechanics were mostly unproblematic. Unfortunately, the laws, policies, and practices of notice in America are far from perfect. For a number of participants in the modern-day adversarial system, notice does not function particularly well. This is a due process problem for defendants who do not learn of pending actions,[18] for plaintiffs who are unable to prosecute an action because of difficulties in serving an adversary,[19] and for absent class members who are unaware of an action in which they might want to participate or file a claim.[20]

I have hypothesized elsewhere that the reason for the relative disinterest in these problems is that commentators have erroneously (and mostly

15. Challenging jurisdiction can be one of the few paths to avoiding any sort of merits entanglement in a case.

16. *See* Matthews v. Eldridge, 424 U.S. 319, 333 (1976).

17. *Cf.* Brandon L. Garrett, Karima Modjadidi & William Crozier, *Undeliverable: Suspended Driver's Licenses and the Problem of Notice*, 4 UCLA CRIM. JUST. L. REV. 185, 194–95 (2020) (criticizing a court for focusing on the provision of a hearing as justification for due process but failing to consider "that many individuals may not receive such a notice [of the suspension or hearing] at their current address").

18. *See* Grannis v. Ordean, 234 U.S. 385, 394 (1914).

19. *See* Budzinski, *supra* note 9, at 173 ("[T]he Due Process Clause protects a plaintiff's right to a hearing on the merits of her claim at a 'meaningful time and in a meaningful manner.' Service of process rules that make it impracticable for a plaintiff to serve a defendant deny the plaintiff that right.").

20. Bartholomew, *supra* note 13, at 228–34 (describing the due process dimensions to class action notice).

implicitly) treated notice as an impediment to plaintiff court access, rather than as a significant court access doctrine in and of itself.[21] This Article aims to revive an interest in engaging with the conceptual and logistical problems of notice as a systemic project, rather than addressing problematic aspects of notice on a piecemeal basis. The modern execution of notice in adversarial proceedings fails to serve[22] many litigants, from the most vulnerable individuals to well-resourced businesses. Notice and service of process deserve deeper investigation. Siloed inquiries into individual problems scattered across the litigation landscape have prevented scholars from seeing the larger doctrinal and conceptual problems embedded in the *Pennoyer*/*Mullane* framework.

*Mullane*'s case-by-case approach contains the seeds of judicial adaptability. It has been capacious enough that, for the most part, the standard has not been a total roadblock to procedural innovations.[23] As this Article demonstrates, the context-specific approach allows judges to consider the individual constellation of costs and logistics in any case in which the sufficiency of service of process or a plan for notice is contested. The paradox of *Mullane* is that, by encouraging judges to consider the individual circumstances of the parties and case before them, judges have failed to see the broader changes in circumstances within which litigation and notice take place. Superficially, it might appear as if courts are considering the individual circumstances of each case. However, judges are still judging the reasonableness of rules and applications thereof against a background of circumstances that no longer reflects the state of the world today.

This Article suggests that notice innovations are only possible with a fundamental rethinking of the constitutional notice paradigm. Upon closer examination, *Mullane* did not truly break with the past. Instead, it updated and augmented the *Pennoyer* framework to form a paradigm that anchors notice in older norms and practices rendering it stubbornly resistant to change. In the post-*Mullane* decades, judges and lawmakers consider surface level "circumstances" of notice and service. But for decades, a deeper set of "invisible" circumstances of notice have gone unnoticed and underappreciated. Only by uncovering and discarding these invisible circumstances will judges and lawmakers be free to create and evaluate new rules and paradigms. This Article is dedicated to establishing a better accounting of the circumstances of notice that is entirely within *Mullane*'s flexible standard. When Justice Jackson wrote that notice must be reasonable "under the circumstances," he was, of course, referring to the specific circumstances of the parties to the lawsuit—the

21. Robin J. Effron, *Putting the "Notice" Back into Pleading*, 41 CARDOZO L. REV. 981, 987–89 (2020) [hereinafter Effron, *Putting the "Notice" Back into Pleading*] (suggesting that notice is understudied because of the "court-access conundrum").

22. Pun intended!

23. The most notable innovation is the slow but inevitable migration to electronic means of notice and service of process, particularly in class actions. *See infra* Section II.D.

logistical feasibility of a notice plan and its relative costs.[24] But the result of *Mullane*'s case-by-case approach to notice was the entrenchment of a *deeper* set of background circumstances of notice—circumstances that held sway over the judicial imagination since before *Pennoyer* and the Fourteenth Amendment constitutionalized the concept of notice.

These are the invisible circumstances of notice. They are a set of shared assumptions about what "real" or "good notice" is—who serves it and how; who receives it and where; and what "process" is, as well as the extent to which other forms of service[25] deviate from the *Pennoyer*/*Mullane* world of invisible circumstances. These circumstances also determine their constitutional and sub-constitutional acceptability.

The invisible circumstances of notice center around five core attributes of in-hand personal service, the paradigm of ideal notice and service from the *Pennoyer* era: (1) delivery of physical papers; (2) by a natural person (the process server); (3) to another natural person; (4) who is the person to whom the notice is addressed;[26] (5) in a "traditional" lawsuit in which each claimant or defendant is a named party to the action. Every other form of notice and service is defined and evaluated by its adherence to or distance from these five attributes.

These five attributes supply the organization structure of the analysis and argument in this Article which proceeds in three parts. The first two parts are dedicated to uncovering how the five core attributes—thought to be long discarded as mandates—continue to dominate how notice rules are promulgated and how notice plans and practices are evaluated. Part I addresses the first two attributes: the circumstance of "process" and how the ideal of tangible paper has constrained progress. Part II considers the second two attributes which encapsulate the circumstances of service, namely, how a reliance on the importance of natural persons has distorted and stalled efforts to modernize notice practices. Part III investigates the circumstances of litigation itself and

24. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 317–19 (1950) (recognizing and weighing the inherent costs in notifying large numbers of beneficiaries).

25. Many of these are tellingly denominated "substituted service." Substituted service or constructive notice is "[s]ervice accomplished by a method or circumstance that does not give actual notice." *Service*, BLACK'S LAW DICTIONARY (11th ed. 2019).

26. Or, in the case of a business or other entity, is a natural person who is as synonymous with the entity as possible. *See, e.g.*, FLA. STAT. ANN. § 48.081 (Westlaw current with laws and joint resolutions in effect from the 2021 1st Reg. Sess. and Spec. "A" Sess. of the 27th Leg.) (stating that if service cannot be made on a registered agent of the corporation, service of process shall be permitted on any employee at the corporation's principal place of business or on any employee of the registered agent); CAL. CIV. PROC. CODE § 415.20 (Westlaw current with urgency legislation through Ch. 145 of 2021 Reg. Sess.) (explaining that in lieu of personal delivery of a copy of the summons and complaint to a registered agent or officer of the corporation, a summons may be served by leaving a copy of the summons and complaint during usual office hours in a registered agent or officer's office); ARK. CODE ANN. § 16-58-124(a) (LEXIS through all legislation of the 2021 Reg. Sess.) (stating that in the absence of service on listed corporate officers, it may be served upon the cashier, treasurer, secretary, clerk, or agent of the corporation).

argues that the *Pennoyer*/*Mullane* model does not capture the new landscape of modern American litigation and explains how notice and service of process must adapt to account for these changes. Finally, in Part IV, this Article concludes by suggesting that lawmakers and courts must rethink the "circumstances of the circumstances," the idea that the circumstances of notice are unique to each lawsuit and arrive fully formed. Contrary to this implicit assumption, courts and lawmakers are active participants in creating and maintaining the invisible circumstances of notice. Lawmakers should not wait for the circumstances of notice to change—key changes can be forged by the state and the judiciary itself.

## I. THE CIRCUMSTANCES OF PROCESS

The "new" standard for notice is actually an expansion and reification of the old. This Article unpacks the hidden contents of the *Pennoyer*/*Mullane* standard, which is the benchmark against which judges and lawmakers evaluate the sufficiency of new tools and methods. The current permissibility of such innovations depends on how closely they mimic or improve an existing hierarchy of old methods. This reconceptualization of *Mullane* is more than just an academic exercise. Once one understands how the new circumstances of notice no longer fit the old framework, it becomes far easier to evaluate and promote newer and more technologically advanced methods of notice because they need not be evaluated against antiquated benchmarks that reflect older circumstances. Thus, a conceptual move away from the process-as-paper model would make room for electronic notice ("e-notice") to exist coequally with traditional paper process.

In-hand, personal service sits atop the hierarchy of preferred notice methods. This platonic ideal is the direct descendent of the old English *capias ad respondendum* in which a defendant was "served" by being arrested and physically held until adjudicated by the state.[27] *Pennoyer* enshrined in-hand, personal service in the territory of the forum state as *sine qua non* of constitutional notice.[28] Although other methods of substituted service had been in use for decades prior, the *Pennoyer* Court confirmed the notion that such methods were suboptimal and only to be used in specially circumscribed circumstances.[29]

In the decades between *Pennoyer* and *Mullane*, the strict adherence to the primacy of in-hand service became untenable, just as *Pennoyer*'s rigid

27. *See* Robin J. Effron, *The Lost Story of Notice and Personal Jurisdiction*, 74 N.Y.U. ANN. SURV. AM. L. 23, 32 (2018) [hereinafter Effron, *The Lost Story of Notice and Personal Jurisdiction*].

28. *See* RHONDA WASSERMAN, PROCEDURAL DUE PROCESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 130 (2004).

29. Pennoyer v. Neff, 95 U.S. 714, 727 (1878) (describing the limited situations in which "[s]ubstituted service by publication, or in any other authorized form, may be sufficient").

territorialism strained the practicability of personal jurisdiction.[30] *Pennoyer*'s idealized circumstances had never been a ubiquitous reality. But the circumstances of parties, process, and lawsuits had changed enough by the middle of the twentieth century that the Court recognized newer circumstances that called for a more flexible constitutional framework.[31]

*Mullane,* then, was itself the culmination of changed circumstances: the ubiquity and reliability of first-class mail, the growing prevalence of complex suits, and the growing need to inform their multiple participants. The Supreme Court intended for *Mullane* to normalize "newer" forms of substituted service and notice plans in complex cases, but it also meant for *Mullane*'s standard to be capacious enough to account for the not-yet-known financial and logistical predicaments that litigants of the future would face in executing notice. It succeeded in the former but did not in the latter. Rather, *Mullane* enlarged the generic ideal of the circumstances of notice so that a rule or notice plan could be evaluated by its distance from *Mullane*'s ideal almost as much as it could from *Pennoyer*'s ideal.

### A. *Questioning the Primacy of Paper*

For most of Anglo-American legal history, "process" meant something very particular. It was a tangible thing—a document or set of documents—that could be held by the server or recipient and physically transferred from one set of hands to another.[32] The question of whether process from one jurisdiction could cross over into another and be delivered to persons there exerted tremendous power over the judicial imagination—especially when paired with questions about the personal jurisdiction of the courts of a forum state.[33]

The primacy of physical paper documents was as central to the world of *Mullane* as it was to *Pennoyer*'s. In adversarial litigation, notice is tantamount to process. *Mullane* jump-started the serious constitutional contemplation of other kinds of notice sent to absent parties in complex cases, but it also carried forward *Pennoyer*'s unquestioned assumption that "process" was tantamount to a set of paper documents. Until the late twentieth century, it was hard to conceive of alternatives to "process-as-documents." The closest thing to an alternative form of process would have been notice by publication, a form of notice that courts

30. WASSERMAN, *supra* note 28, at 212–19 (describing the evolution of doctrine between *Pennoyer* and *International Shoe* and the persistent problems of reaching absent defendants).

31. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 319 (1950) ("However it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication.").

32. Max Crema & Lawrence B. Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 VA. L. REV. (forthcoming 2021) (manuscript at 5) (on file with the North Carolina Law Review).

33. WASSERMAN, *supra* note 28, at 130.

and commentators viewed with deep skepticism as a method of last resort.[34] While publications were still tangible items (newspapers, trade journals, papers tacked to wall in a town square and the like), they were not documents that could be passed into the possession of another person or entity. This was one reason that notice by publication was viewed as a poor alternative to personal in-hand service. Although a printed newspaper is a tangible object, one could not be sure that the intended recipient would ever possess it, let alone read it.

Skepticism about publication notice entrenched two related assumptions that form an invisible "circumstance of notice." The first was the assumption that process equals paper documents. The second is that any alternative to process-as-documents, especially publication notice, is inherently inferior. While these background assumptions made some sense in the paper and analog world of the *Pennoyer*/*Mullane* paradigm, it is time to investigate whether either of these assumptions hold true in the twenty-first century. To do so, it is worth taking each of these assumptions in turn.

Until very recently, no judge or lawmaker had reason to imagine that "process" would consist of anything besides tangible paper documents. Short of the unreliable and unverifiable practice of verbal communication, the service of paper documents was the only way to transmit notice of the pendency of an action or proceeding to an interested party. Because this was as true in 1950 as it was in 1877, *Mullane* did nothing to disturb this background assumption of notice. The "circumstance" of notice in adversarial litigation was that notice was tantamount to service of process, and service of process meant paper documents. The innovation in *Mullane* was to widen the lens of what prototypical service of process meant, namely by elevating first-class mail to a higher status of acceptability within the background hierarchy of acceptable notice practices against which all future rules and notice plans would be evaluated.

The primacy of paper in the *Pennoyer*/*Mullane* model solidified two subsidiary assumptions in the invisible circumstances of notice. First, that process must either *be* paper, or second, that process must *look* as much like paper as possible. These two assumptions are responsible for the sluggish pace of adapting new technologies for use in notice and service of process.

The assumption is so fundamental to modern conceptions of process that one hardly notices it at all. Paper documents look official. They are tangible manifestations of notice. Tangible documents connect litigants to the long historical tradition of state assertion over parties by connecting these parties to physical pieces of paper; recall that pre-*International Shoe* judges grounded their trust in the in-person transmission of process as the "modern" manifestation of

34. *See* Effron, *The Lost Story of Notice and Personal Jurisdiction*, *supra* note 27, at 51–52.

the *capias ad respondendum*.[35] For a process that has its origins in the physical restraint of the defendant, it is no surprise that tangible documents persist as a totem of state power.

However, the circumstances of notice have changed. Paper is no longer the default or even dominant medium for conveying written information.[36] Yet the powerful process-as-paper assumption has such gravitational pull on what sort of notice is "reasonable" under the circumstances, that courts and commentators are barely aware of just how slowly they have adapted to the new technological circumstances of the twenty-first century.

The use of electronic (intangible) notice is still so suspect that its use has been limited to "exceptional" forms of litigation,[37] or to systems of electronic filing and transmission that are only available to parties who are represented by counsel who have access to the system. The New York State Court Electronic Filing System ("NYSCEF") is illustrative. The NYSCEF touts itself as fast, time saving, and available day and night.[38] The information that this website presents for lawyers and unrepresented parties provides overview and assistance. It gives information for serving or receiving filings electronically and paints a picture that this is a comprehensive electronic filing system, even emphasizing the many categories of cases for which e-filing is *mandatory* for parties represented by counsel.[39]

While this may be true for the transmission of documents and information in cases that are already underway, when it comes to notice and service of process, New York still clings to a paper-centric system. First, NYSCEF is not truly comprehensive or universal. While it is possible for most *cases* to be *filed* electronically,[40] this does not mean that there is a comprehensive platform for most *parties* to be *served* electronically. In fact, when it comes to the

35. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (linking modern *in personam* jurisdiction to the original practice of *capias ad respondendum*).

36. *See* Frank Newport, *The New Era of Communication Among Americans*, GALLUP (Nov. 10, 2014), https://news.gallup.com/poll/179288/new-era-communication-americans.aspx [https://perma.cc/QA8C-FUCV] ("Texting, using a cellphone and sending and reading email messages are the most frequently used forms of nonpersonal communication for adult Americans.").

37. Thus, the circumstances of paper notice are connected with another circumstance discussed below, namely, the assumptions about what "normal" litigation looks like. *See infra* notes 38–43 and accompanying text.

38. *New York State Courts E-Filing (NYSCEF) Unrepresented Litigants Fact Sheet*, N.Y. STATE UNIFIED CT. SYS., https://iappscontent.courts.state.ny.us/NYSCEF/live/help/UnrepresentedFactSheet.pdf [https://perma.cc/QRL4-8FHQ].

39. *See Authorized for E-Filing*, N.Y. STATE UNIFIED CT. SYS., https://iapps.courts.state.ny.us/nyscef/AuthorizeCaseType [https://perma.cc/RK4B-D9SH] (choose court from drop-down menu and press "select").

40. Each of New York's judicial subdivisions lists the cases for which e-filing is "mandatory." However, unrepresented parties always have the option of choosing e-filing or traditional courthouse-and-paper filing. *See New York State Courts E-Filing (NYSCEF) Unrepresented Litigants Fact Sheet*, *supra* note 38.

commencement of an action, "papers must be served in hard copy pursuant to the Civil Practice Law and Rules together with the appropriate Notice of Electronic Filing."[41] The only scenario in which a plaintiff can avoid traditional hard copy of service of process is if the adverse party "is a registered NYSCEF user, consents to the use of e-filing in the case, and agrees to accept electronic service of the initiating documents."[42] Thus, this exception only captures true "repeat players" in the New York court system, as even large businesses often have not retained counsel to represent them in matters that have not yet materialized. Natural persons and foreign corporations in particular are unlikely to fall into this narrow exception.

Thus, for all its advertised promise of speed, ease, and modernization, the NYSCEF, like the electronic filing systems in most other jurisdictions,[43] exists amidst the invisible circumstances of the *Pennoyer/Mullane* hierarchy. When it comes to *notice* (as opposed to filing or service of other documents beyond the summons and complaint), paper reigns supreme. In most U.S. jurisdictions, paper documents are the bedrock of notice. Alternative electronic methods of service are treated as suspect and must be justified either by duplicative paper efforts, or by the reassurance that plaintiffs will only be permitted to sidestep the use of paper documents in a small subset of cases.

Jurisdictions like New York have constructed e-filing systems but not e-notice systems. The lawmakers and court administrators are still caught in the invisible circumstances of the *Pennoyer/Mullane* model which prizes both paper and the human transmission of it. Jurisdictions that require traditional service of paper documents at the commencement of an e-filed lawsuit presume to provide a higher degree of assurance that notice will be actual and not merely constructive.

One of the conceptual barriers to turning an e-filing system into an e-notice system is a resistance to minimizing the role of human interaction in delivering and receiving notice.[44] But in the modern circumstances of notice, there is no reason to automatically privilege paper over electronic communication as the more reliable or effective form of process. For many people in the modern world, paper does not hold the status, importance, or

41. *User Manual for Supreme Court and Court of Claims Cases*, N.Y. STATE UNIFIED CT. SYS., https://iappscontent.courts.state.ny.us/NYSCEF/live/training/userManual.pdf [https://perma.cc/MAH9-DGPZ].

42. *Id.*

43. *See, e.g.*, *Virginia Judiciary E-Filing System (VJEFS)*, VA.'S JUD. SYS., http://www.courts.state.va.us/online/vjefs/home.html [https://perma.cc/8ZE5-XTED] (allowing filing for registered parties but not service of process); *Frequently Asked Questions*, N.J. ECOURTS, https://njcourts.gov/attorneys/assets/ecourts/ecourtsfaq.pdf?c=yQu [https://perma.cc/ZKW5-FG2C] (restricting New Jersey's eCourt system to attorney use in almost all cases and refusing to provide for electronic service of process).

44. *See infra* Section I.B.

"seriousness" that it once signified. Text messages ping. Email is checked with regularity. Social media accounts provide an endless supply of content notifications. But, for many people, the arrival of a piece of paper no longer triggers the sense of urgency and importance of years past.[45] An electronic communication can be designed to look and feel as important and official as a piece of paper.

Additionally, pieces of paper are not foolproof methods of communication. In fact, the tendency for paper to be lost or discarded, never to be seen again, explains the heavy historical preference for in-hand, rather than substituted service. Lower income defendants, or those in precarious personal circumstances are more likely to be victims of sewer service—a practice of falsifying service affidavits for process that has been thrown in a figurative "sewer" rather than delivered to the intended party.[46] These practices are not isolated instances—a recent journalistic exposé showed widespread problems with affidavits of service in eviction cases in Washington, D.C., leading to the eviction of many low-income tenants.[47]

Beyond sewer service, businesses can fall prey to human errors that periodically prevent paper documents from reaching the right hands.[48] In one notorious example, a summons and complaint in a Wisconsin action against PepsiCo were served on Pepsi's registered agent in North Carolina. The documents that the agent allegedly forwarded to Pepsi's headquarters in New York were not received by Pepsi's in-house counsel, nor his assistant. This eventually resulted in the Wisconsin court entering a $1.26 billion default judgment against Pepsi.[49] Perhaps if Pepsi had been able to participate in a well-

45. Brad Adgate, *Newspaper Revenue Drops as Local News Interest Rises Amid Coronavirus*, FORBES (Apr. 13, 2020), https://www.forbes.com/sites/bradadgate/2020/04/13/newspapers-are-struggling-with-coronavirus/?sh=27109bc439ef [https://perma.cc/8KV6-Q34G (dark archive)] (outlining reduction in circulation and ad revenue of paper newspaper, a trend that has ironically been exacerbated by the coronavirus pandemic despite an increase of interest in news); *see* Tony Rogers, *Why Newspapers Are Still Important*, THOUGHT CO., https://www.thoughtco.com/why-newspapers-are-still-important-2074263 [https://perma.cc/8XPN-Q3NL] (describing the decline in circulation of paper newspapers) (last updated July 3, 2019).

46. *See infra* note 101 and accompanying text.

47. Josh Kaplan, *Thousands of D.C. Renters Are Evicted Every Year. Do They All Know To Show Up to Court?*, DCIST (Oct. 5, 2020), https://dcist.com/story/20/10/05/thousands-of-d-c-renters-are-evicted-every-year-do-they-all-know-to-show-up-to-court/ [https://perma.cc/W6GU-RDLV]. The exposé led to action by the D.C. Council strengthening notice requirements in eviction cases. *See B23-0940-Fairness in Renting Emergency Amendment Act of 2020*, COUNCIL OF D.C., https://lims.dccouncil.us/Legislation/B23-0940 [https://perma.cc/2A53-7BUL].

48. *See* Jennings, *supra* note 14, at 87–88 (documenting the problems with human transmission of documents when serving business entities).

49. Joyce v. Pepsico, Inc., 2012 WI App 52, ¶ 6, 340 Wis. 2d 740, 813 N.W.2d 247, Nos. 2010AP2148, 2010AP2149, 2010AP2150, 2011AP117, 2012 WL 1033468, at *1 (2012) (unpublished table decision). Pepsi managed to convince the court to vacate the default judgment. *Id.* But it was not without the expense of extra motion practice and the embarrassment that came with publicity of the incident. *See, e.g.*, Erin Geiger Smith, *Pepsi Nailed with $1.26 Billion Judgment After Secretary's Mistake*,

designed and widely used electronic notification system—particularly one that utilizes secure, cloud-based technology—it would have been less susceptible to the human error that led to the embarrassing default judgment.[50]

To be clear, none of this is to say that e-notice is *superior* to paper. For natural persons who are not digital natives or do not have reliable access to a computer or internet-connected device, paper documents are still more effective. In other circumstances, paper is so crucial that it should be given *more* protection than the Supreme Court has currently given. For example, for incarcerated persons, ensuring actual delivery of a tangible document should be of the highest priority. None of this is to say that paper notice and service of process is of no value whatsoever. Paper likely will persist in our systems for quite some time as a primary means of notice for some parties and as a backup or backstop for others.

The point, then, is not to replace paper process with e-notice, but to shake courts and lawmakers loose from the assumption that any departure from paper process must be deeply constrained and meticulously justified.

### B. *Thinking Beyond Paper Replicas in the Design of Electronic Communications*

The assumption that notice and process must almost always be a tangible document has been a major roadblock to the development of mold-breaking e-notice systems that would enable widespread and simplified service of process via electronic means. Class action notice is one of the few areas where courts have slowly begun to harness the power of electronic communication by using e-notice. Class action notice is logistically difficult and often expensive.[51] Notice is challenging due to the inherent nature of class actions themselves.[52] As representative actions, class actions necessarily include absent claimants, many of whose identities and whereabouts can be difficult and possibly expensive to obtain.[53] Many class action lawsuits are "opt-out" class actions, meaning that class members can opt out of the litigation, reserving their own rights to pursue

BUS. INSIDER (Oct. 28, 2009, 8:02 AM), https://www.businessinsider.com/pepsi-nailed-with-126-billion-judgment-after-secretarys-mistake-2009-10 [https://perma.cc/F5HN-LREJ (dark archive)].

50. *See* Jennings, *supra* note 14, at 87.

51. Robert H. Klonoff, Mark Hermann & Bradley W. Harrison, *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. PITT. L. REV. 727, 730 (2008) ("Courts and commentators have long struggled with the difficulties associated with providing 'the best notice that is practicable under the circumstances.'"); Rose, *supra* note 13, at 489 ("[I]dentifying potential class members is often a difficult and expensive task, and the cost of the effort may reduce the pro rata amount class members making claims will receive.").

52. For a comprehensive summary of the relationship between procedural due process in notice and the class action notice requirements in Rule 23, see Bartholomew, *supra* note 13, at 228–34.

53. *See* John C. Coffee Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 381 (2000).

individual actions against the defendants.[54] However, even in the limited circumstances in which courts and lawmakers have begun to authorize e-notice, progress is hampered by a second assumption which is that e-notice should be the electronic delivery of a picture of the document that would otherwise be delivered in tangible form.

Notice is the due process lynchpin in the opt-out class action system. Effective communication regarding the pendency of the action and any proposed settlement is what allows a court to enter a judgment that binds all class members.[55] In federal court, the notice requirements found in Rule 23 are meant to ensure that class members learn of the action in time to participate or opt out,[56] or to object to a proposed settlement.[57] Many state class action rules contain similar provisions and requirements.[58]

Class action notice has received far more attention than other arenas of adversarial litigation. As a result, a number of commentators, judges, agencies, and advocacy groups have produced some reforms and reform proposals based on best practices over the past few decades.[59] Since the late 1990s, commentators have seized on electronic communication and publication as possibilities for cheaper and more effective notice.[60] Despite these modest innovations in notice practices, effective use of technology in class notice plans is far from universal, and claims rates remain "dismally low."[61]

As Professor Rose has argued, subpar notice practices contribute to low claim participation rates—either because not enough class members have been notified of the action,[62] or because the nature of the notice itself imposes unacceptably high processing costs on the claimant who might decide that the

54. *See* Jay Tidmarsh & Roger H. Transgrud, COMPLEX LITIGATION AND ITS ALTERNATIVES 139–40 (2d ed. 2018) (describing opt-out class actions).

55. *See* 7AA CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1786 (3d ed. 2021) (discussing how the concepts of notice and due process are central to Rule 23 and the procedure regarding a class action lawsuit); *id.* § 1753.1 (discussing how a plethora of revisions to Rule 23 have emphasized the concept of notice).

56. FED. R. CIV. P. 23(c)(2)(B). Even in so-called "mandatory classes," notice is still important enough that Rule 23 instructs judges that they "may direct appropriate notice to the class." FED. R. CIV. P. 23(c)(2)(A).

57. FED. R. CIV. P. 23(e)(1)(5)(A).

58. *See, e.g.*, 735 ILL. COMP. STAT. 5/2-803, 5/2-806 (Westlaw through the end of the 2020 Reg. Sess. of the 101st Gen. Assemb.) (detailing Illinois class action notice requirements); Faulkenbury v. Tchrs.' & State Emps.' Ret. Sys. of N.C., 345 N.C. 683, 697, 483 S.E.2d 422, 431 (1997) (interpreting North Carolina's state class action rule to require notice).

59. *See, e.g.*, *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide*, FED. JUD. CTR. (2010), https://www.fjc.gov/sites/default/files/2012/NotCheck.pdf [https://perma.cc/J2JD-WJ7A]. Most notably, Rule 23 was amended to adopt the requirement that class action notice must use plain and easily understood language. *See* FED. R. CIV. P. 23(c)(2)(B).

60. Bartholomew, *supra* note 13, at 232–36; Rose, *supra* note 13, at 503–04.

61. Rose, *supra* note 13, at 490–91 (posing this discrepancy as "puzzling").

62. Bartholomew, *supra* note 13, at 218–20.

time and effort needed to read and understand the notice and verification outweigh any nominal compensation that would flow from filing a claim.[63] Despite the slow progress and stubborn persistence of low participation rates, the benefits of e-notice should not be ignored. As Professor Bartholomew has observed, class action objectors, whose participation can often sharpen the value of a settlement for class members, "are almost twice as common in cases involving E-notice."[64] Notice methods must be pervasive, standardized, and break free from the unhelpful benchmark of individual letters sent by first-class mail.

Jurists view *Mullane* as an innovative and flexible standard, but its facts centered the primacy of first-class mail as the gold standard for notifying large groups of claimants about an action. The Supreme Court cemented this bias in *Eisen v. Carlisle & Jacquelin*,[65] which addressed class action notice to unknown, absent class members and unknown beneficiaries.[66] *Eisen* required that "individual notice . . . be sent to all class members who can be identified through reasonable effort," that the high cost of mailing such notice did not alter this requirement, and that the class could not shift the cost of notice to the defendant.[67] This mirrored the *Mullane* picture that the presence of unknown claimants would not destroy the action altogether because of the impracticability of identifying and notifying all possible claimants, but that notice to the known claimants was needed to protect the interests of the unknown class members.[68] The one-two punch of the Court giving its imprimatur to the cumbersome and expensive method of first-class mail in *Mullane* and *Eisen* reaffirmed first-class mail as the yardstick by which all other mass action notice plans would be evaluated.[69]

Although the Supreme Court handed down *Eisen* in 1974, first-class mail is still quite present in the class action notice plans that trial judges approve

63. Rose, *supra* note 13, *passim* (stating that the central argument is that verification and trust costs on the part of the class member are a major barrier to increasing class participation, even when notice is received). Professor Rose also discusses the "claims processing costs" involved with filing the actual claim which, while related to notice, are not actual "notice costs" themselves. *Id.*; *see also* Jessica Erickson, *Automating Securities Class Action Settlements*, 72 VAND. L. REV. 1817, 1850–51 (2019); *cf.* Bartholomew, *supra* note 13, at 248–49 ("[R]esearch on online ads [for class action settlements] confirms, even in the absence of clicks, such ads still 'reach' individuals—and do so quite effectively.").

64. Bartholomew, *supra* note 13, at 258.

65. 417 U.S. 156 (1974).

66. *Id.* at 175.

67. *Id.* at 157–58.

68. *Id.* at 175–77.

69. Note that first class mail in the time of *Mullane* and *Eisen* was certainly less cumbersome and expensive than in-hand service of process and dispensing with notice altogether would have been unconstitutional. Thus, what seemed like the least expensive and cumbersome solution in its day has now become the slower and costlier option.

across the state and federal courts.[70] The reluctance to wholeheartedly embrace electronic solutions to class action notice has been well documented, but the root of this hesitancy has yet to be fully explained.[71] *Mullane*'s case-by-case approach promised progress, but the mechanics of common-law reasoning left courts constantly looking backwards to assess new notice plans against old methods and metrics.[72] Moreover, "fear of change, imperfection, and technology leave some courts clinging to mail and publication notice as the primary means of satisfying procedural due process."[73] Accordingly, courts often approve notice plans that utilize these traditional methods without analyzing whether there are more practical methods of notice available,[74] citing the Supreme Court's history of endorsing notice by first-class mail,[75] or relying on earlier cases holding that notice by publication in a newspaper is constructive notice and therefore satisfies due process.[76]

Many of the emails that courts and settlement administrators send out resemble the paper documents or postcards that preceded email technology. They consist primarily of plain text with few differentiated fonts, and perhaps one or two links to a website with further information about the pending litigation or proposed settlement.[77]

These plain text, legally dense, and minimally interactive notices might be cheaper than printing and mailing hundreds of thousands of print notices, but they have little else to recommend them as models of improved notice. It is a parallel tale to the way many periodicals approached publication in the early days of the internet, namely, by posting pictures of periodical pages or very lightly hyperlinked versions of the print versions of the newspaper or

70. Bartholomew, *supra* note 13, at 237 (explaining that in data collected from 2005–2017, "76 percent [of judges] approve[d] notice by direct mail, publication through magazines or newspapers, or a settlement webpage"); *id.* at 222 ("[T]he FJC equates mail notice with the ideal notice, going so far as to caution judges against approving E-Notice.").

71. As I will argue, the supposed flexibility of the *Mullane* standard is somewhat illusory, as it takes certain background "circumstances" for granted and thus treats notice problems as issues of individual variations in context rather than as a standard that requires a periodic full overhaul of contextual understanding.

72. Bartholomew, *supra* note 13, at 238.

73. *Id.* at 223–24; *see also* Reab v. Elec. Arts, Inc., 214 F.R.D. 623, 630 (D. Colo. 2002) ("Electronic communication inherently has the potential to be copied and forwarded to other people via the internet with commentary that could distort the notice approved by the Court.").

74. Alexander W. Aiken, Comment, *Class Action Notice in the Digital Age*, 165 U. PA. L. REV. 967, 981 (2017). For example, the Tenth Circuit approved notice of settlement by first-class mail without analyzing whether there were more practical methods available to notify class members. Fager v. CenturyLink Commc'ns, LLC, 854 F.3d 1167, 1174 (10th Cir. 2016).

75. *Fager*, 854 F.3d. at 1173.

76. Klein v. O'Neal, Inc., 705 F. Supp. 2d 632, 663–64 (N.D. Tex. 2010); *see also In re* MetLife Demutualization Litig., 262 F.R.D. 205, 208 (E.D.N.Y. 2009) (holding publication notice in securities class action was sufficient and email or other electronic means of notice were not necessary).

77. *See* Bartholomew, *supra* note 13, at 237 n.116.

magazine.[78] Class action notice administrators should be more aggressive in approaching notices as a fundamentally different medium than "the email version of the letter." Class action notice plans have already begun to do this by utilizing social media, targeted advertising, and the like.[79] But the individual notices themselves are hardly different than the paper notices that some courts still insist on sending to class members.[80]

With little added expense, e-notice can include design elements of color, font, spacing,[81] and more extensive use of hyperlinks to relevant information. The putative class member can be directed to clear information not only about the pending action or settlement, but general information about the rights of class members in the relevant jurisdiction or about the product or incident at issue. By providing separate links to distinct pages, the notices can avoid the pitfalls of needing to convey all necessary information in small print crammed onto a few sheets of paper. While some class actions have begun to make better use of these design tools, the "process-as-paper" model will continue to stifle creativity and innovation until courts and commentators have broken free from the *Pennoyer*/*Mullane* model.

The process-as-paper model permeates the limited uses of e-notice in ordinary litigation as well. Class action notices have been at the forefront of innovation (however timid) because the necessity of cheaper methods of distribution to large numbers of absent class members forced courts and litigants to embrace some degree of e-notice.[82] But in noncomplex litigation, e-notice is still in its infancy. In the NYSCEF system, for example, e-notice consists of the electronic transmission of PDF documents of the summons, complaint, and other supporting documents.[83] Although the serving party

78. *See generally* Deniz Bokesoy, *E-newspapers: Revolution or Evolution?*, 1 SCROLL: ESSAYS ON DESIGN ELEC. TEXT, no. 1, 2008, at 1, https://tspace.library.utoronto.ca/bitstream/1807/43819/1/E-newspapers_Revolution%20or%20Evolution.pdf [https://perma.cc/RPT7-P696] (discussing history of design and layout of e-newspapers).

79. *See* Bartholomew, *supra* note 13, at 257 (describing social medial and targeted advertising as used in class action notice); Elizabeth M.C. Scheibel, *#Rule23 #Classaction Notice: Using Social Media, Text Messaging, and Other New Communications Technology for Class Action Notice and Returning to Rule 23(c)(2)(B)'s "Best Notice Practicable" Standard*, 42 MITCHELL HAMLINE L. REV. 1331 *passim* (2016).

80. *See* Bartholomew, *supra* note 13, at 260–64.

81. For example, strategic use of different colors and larger fonts for selected words and phrases can draw the reader's attention to important pieces of information such as the subject matter of the action (as opposed to the case caption which may or may not be indictive of the subject of the class action itself), the recipient's unique claim number, and any important dates or deadlines. Spacing can be used to set apart important information for easy visual access, such as a menu of award options from which a class member can choose. Hyperlinks can visually highlight text (when they remain underlined) and can direct class members to specific information about class actions generally, such as the court in which the action is pending, the identity of law firms involved, and further information specific to the case. The advantage of hyperlinks is that it can slim down the notice itself—much of what might be "small print" that clutters a paper message can be stored as hyperlinked information.

82. *See* Bartholomew, *supra* note 13, at 222–23.

83. *User Manual for Supreme Court and Court of Claims Cases*, *supra* note 41.

enters some basic information that becomes metadata alongside the documents, the service of process is just an electronic form of what a process server might have handed to the defendant in person. Because e-notice in this system can only be deployed against parties who are already represented by counsel and have registered with and consented to NYSCEF, the verisimilitude to paper documents is neither here nor there—the law firms representing the e-service registered clients assimilate and process the PDF documents with ease. For sophisticated litigants, e-service of PDF documents is frictionless, and the parties have little reason to imagine and advocate for innovations in the form of e-served process that might have advantages for other parties.

Service of e-notice may be considerably cheaper and logistically easier for both plaintiffs and defendants, a point addressed at length below. But the form of process itself that litigants serve could also reflect the new circumstances of technology and information transmission in ways that benefit litigants. Just as courts and litigants designing class action notices have begun to experiment with better uses of email and electronic communication to make notices accessible, comprehensible, and convey the importance of the underlying action, lawmakers designing a system of e-notice for "ordinary" litigation can do the same.

A summons and complaint contain the necessary information for a defendant to know they have been sued, know where to appear and how to respond, and know the grounds of the action so that the defendant can begin to prepare a response.[84] While the information is meant to be comprehensive, the format and language used to present it are not always comprehensible to lay people.[85] Thus, many of the standard summons forms recommended by state judicial systems contain boilerplate information including the website address providing further information for litigants.[86] Imagine if, instead, an e-summons and e-complaint contained a series of hyperlinks, creating a useful annotated

84. For a concise history of pleading and its purposes, see Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 109–14 (2009).

85. *See, e.g.*, *Volkswagen 3.0-Liter Diesel Emissions Class Action Settlement*, https://www.vwcourtsettlement.com/en/docs/3Liter/Notices/VW%203L%20Settlement%20Notice.pdf [https://perma.cc/Y92Z-NZ6D] (displaying the class notice for the VW emissions case, which is comprised of forty-six pages of legal terms and instructions for class members); *see also Official Court-Approved Legal Notice: Settlements with Ram and Jeep EcoDiesel Vehicle Owners/Lessees, the Environmental Protection Agency, and the California Air Resources Board*, https://www.ecodieselsettlement.com/content/dam/fcacourtsettlement/pdf/Long%20Form%20Notice.pdf [https://perma.cc/MZ97-QXU6] (displaying the class notice from the Fiat Chrysler emissions case which is comprised of twenty-two pages of legal terms and instructions for class members).

86. *See, e.g.*, *Supreme Court of the State of New York Summons*, https://www.nycourts.gov/LegacyPDFS/courts/11jd/supreme/civilterm/CH-FORMS/Summons%20Complaint%20and%20Answers/summons.pdf [https://perma.cc/SEJ4-DRC6]; *California Family Court Form of Summons*, https://www.courts.ca.gov/documents/fl110.pdf [https://perma.cc/5T25-JAQ5]; *Instructions for Florida Family Law Rules of Procedure from 12.910(a) Summons: Personal Service on an Individual* (Mar. 2017), https://www.flcourts.org/content/download/403082/file/12-910a.pdf [https://perma.cc/EA2E-8JPF].

document of sorts. The links would contain the most mundane information (a map of the courthouse with driving and public transit directions enabled) as well as more sophisticated legal information, such as links to the publicly available explanations of statutes of limitations, filing deadlines, available motions and responses, and the like.

Hyperlinked text is only the beginning (and probably the most simplistic) of ideas for transforming process from paper documents to electronic and interactive communications. The creative possibilities for the form and design of notice and process undoubtedly outstrip what I can imagine at the time of this writing, or even what tech-savvier people than I can envision at this moment.[87] What does seem certain, however, is that very little innovation can take place when courts, lawmakers, litigators, and the third-party suppliers of litigation tools remain conceptually chained to the process-as-paper model. It is telling that many jurisdictions have adopted systems for e-*filing* but were unable to adapt these systems for widespread use of e-*notice*.[88]

## II. THE CIRCUMSTANCES OF SERVICE

The *Pennoyer*/*Mullane* paradigm idealizes notice that is service *on* natural persons and that is service made *by* a discrete and identifiable natural person. Placing natural persons at the center of service and notice has complicated efforts to adapt to the social, economic, and technological changes of the late twentieth and early twenty-first century. Most methods of service and notice, as well as the evaluation of their adequacy, use natural persons as the benchmark. Every form of service that is not delivered by or to a natural person is scrutinized for how well it mimics the natural person ideal, or by how far it strays from that model.

87. *See* Paul Croke, *Unpredictable Future: Computer Technology Growing Faster as Time Passes*, BALT. POST-EXAM'R (Jan. 27, 2015), https://baltimorepostexaminer.com/unpredictable-future-computer-technology-growing-faster-time-passes/2015/01/27 [https://perma.cc/Q6QM-2ZEM].

88. Connecticut courts offer various electronic services, such as electronic filing and online attorney registration. *See Welcome to State of Connecticut Judicial Branch E-Services*, CONN. JUD. BRANCH (2017), https://www.jud.ct.gov/external/super/E-Services/efile/ [https://perma.cc/NYM2-B8Z8]. In Maryland, the Maryland Electronic Courts (MDEC) project will create a single judiciary-wide integrated case management system that will be used by all the courts in the Maryland state court system. *Baltimore County Courts Launch Electronic Case Management System*, MD. CTS. (Feb. 22, 2019), https://www.mdcourts.gov/media/news/2019/pr20190222 [https://perma.cc/483C-ENGV]. To date, more than 87% of Maryland's jurisdictions are operating under MDEC with the goal of bringing MDEC to all Maryland state courts by 2021. *Id.* E-filing is mandatory for attorneys in Maryland counties that have implemented the MDEC case management system. *Id.* Indiana's statewide e-filing system is used to file documents online in nearly all types of cases in the state's trial and appellate courts. *See* E-FINE INDIANA, E-FILING USER GUIDE: INDIANA STATEWIDE E-FILING SYSTEM 10, https://www.in.gov/judiciary/files/efiling-user-guide.pdf [https://perma.cc/T9L3-5JRB] (last updated May 13, 2021). Indiana's system allows litigants to electronically serve anyone on the Public Service List, or, in existing cases, a person listed as a service contact in the e-filing system. *Id.* If neither of those apply, litigants must serve conventionally. *Id.*

Although it once might have seemed that the most trustworthy form of notice or service of process was to demand that notice was delivered *by* one natural person *to* another natural person, the modern circumstances of notice demand a reevaluation of both premises. Nonetheless, some of the problems with centering natural persons long predate the modern era. No one questioned the assumptions about the superiority of natural persons because the alternatives to service by and on natural persons were so poor by comparison.

The transmission of notice *by* a natural person *to* a natural person has a long history dating back to the *capias ad respondendum* in which the sheriff would arrest the defendant and hold him until trial.[89] Once service of process replaced the *capias* and forms of substituted service soon emerged, the implicit hierarchy of acceptable methods of notice reflected how closely such processes involved natural persons. Table 1, below, demonstrates how notice can be categorized along two axes of involvement by natural persons.

**Table 1. Matrix of Notice Categorized by Natural and Non-Natural Persons**

| | Notice Served by a Natural Person | Notice Not Served by a Natural Person |
|---|---|---|
| Notice Received by a Natural Person | - In-hand notice to defendant/named party<br>- In-hand substituted service on household member; business officer; or designated agent for service of process | - Notice mailed or emailed[90] to individuals |
| Notice Not Received by a Natural Person | - Notice affixed to property<br>- Other forms of conspicuous service | - Notice by publication<br>- New publication notice methods such as targeted advertising |

Observe how methods in which a natural person *receives* notice are preferred by both lawmakers and courts. The procedures in the lower right quadrant are methods of last resort or reserved for "exceptional" circumstances or "nontraditional" forms of litigation (such as class actions) and must usually

89. This also had important jurisdictional implications. *See* Effron, *The Lost Story of Notice and Personal Jurisdiction*, *supra* note 27, at 32.

90. *See infra* Section II.B. Some of the skepticism for this method can be attributed to the hesitancy to accept intangible communications as process.

be paired with a method of direct notice.[91] It has taken a global pandemic and near universal disruption of ordinary court proceedings for some courts to begin questioning the need or even desirability of face-to-face interaction in the service of process.[92]

The rules and the implicit hierarchy reflect three competing considerations: cost, feasibility, and reliability. Along the reliability axis, it has gone mostly unquestioned that human-to-human transmission is the most reliable form of notice. Process or other notices that were published in newspapers, nailed to property, or affixed to a public place (perhaps a town hall) could be lost, destroyed, or simply never seen by the intended recipient. The most certain way to ensure receipt was to have one natural person attest to the fact that they had personally delivered the notice to the adverse party.

But even the earlier, "simpler" days of litigation could not support a rigid rule in which *only* in-hand, personal service was effective as notice. This is because such a demand would quickly outstrip the realities of cost and feasibility. Consider cost. If a plaintiff dispatched a process server to the house of the defendant, only to find that the defendant was absent, it would quickly become expensive to demand that the process server spend additional time locating the defendant (even when the defendant could be easily found) when process could just as well be left with a trustworthy member of the defendant's household.[93] And consider feasibility: courts and lawmakers have long recognized that some defendants are difficult to find and that, under some circumstances, this logistical difficulty should not bar plaintiffs from vindicating their rights in court.[94]

91. In the case of affixing notice to property, most jurisdictions require that notice also be mailed to the "last known address." *See infra* note 121. In the case of class actions or other complex cases, notice by publication is almost always paired with direct notice to known class members. *See* Bartholomew, *supra* note 13, at 223 n.31.

92. *See, e.g.*, Plaintiff's Motion for Substituted Service, OHVA, Inc. v. Ace Merch. Processing, LLC, No. 4:20-cv-1244-KPE (S.D. Tex. Apr. 14, 2020) (making a motion for substantiated service due to the COVID lockdown).

93. *See, e.g.*, FED. R. CIV. P. 4(e)(2)(B); N.Y. C.P.L.R. 308 (McKinney 2021); ALASKA R. CIV. P. 4(d)(1) (stating that service is acceptable on a natural person "by leaving [the summons and complaint] at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein"); OHIO R. CIV. P. 4.1(c) ("[P]rocess may be delivered by . . . leaving a copy . . . at the usual place of residence of the person to be served with some person of suitable age and discretion then residing therein.").

94. *See, e.g.*, SEC v. Reynolds, 112 F.3d 505, No. 96-6073, 1996 WL 599797, at *2–3 (2d Cir. 1996) (unpublished table decision) (holding that the SEC was entitled to their default judgment against the appellee because they showed due diligence in trying to serve him and the defendant was knowingly avoiding service); Hunt v. Inter-Globe Energy, Inc., 770 F.2d 145, 148 (10th Cir. 1985) (per curiam) (holding that the plaintiff exercised due diligence in attempting to serve the defendant, as they complied with Oklahoma law with regard to service by publication, and therefore the default judgment was valid); JP Morgan Chase Bank, N.A. v. Baldi, 10 N.Y.S.3d 126, 126 (N.Y. App. Div. 2015) (holding that the plaintiff exercised due diligence in attempting to make service on the defendant before resorting to "affix and mail" service, and therefore the default judgment was affirmed); Barlage v.

These assumptions formed the basis of the *Pennoyer*/*Mullane* hierarchy. Reliability of receipt was the dominant concern but could be tempered by the competing demands of cost and feasibility of service. The following two sections will demonstrate that the circumstances of modern life, commerce, and litigation have changed such that courts and lawmakers should reevaluate the core assumptions of the *Pennoyer*/*Mullane* model regarding the role of natural persons. Notice that does not require a natural person for delivery or even receipt may be more reliable than it once was. And an honest evaluation of the use of natural persons in transmitting and receiving notice illuminates the less desirable aspects of the reliance on the use of natural persons. Accordingly, this part begins with an argument for increased trust in notice practices that do not depend on direct receipt (notice by publication) or personal delivery (mail and electronic transmission), and then examines the ways in which misplaced trust in the reliability of natural persons has enabled systemic problems in notice and service of process.

### A. *Reevaluating the Role of Natural Persons in the Delivery and Receipt of Notice*

The *Pennoyer*/*Mullane* model of notice and service of process assumes the superiority of using natural persons to deliver and receive notice. This was a perfectly logical assumption. If one wanted to be sure that an adverse party *actually received* notice or process, then the best solution was for one natural person to affirm that they had hand delivered the documents to that person, or to another natural person whom one could reasonably assume would then transmit the documents to the defendant.

Because delivery to a natural person went unquestioned as the most reliable means of notice, the acceptability of every other means of notice was evaluated based on how closely it hewed to this ideal. Accordingly, the next best solution was to have the defendant (perhaps a natural person, perhaps a business or entity), designate an agent for receipt of service.[95] Also acceptable was service on trustworthy natural persons in close relational proximity to the defendant, thus spawning the familiar rules of substituted service on a person of suitable age and discretion at the defendant's household or serving a business by delivering the relevant documents to an office or other like person.[96] All of these methods of substituted service involved significant interaction with a natural person. Other forms of substituted service were disfavored or cast as methods of last resort.

Valentine, 110 P.3d 371, 379 (Ariz. Ct. App. 2005) (holding that a default judgment was valid because the plaintiff satisfied due diligence in serving the defendant).

95. *See infra* notes 132–46 and accompanying text.

96. *See supra* note 93 and accompanying text.

The modern circumstances of notice call those assumptions into question. Many of the vulnerabilities and disadvantages of centering natural persons were always present. However, it is only in the modern era of equally effective, if not more reliable methods of service that the drawbacks to privileging service on natural persons become visible. Before delving into the ways in which overreliance on the natural person paradigm has stunted innovation in the use of non-natural persons and systems, it is worth briefly interrogating the assumed superiority of natural persons as servers or receivers of process and notice.

Given its relatively stable and successful operation, service of process on natural persons in "ordinary" lawsuits rarely results in problems that make headlines. The natural person paradigm places outsized trust in constructive notice where a natural person is the recipient (and also possibly the server) of notice. But not all defendants are comfortably situated in a way that renders them ready to receive service of process and absorb its consequences. For such defendants, constructive notice is deemed sufficient.[97] These parties are left vulnerable to the consequences of failure to receive actual notice, the worst of which is the entry of a default judgment.[98]

Defendants who do not speak or read English are at a disadvantage when it comes to understanding the content and import of a summons and complaint.[99] Beyond issues of comprehension, there are defendants whose concerns about immigration status cause them to avoid entanglements with the civil litigation system.[100] This may interfere with the willingness to accept

97. Constructive notice is "information or knowledge of a fact imputed by law to a person . . . because he or she could have discovered the fact by proper diligence, and his or her situation was such as to cast upon him or her the duty of inquiring into it." ROMUALDO P. ECLAVEA, 58 AM. JUR. § 4 (2d ed. 2021); *see also* Wuchter v. Pizzutti, 276 U.S. 13, 24 (1928) (holding that notice rules must "indicate that there is reasonable probability that if the statutes are complied with, the defendant will receive actual notice").

98. *See, e.g.*, FED. R. CIV. P. 55 (grounds for default judgment); N.Y. C.P.L.R. 3215 (McKinney 2021) (grounds for default judgment).

99. *See* Lysette P. Romero, Note, *Why English-Only Notice to Spanish-Only Speakers Is Not Enough: The Argument for Enhancing Procedural Due Process in New Mexico*, 41 N.M. L. REV. 603, 603–04 (2011). This problem is clearly not confined to non-native speakers of English. The comprehensibility of legal documents to lay persons (and, frankly, even members of the legal profession) is a serious issue. This Article focuses on the problems inherent in the *mechanics* of notice and service of process, but the contents of notice itself is also a constitutional due process issue and one in need of its own deeper investigation. *See* Todd B. Hilsee, Shannon R. Wheatman & Gina M. Intrepido, *Do You Really Want Me To Know My Rights? The Ethics Behind Due Process in Class Action Notice Is More Than Just Plain Language: A Desire to Actually Inform*, 18 GEO. J. LEGAL ETHICS 1359, 1365–66 (2005); Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. L.F. 519, 555 (describing the Federal Judicial Center's efforts to "improve the readability of class action notices by designing notices using plain language").

100. *See* Saja Hindi, *ICE Arrests at Colorado Courthouses Leave Immigrants Fearful*, DENVER POST (Jan. 20, 2020, 6:00 AM), https://www.denverpost.com/2020/01/20/ice-immigrant-arrests-colorado-courthouses/ [https://perma.cc/2S4S-MKY5 (dark archive)]; Christina Goldbaum, *When Paying a*

service of process because of a fear of interacting with someone associated with the court system.

Some defendants, particularly those in marginalized communities, are victims of so-called "sewer service.[101] Although there is no foolproof rule for service of process that could ever eliminate such shenanigans entirely, it is certainly possible to identify and target communities where this practice is widespread and engage in efforts to mitigate the problem.[102]

Service antics can also be costly for plaintiffs. Evasion of service is the defendant's analogue to plaintiffs who weaponize sewer service. When service of process rules center natural persons and make service by mail or other impersonal means subject to affirmative agreement or waiver, a well-situated defendant can run up the costs of litigation for the defendant. In a recent high-profile incident, Rudy Giuliani spent a week evading process servers in the post-2020 election fraud libel lawsuits.[103] By making himself, his close associates, and the premises of his residence and office inaccessible, he forced the plaintiffs to expend extra effort and expense[104] to serve him in the lawsuit. By privileging natural persons as the ideal servers and recipients of process, the current system

*Traffic Ticket Can End in Deportation*, N.Y. TIMES (June 30, 2019), https://www.nytimes.com/2019/06/30/nyregion/ice-courthouse-arrests.html [https://perma.cc/UK9C-2EZ5 (dark archive)]. Note that the immigration system itself is a site of problematic notice practices. Cassandra Burke Robertson & Irina D Manta, *(Un)Civil Denaturalization*, 94 N.Y.U. L. REV. 402, 405–06 (2019).

101. *See* Gottshall, *supra* note 12, at 816–18; Ray Rivera, *Suit Claims Fraud by New York Debt Collectors*, N.Y. TIMES (Dec. 30, 2009), https://www.nytimes.com/2009/12/31/nyregion/31debt.html [https://perma.cc/DN6C-2JMA (dark archive)]; Bernice Yeung, *Bay Area Residents Sue Process Servers for Failing to Deliver Lawsuits*, SAN DIEGO UNION-TRIB. (May 24, 2012, 12:00 AM), https://www.sandiegouniontribune.com/sdut-bay-area-residents-sue-process-servers-for-failing-2012may24-htmlstory.html#:~:text=The%20lawsuits%20accuse%20ABC%20Legal,also%20named%20in%20these%20lawsuits.%20 [https://perma.cc/QQM6-3Y6N (dark archive)]; Claudia Wilner, Senior Staff Att'y, Neighborhood Econ. Dev. Advoc. Project, Comments at the Fed. Trade Comm'n Roundtable, Debt Collection: Protecting Consumers (Jan. 8, 2010), https://www.ftc.gov/sites/default/files/documents/public_comments/protecting-consumers-debt-collection-litigation-and-arbitration-series-roundtable-discussions-august/545921-00022.pdf [https://perma.cc/5S8J-2BQR] ("In New York City, the default judgment rate is approximately 75% and the answer rate hovers around 10%. We believe that sewer service . . . is the primary reason that most defendants do not appear in court.").

102. *See infra* Part IV.

103. *See* Stephen Rex Brown, *Rudy Giuliani Tried Dodging Getting Served with $1B Dominion Voting Systems Suit: Source*, N.Y. DAILY NEWS (Feb. 22, 2021, 7:53 PM), https://www.nydailynews.com/new-york/ny-giuliani-dominion-lawsuit-service-20210222-6ejrl7c3rva3xbvhzqijoloe3y-story.html [https://perma.cc/8H8Y-MRJ6] (describing prolonged efforts to find and serve Giuliani in the Dominion voting libel lawsuit).

104. The expense component is complicated. A failure to waive formal service in federal court without good cause will result in the defendant bearing the costs of service. FED. R. CIV. P. 4(d)(2). As a practical matter, however, evasion of service, even if unjustified, forces plaintiffs to make an up-front investment in a process server, seek the remedy of service costs, and then attempt to collect such fees from a party who has already demonstrated intransigence. One can only imagine that some plaintiffs are deterred from attempting formal service and thus pursuing their lawsuit.

allows a defendant evading service to disingenuously make himself unavailable or unreachable via impersonal means.

Excessive costs and logistical feasibility are not the only downsides to relying on natural persons for notice. While natural persons should always continue to be a supported option for the delivery and receipt of notice, lawmakers and courts should not let the historical superiority of relying on natural persons cloud the ability to interrogate and remedy some of the pitfalls of assuming that service by or on natural persons is generally unproblematic. With those observations in mind, it is time to investigate how the *Pennoyer*/*Mullane* "natural person" paradigm is responsible for the sluggish pace of courts and lawmakers to adapt to and adopt new technologies for notice and service of process.

### B. *Impersonal Delivery: From the Old Circumstances of Service by Mail to the New Circumstances of Electronic Communications*

The oldest method of notice and the "poster child" for serving process was the process server who could personally deliver the summons and provide an attestation or affirmation of completion.[105] Most other forms of notice required direct action by an identifiable natural person. For example, the person deputized to affix notice or attach property was a known and identifiable actor.[106] Prior to rules authorizing some form of notice by mail, notice was not

105. *See, e.g.*, FED. R. CIV. P. 4(e)(2)(A); N.Y. C.P.L.R. 308(1) (McKinney 2021); 231 PA. CODE § 402(a)(1) (2021) ("[O]riginal process may be served by handing a copy to the defendant."); CAL. CIV. PROC. CODE § 415.10 (Westlaw current with urgency legislation through Ch. 145 of 2021 Reg. Sess.) ("[S]ummons maybe served by personal delivery of a copy of the summons and of the complaint to the person to be served.").

106. Most allow service on a party at a place that they may routinely be found, such as their home or place of business. *See, e.g.*, N.Y. C.P.L.R. 308(2) (McKinney 1994) (authorizing service at the "actual place of business, dwelling place or usual place of abode of the person to be served"); 231 PA. CODE § 402(a)(2)(iii) (2021) ("[P]rocess may be served by handing a copy at any office or usual place of business."); CAL. CIV. PROC. CODE § 415.20(a) (Westlaw current with urgency legislation through Ch. 145 of 2021 Reg. Sess.) (authorizing service at a person's office). However, the summons and complaint must be left with someone of "suitable age and discretion." ALASKA R. CIV. P. 4(d)(1) (authorizing service acceptable on a natural person "by leaving [the summons and complaint] at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein"); OHIO R. CIV. P. 4.1(c) ("[P]rocess may be delivered by . . . leaving a copy . . . at the usual place of residence of the person to be served with some person of suitable age and discretion then residing therein."). Additionally, in some jurisdictions, this method of service is ineffective unless the summons and complaint are also mailed to the party by first-class mail. *See, e.g.*, FED. R. CIV. P. 4; N.Y. C.P.L.R. 308(2) (McKinney 2021) (requiring service on a person of suitable age and discretion followed up by first-class mail); CAL. CIV. PROC. CODE § 415.20(a) (Westlaw current with urgency legislation through Ch. 145 of 2021 Reg. Sess.) (requiring service on a party at a place that they are routinely found to be accompanied by "mailing a copy of the summons and complaint by first-class mail . . . to the person to be served at the place where a copy of the summons and complaint were left"); MISS. R. CIV. P. 4(c) (explaining how service of process can be completed and the circumstances in which service by first-class mail is allowable).

delivered through an intermediary *system*, save for notice by publication, the special case of which is discussed below.

Although *Mullane* supposedly ushered in a new era of flexibility in evaluating notice and service methods, it did little to disrupt the older conceptual hierarchy. This was because, outside of notice by publication, notice by mail was the only viable way of using a delivery system instead of an identifiable human to deliver notice to intended recipients. *Mullane* gave explicit due process imprimatur to notice by mail in the context of a form of litigation that was visibly exceptional.[107] The need to notify innumerable recipients—some of whose identities were unknown—in a single action necessitated that the Court authorize an impersonal means of notice. So, while the Court articulated the flexible standard in order to accommodate a notice plan in which only the known beneficiaries received notice by mail,[108] it was clear that the "circumstances" of the *Mullane* accounting action were quite different from ordinary litigation.

Outside of complex litigation, notice by impersonal delivery (that is to say, notice by mail) was not the site of investment, improvement, or innovation in notice and service practices. Instead, notice by mail languished as a disfavored alternative, useful mostly to savvy litigants who were already well-situated to transmit, receive, and process the documents initiating litigation.

Utilizing an established, nationwide system of mail delivery is much cheaper than deploying a dedicated process server, even when accounting for conscientious use of certified or registered mail with the inclusion of prepaid return postage. However, mail provides fewer outward indicia of receipt by the relevant party than in-hand. Consequently, almost every jurisdiction requires that service by mail include a form indicating receipt and a prepaid means of returning it,[109] or that the plaintiff use certified or registered mail to procure proof that the notice was sent.[110]

With the gnawing intuition of the riskiness of relying on a *system* rather than a *person* to deliver notice, most jurisdictions do not encourage service by mail, and many caution litigants to consider whether it is worth the risk at all.[111]

107. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 319–20 (1950) (considering notice in a lawsuit involving a statutory accounting of a trust with many known and unknown resident and nonresident beneficiaries).

108. The notice plan also stipulated publication in a periodical for successive weeks. *Id.* at 309–10.

109. *See, e.g.*, N.Y. C.P.L.R. 312-a (McKinney 2021).

110. *See, e.g.*, TEX. R. CIV. P. 106(a)(2).

111. For example, California's public-facing website cautions litigants that "[m]ail service is easy but not very reliable because the court cannot know for sure that someone received the paperwork." *Service of Court Papers*, CAL. CTS.: JUD. BRANCH OF CAL., https://www.courts.ca.gov/selfhelp-serving.htm [https://perma.cc/G488-FWAR]. In another example, New York's public-facing courts website only describes in-hand service, conspicuous delivery, and substituted service. *How Legal Papers Are Delivered (Service)*, NYCOURTS.GOV, https://www.nycourts.gov/courthelp/goingtocourt/service.shtml [https://perma.cc/295B-AHKR] (last updated Nov. 26, 2019).

The Federal Rules of Civil Procedure do not independently authorize service by mail,[112] instead they denominate it as a mail-based waiver process. Rule 4 of the Federal Rules of Civil Procedure had formerly referred to this process as "service by mail," but the rules drafters changed the language to reflect the fact that this method requires active participation by the defendant rather than passive reception.[113] In practice, it resembles the procedures that many states label "service by mail" or "personal service by mail," all of which require the defendant to return an acknowledgment (or, in jurisdictions that follow the new Rule 4, a waiver) within a certain period of time,[114] although some defendants retain the right to traditional service of process.[115]

Although these rules are designed to insulate most plaintiffs from the additional costs or difficulties with statutes of limitations if service by mail (or waiver request) is not acknowledged, jurisdictions do not promote service by mail as a reliable or cost-effective means of commencing a lawsuit. New York State, for example, authorizes service by mail in section 312-a of the New York Civil Practice Law and Rules, but the public-facing website does not mention service by mail at all as a possibility. Instead, it informs potential litigants that their three options for service of a summons and complaint are personal delivery, substituted delivery,[116] or conspicuous delivery.[117] California, on the other hand, does list "service by mail" as an acceptable means of service of process on its public-facing webpage. But it cautions potential litigants: "Mail service is easy but not very reliable because the court cannot know for sure that someone received the paperwork."[118]

Using the mail to commence a lawsuit is authorized in many U.S. jurisdictions.[119] But jurisdictions make its disfavored status clear or shift the language away from service and notice altogether. Jurisdictions have crafted service by mail and waiver of service rules to try to leverage the substantial cost

112. *See* FED. R. CIV. P. 4. However, service by mail is still permissible if one is serving pursuant to state law. FED. R. CIV. P. 4(e)(1).

113. *Cf*. Gulley v. Mayo Found., 886 F.2d 161, 165–66 (8th Cir. 1989) (holding that a signature is not sufficient evidence to acknowledge receipt of a summons and complaint and that the formal requirements of mail service are not met unless an acknowledgement form is returned to the sender).

114. In the federal system, failure by certain types of defendants to waive service results in the defendant bearing the cost of traditional service. FED. R. CIV. P. 4(d)(2); *see also* CAL. CIV. PROC. CODE § 415.30(d) (Westlaw current with urgency legislation through Ch. 145 of 2021 Reg. Sess.).

115. FED. R. CIV. P. 4(d)(1) (requiring individuals, corporations, and associations—but not other types of defendants, like governments—to request a waiver).

116. Substituted delivery requires that the plaintiff mail the papers in addition to delivery, but the website does not direct plaintiffs to any options in which delivery by mail is sufficient without also serving papers personally, conspicuously, or leaving them with someone else. *How Legal Papers Are Delivered (Service)*, *supra* note 111.

117. *Id.*

118. *Service of Court Papers*, *supra* note 111.

119. *See* 62B AM. JUR. 2D *Process* § 195, Westlaw (database updated Feb. 2021) (describing service by mail generally).

savings of serving an adverse party by mail while simultaneously ensuring that lost, misdirected, or unopened mail does not unfairly burden the defendant with a default judgment or the plaintiff with the inability to move forward with a lawsuit.

The skepticism about the reliability of service by mail is not unfounded.[120] There are defendants who have unstable residential status or lack a permanent fixed address altogether.[121] A recent study of suspended driver's license notices in North Carolina demonstrates that as many as one-third of mailed notices of driver's license suspensions do not reach the intended recipient, and that the problems with reaching individuals at a listed residential address stem from a wide variety of problems.[122] Medicaid caseworkers report boxes of returned mail lining a wall of an El Paso, Texas, office, indicia that persons in need are not receiving necessary notices of their government benefits.[123] Incarcerated persons are at the mercy of prison mail delivery systems which, as Justice Ginsburg observed in her *Dusenbery v. United States*[124] dissent, may be seriously suboptimal.[125]

120. *See* Garrett et al., *supra* note 17, at 185.

121. Robin Phinney, *Exploring Residential Mobility Among Low-Income Families*, 87 SOC. SERV. REV. 780, 780 (2013) ("[I]t is widely recognized that low-income households move more frequently."); *see also* Budzinski, *supra* note 9, at 169–70 ("Because current methods of service all center around a defendant's home address or physical location, pro se litigants in low-income communities often struggle to accomplish traditional service on defendants who do not have a stable or identifiable home or work address."). For these defendants, leaving a summons and complaint with a person of suitable age and discretion at a "last known address" may be just as ineffective as service by mail. *See* Robertson & Manta, *supra* note 100, at 414–17 (2019) (describing the plight of a person who was deported in absentia because notice of his immigration hearing was served at his "friend's house" and he never received it).

122. Garrett et al., *supra* note 17, at 191. These problems included "insufficient address; not deliverable as addressed; attempted to forward but forwarded address not known; unclaimed; no street or number exists at address; no mail receptacle; time to forward to a new address expired; vacant; wrong address in handwriting; moved and no forwarding; undeliverable as addressed; refused." *Id.*

123. Markian Hawryluk, *Return to Sender? Just One Missed Letter Can Be Enough to End Medicaid Benefits*, NPR (Nov. 1, 2019, 5:00 AM), https://www.npr.org/sections/health-shots/2019/11/01/774804485/return-to-sender-just-one-missed-letter-can-be-enough-to-end-medicaid-benefits?utm_campaign=storyshare&utm_source=twitter.com&utm_medium=social [https://perma.cc/4KQ2-L4H5]. Correctly identifying people and where they can be reached can make a tangible difference. A report by the Treasury Department found that people who received a notice that they had recently paid a fine for lacking insurance coverage under the Affordable Care Act were more likely to sign up for insurance. Sarah Kliff, *The I.R.S. Sent a Letter to 3.9 Million People It Saved Some of Their Lives*, N.Y. TIMES (Dec. 10, 2019), https://www.nytimes.com/2019/12/10/upshot/irs-letter-health-insurance-fine-study.html [https://perma.cc/U99T-D9XV (dark archive)] (last updated Dec. 13, 2019). Economists calculated that these plain notices, sent by first-class mail, may have saved up to 700 lives. *Id.*

124. 534 U.S. 161 (2002).

125. *Id.* at 179–80 (Ginsburg, J., dissenting). As Professor Shapiro observed, Justice Ginsburg "argued forcefully that the procedures followed (and since improved) were too lax given the government's total control of the inmate's location and the feasibility of better procedures." David L.

Thus, a system that relies blithely on the efficacy of mail would be problematic. But what is curious is the startling lack of innovation in notice for ordinary lawsuits. Society has changed significantly since the days of hand delivery of important messages, face-to-face communications, and reliance on mail and the postal service as a delivery system for written communication. Yet when commencing a lawsuit, these are still the primary options. The urgency of accommodating large scale communication needs has pushed class action notice further into the realm of e-notice, but even here, society and technology have far outpaced litigation rules and practices.

This Article has already shown the extent to which a fierce commitment to the process-as-paper model has hindered the development of e-notice systems in ordinary litigation. One can now also see how skepticism about using *systems* instead of *persons* to deliver notice have further stymied such efforts. Mail was the default system of impersonal delivery at the time of *Mullane*. Viewed with mild distrust and disfavor, the question was whether the circumstances of a particular lawsuit warranted its use.[126] In *Mullane*, the Supreme Court, starting from the unstated assumption that personal service to the trust beneficiaries would be impracticable, appeared to trust that the high number of known recipients would blunt possible problems with mail delivery, as well as protect the interests of the unknown beneficiaries.[127] In the case of service by mail or waiver rules, lawmakers ensured that impersonal service would be reasonable under the assumed circumstances that impersonal delivery could only be so reliable.

While this might have been a fair assessment of the circumstances of the mid-twentieth century, it is time to reassess the circumstances of communication and delivery. Jurisdictions could be much more proactive and creative about enabling and creating systems for impersonal delivery that capture the cost-savings and efficiencies of service by mail without falling prey to its reliability deficits.

As it stands, the most outwardly innovative changes still operate within the invisible circumstances of the *Pennoyer*/*Mullane* model. Texas's new rules for service of process are illustrative. The Lone Star State recently garnered attention for amendments to its procedural rules that would permit service of process via "social media, email, or other technology."[128] While this rule looks

Shapiro, *Justice Ginsburg's First Decade: Some Thoughts About Her Contributions in the Fields of Procedure and Jurisdiction*, 104 COLUM. L. REV. 21, 26 (2004).

126. *See* Hendershot v. Ferkel, 56 N.E.2d 205, 207 (Ohio 1944) (discussing the circumstances under which service by mail was authorized by a mid-century Ohio statute); Van Aernam v. Winslow, 35 N.W. 381, 381 (Minn. 1887) (describing and approving of the nineteenth-century Minnesota statute that provided for service by mail under certain circumstances).

127. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 319–20 (1950).

128. TEX. R. CIV. P. 106(b)(2).

innovative, it is questionable just how far this rule will go in enabling routine use of e-notice or establishing a workable e-notice system. The Texas rule codifies notice practices that judges have approved on an ad hoc basis in many jurisdictions across the country; when a judge does authorize some form of email or social media service, it is in exceptional circumstances when other forms of service have failed.[129] The Texas rule mimics this structure. It does not authorize e-service as a matter of course, on par with personal service or service by mail. Instead, in order to use e-service, the plaintiff must make a motion to do so and must demonstrate that they have attempted and failed to serve the defendant in person or by mail.[130]

This is far from the type of innovative solution that would befit the new circumstances of notice. It authorizes selective use of e-notice without building a system or designing a set of protocols that would harness the advantages of electronic communication while minimizing its downsides. It also reinforces the implicit *Pennoyer*/*Mullane* hierarchy which privileges in-person delivery or hard copy documents, followed closely by mail delivery. It is unclear what benefit the Texas rulemakers believe flows from continuing to prioritize mail over electronic communication. As this Article has already established, mail delivery is less reliable than rulemakers might want to admit. And service by mail in Texas does not even require return confirmation from the recipient—proof that notice has been sent via certified or registered mail is enough.[131] One wonders how this is any different than notice sent to an email address or social media account that the plaintiff has a good faith reason to believe is valid. And yet, the image of a natural person grasping a physical piece of paper is a powerful enough image that Texas has amended its rules without truly grasping how the new circumstances of communication are not those of old.

E-notice is not a simple or all-encompassing answer to the problems of improving impersonal delivery. For one thing, electronic communications have a different set of trustworthiness and reliability problems that rule makers must account for, a point which is returned to in Section II.D. Additionally, electronic impersonal delivery systems must account for the sector of the

129. *See, e.g.*, Baidoo v. Blood-Dzraku, 5 N.Y.S.3d 709, 714–15 (N.Y. Sup. Ct. 2015) (concluding, after considering several other methods of service, that "plaintiff has a compelling reason to make Facebook the sole, rather than the supplemental means of service, with the court satisfied that it is a method reasonably calculated to give defendant notice that he is being sued for divorce"); Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1018 (9th Cir. 2002) ("Despite our endorsement of service of process by email in this case, we are cognizant of its limitations."). *But see* Johnson v. Preleski, 229 A.3d 97, 116–17 (Conn. 2020) (holding that electronic service is not permitted unless specifically authorized under the procedural rules by state legislature).

130. TEX. R. CIV. P. 106(b).

131. TEX. R. CIV. P. 106(a)(2) ("[M]ailing to the defendant by registered or certified mail, return receipt requested, a copy of the citation and of the petition."). A return receipt is issued by the postal service and shows a signature on receipt of delivery. *See Insurance & Extra Services*, U.S. POSTAL SERV., https://www.usps.com/ship/insurance-extra-services.htm [https://perma.cc/3SVA-ZJCJ].

populace who are not (yet) well-situated to receive and process e-notice. As with any complex problem, there are myriad options for designing and executing a system or the rules to support it. But the one thing unifying most systems right now is the near total lack of innovation or design in that space. While e-filing, e-discovery, and even e-court appearances have grown up around it, the supposedly flexible *Mullane* standard has anchored notice in the mostly analog work of the mid-twentieth century.

None of this is to say that personal service is irrelevant or unneeded. There will always be situations in which personal service is the only (or clearly superior) way of reaching an adverse party. To advocate decentering natural persons is not to discard their role in service altogether. Rather, it is to erase the shadow that they have cast across conceptual understandings of the boundaries of what notice is and can be.

### C. *Impersonal Receipt: The New Circumstances for the Old Problem of Serving Businesses*

Although nonnatural persons (businesses and other organizations and entities)[132] have been parties to lawsuits since before the founding,[133] the notice rules in most jurisdictions continue to require that natural persons receive process on behalf of businesses whenever possible. These rules, with very few exceptions, favor arrangements in which a natural person is interposed to receive notice on behalf of the business, either because they are an officer or manager of the business,[134] or because they have been appointed as agent for receiving service of process. The result is that, in an era of lightning-fast e-commerce and easy electronic communication, serving businesses is still an expensive and labor-intensive process.

Service on businesses relies, in part, on a registered agent model in which businesses' commercial registered agents serve as their agent for receiving

132. For ease of reading, this Article uses "businesses" as a shorthand for all non-natural persons, even though many organizations and entities that are parties to lawsuits are not businesses, per se.

133. For an excellent history of corporate and other non-natural entities, including the rights to sue and be sued, see ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 46–51 (2018).

134. Businesses can be served "directly" by "delivering a copy of the summons and complaint to an officer, a managing or general agent." FED. R. CIV. P. 4(h)(1)(B); *see also* CAL. CIV. PROC. CODE § 416.10(b) (Westlaw current with urgency legislation through Ch. 145 of 2021 Reg. Sess.) ("A summons may be served on a corporation by delivering a copy of the summons and the complaint . . . [t]o the president, chief executive officer, or other head of the corporation, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a controller or chief financial officer, a general manager, or a person authorized by the corporation to receive service of process.").

service of process.[135] While this was once "an ingenious and elegant solution"[136] to the problem of serving businesses whose precise whereabouts and leadership are not always obvious to plaintiffs, this system is still "a manual undertaking that is susceptible to failure at each step, including human error on the part of its employees."[137] Beyond the periodic problems that result from the logistical failures of registered agents, it is unclear that the costs of maintaining such a system are justified. At least one commentator has called the cost-benefit calculus of this system into question and estimated that in the United States, "total yearly registered-agent fees likely well exceed a quarter-billion dollars."[138]

The pricey commercial registered agent method cannot exist without its reliance on corporate registration statutes. In these situations, out-of-state corporations must designate a state's secretary of state as its agent for service of process as a condition of an admission to do business in the state.[139] Like the failures of notice that flow from the use of commercial agents, service on the secretary of state does not always result in actual notice to a business entity.[140] Yet, the Supreme Court has upheld this service as constitutionally acceptable constructive notice.[141] As Professor Chatman has argued, this produces a situation in which out-of-state corporations are in a constitutionally worse position than natural persons[142] (whom we might recall are also often victims of poor notice practices), and the procedures that states have constructed "impose unduly burdensome restrictions which may reward [a] bad-actor plaintiff."[143] While corporations are often in a better position than natural persons to stop or counteract the consequences of bad notice by virtue of greater financial resources and established relationship with lawyers, the additional procedural wrangling adds complexity and expense to the process. This warrants further analysis to determine whether these procedures could be reimagined to reflect a fairer allocation of the costs and risks of notice between the parties, thus enhancing access to justice for all parties involved.

135. *See* Jennings, *supra* note 14, at 79–80 (describing the registered agent model and process for service on business entities).

136. *Id.* at 77. Professor Jennings argues that this leads to a "residual uncertainty in the case of artificial persons" and asks, "how can it be known whether papers have found their way to the appropriate legal decision-maker?" *Id.* at 80–81.

137. *Id.* at 87.

138. *Id.* at 84.

139. *See, e.g.*, N.Y. BUS. CORP. LAW §§ 306(b), 1301 (McKinney 2021).

140. *See* Chatman, *supra* note 14, at 52–55 (detailing the failures of notice that occur when secretaries cannot reach a defendant corporation).

141. *Id.* at 62–63 ("Such treatment seems particularly outdated in the modern context of multi-state and multi-national corporations.").

142. *Id.* at 62 (arguing that this treatment is no longer constitutionally justified after *Citizens United*).

143. *Id.* at 79.

The working assumption appears to be that this multimillion-dollar commercial agent enterprise and the registration statute system form the inevitable background cost of providing a constitutionally acceptable system for notice and service of process. It is time to question whether the current rules and practices do much more than line the pockets of a few commercial registration agencies who provide a mostly (but not completely) competent service that could be accomplished by far more efficient and even effective means.[144] Professor Jennings has proposed a system and model statutes that allow businesses to bypass the registered agent model in favor of e-service, a method that could result in significant economic efficiencies as well as the minimization of human error.[145]

The need for lawmakers and courts to innovate e-service options is not limited to the business context, but the analysis shows the multiple layers of assumptions that must be cast aside. Promoting e-service on businesses is not just about questioning the registered agent model.[146] Rather, it is a matter of letting go of the implicit need to center natural persons as either means of delivery or the target of receipt of process and discarding the old process-as-paper model of notice.

### D. *The Special Problem of Notice by Publication*

Notice by publication is a form of "substituted service" and is considered to be one of the least desirable forms thereof. Historically, notice by publication acted as a stopgap measure, designed to aid plaintiffs who would otherwise be unable to bring lawsuits against defendants who could not be found and served by other means.[147]

144. *See* Jennings, *supra* note 14, at 76–77 (suggesting a system of electronic registered agency for businesses).

145. *Id.*

146. The registered agent model might also serve as a basis for exercising personal jurisdiction over a defendant. The status of general or specific jurisdiction via an appointed agent in the forum state is the subject of contested judicial and scholarly debate. *See, e.g.*, Jack B. Harrison, *Registration, Fairness, and General Jurisdiction*, 95 NEB. L. REV. 477, 481 (2016) (arguing that "consistent with the Court's opinion in *Burnham*, where a corporation's statutorily appointed agent is properly served within a state, that state may properly exercise personal jurisdiction over that corporation"); Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1358–71 (2015) (discussing the issues inherent in using registered agents for acquiring general or specific jurisdiction); Patrick Woolley, *Rediscovering the Limited Role of the Federal Rules in Regulating Personal Jurisdiction*, 56 HOUS. L. REV. 565 *passim* (2019) (describing the delicate interplay between agency, service of process, and personal jurisdiction).

147. A typical notice by publication statute reads:

> Whenever, in any action affecting property or status within the jurisdiction of the court . . . plaintiff or his or her attorney shall file, at the office of the clerk of the court in which the action is pending, an affidavit showing that the defendant resides or has gone out of this State, or on due inquiry cannot be found, or is concealed within this State, so that process cannot be served upon him or her, and stating the place of residence of the defendant, if known, or that

One method of notice by publication involved leveraging the tool of *in rem* jurisdiction. In these cases, courts deemed notice by publication sufficient under a caretaker theory of property in which the property owner had a duty to keep apprised of any proceedings against the property.[148] In *in personam* cases, states typically authorized notice by publication when the defendant could not be found or served after a good faith effort.[149] A typical statute would mandate publication of the notice in a relevant newspaper or periodical for a number of weeks.[150]

The skepticism toward notice by publication is easy to understand. First, it only results in *actual* notice if the relevant party happens upon the publication and reads the notice. This evokes the image of Neff, the original defendant in *Pennoyer*, residing in some unnamed part of California, and unlikely to ever purchase or read the *Pacific Christian Advocate* (the newspaper in which the lawsuit notice was published pursuant to Oregon's long-arm statute).[151] This was the reality for most litigants until recently. If the only notice of a proceeding appeared in a publication, the defendant had to be lucky enough to read the right publication on the right day or week, and to comb through the numerous legal notices printed in miniscule font printed deep inside the publication.

Although publication notice was far from ideal, a few tools existed to blunt its harshness. Wealthy parties or businesses with retained counsel could rely on lawyers or other professionals who dutifully read the legal notices and kept them apprised of any pending actions of interest. Most jurisdictions that permitted notice by publication required repeated publication for a successive number of weeks which would, at least in theory, raise the likelihood that the target of the notice would happen upon the right publication at the right time, or specified

> upon diligent inquiry his or her place of residence cannot be ascertained, the clerk shall cause publication to be made in some newspaper published in the county in which the action is pending. If there is no newspaper published in that county, then the publication shall be in a newspaper published in an adjoining county in this State, having a circulation in the county in which action is pending. . . . The clerk shall also, within 10 days of the first publication of the notice, send a copy thereof by mail, addressed to each defendant whose place of residence is stated . . . .

735 ILL. COMP. STAT. 5/2-206(a) (Westlaw through the 2020 Reg. Sess. of the 101st Gen. Assemb.).

148. *See, e.g.*, N. Laramie Land Co. v. Hoffman, 268 U.S. 276, 283 (1925) ("Owners of real estate may so order their affairs that they may be informed of . . . [the] proceedings of which there is published notice, and the law may be framed in recognition of that fact."); Longyear v. Toolan, 209 U.S. 414, 418 (1908) (holding that in a tax condemnation proceeding, a party is "entitled to . . . sufficient notice. It is no objection that the notice was only by publication").

149. 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1074 n.20 (4th ed. 2021).

150. 12 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3047 (3d ed. 2021).

151. Pennoyer v. Neff, 95 U.S. 714, 717 (1877).

that the notice be published in a periodical that the relevant defendant was somewhat likely to read.[152] But other problems were harder to mitigate with legislative solutions. For example, printing notices that contained more information and were printed in a larger and more conspicuous font would have been expensive and unwieldy for the party giving notice and for the publication that served as the medium through which notice was conveyed.[153] To have mandated this legislatively would have radically altered the size and manageability of the publications where such notices were printed.

This was the picture of notice by publication at the time of *Mullane*. Understandably, it was hard for courts to endorse such a weak and mostly ineffective method of service. Nevertheless, notice by publication was tolerated as the best available alternative to dismissing a lawsuit when a defendant or absent party could not (intentionally or unintentionally) be served by the more traditional methods.

However, the circumstances of publication have changed. Publication no longer hinges on the fortuity of the right party having access to a particular tangible periodical at the right moment. The availability of publishing and publicizing information over the internet and via electronic means has

152. *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 315 (1950) ("It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice, we are unable to regard this as more than a feint."); 7AA CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1786 (3d ed. 2021) (discussing the various requirements for notice in newspapers for class action, which center on the idea of ensuring people actually see the notice); *see also* N.Y. C.P.L.R. 316(a) (McKinney 2021) (noting that a requirement of notice by newspaper in New York is that the notice is published once a week for four consecutive weeks).

153. *See, e.g.*, John L. C. Black & Michael A. Wineburg, *Publication of Legal Notices in New York: Guidelines for a Revision*, 55 CORNELL L. REV. 129, 144 (1969) (discussing the costs of print notices); Joe Friedrichs, *Rates Soar, Issues Surface with Legal Notices in Local Newspaper*, BOREAL (Jan. 13, 2019, 7:51 PM), https://www.boreal.org/2019/01/13/187369/rates-soar-issues-surface-with-legal-notices-in-local-newspaper [https://perma.cc/Z6DA-S9YQ] (discussing the increasing rates that newspapers charge for public legal notices); Dave McKinley, *You Paid for It: The High Cost of Fine Print*, NBC WGRZ (May 4, 2018, 6:06 PM), https://www.wgrz.com/article/news/local/you-paid-for-it-the-high-cost-of-fine-print/71-548946170 [https://perma.cc/7P7N-PDLN] (last updated May 4, 2018, 6:15 PM) ("In a just released report, Mychajliw's office found that Erie County alone spent $800,000 in the last five years to publish legal ads, which perhaps ranks with junk mail in terms of reader interest."); Maryanne Reed, *Fighting To Keep Public Notices in Newspapers*, NIEMANREPORTS (Jan. 3, 2019), https://niemanreports.org/articles/fighting-to-keep-public-notices-in-newspapers/ [https://perma.cc/BA38-8HXK] ("In recent years, some cash-strapped state legislatures have tried to remove the requirement that public notices be published in newspapers, opting instead to allow government entities to post them for free on their own websites.").

revolutionized how people receive and consume news and information. Moreover, the circumstances of "a publication" itself have changed.

Whereas it was once easy to identify a newspaper, magazine, or other printed periodical for what it was, people now interact with social media sites, RSS feeds, and other platforms which themselves might not be traditional "publications,"[154] but are the primary vehicles for driving consumer desire and attention towards particular sites and news articles of interest. A legal notice no longer needs to be printed in a tiny font and an obscure location because cyberspace eliminates the space and printing constraint of traditional print media.

As a result, there are some situations, particularly those connected to notice in complex litigation, in which notice by publication is *superior* to older methods of individual notice, even including electronically delivered individual notice.[155] The new technologies of predictive algorithms and targeted advertising might be better at reaching a high percentage of putative class members than merely relying on lists of possible class members generated from warranty or credit card use databases.[156]

Even without the explicit use of targeted advertising technology, the internet news and social media ecosystem can be a powerful vehicle for notice.[157] Consider what happened with the Equifax data breach litigation in 2019. In September of 2017, the credit monitoring data giant Equifax made an astonishing admission to the public; its security systems had been breached, and the sensitive personal data of over 147 million consumers was now potentially in the hands of hackers.[158] As expected after such an event, lawsuits quickly

154. *See* 47 U.S.C. § 230(a)(1) ("The rapidly developing array of Internet and other interactive computer services available to individual Americans represents an extraordinary advance in the availability of educational and informational resources to our citizens."); Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. 639, 652 (2014) (explaining that courts read § 230 and "interactive computer service" broadly); *see also* Philip P. Ehrlich, *A Balancing Equation for Social Media Publication Notice*, 83 U. CHI. L. REV. 2163, 2164–66 (2016) (detailing how the use of social media for service "raise questions about how courts do and should weigh the costs of over- and underinclusive FRCP 23 publication notice, creating uncertainty for litigants who propose novel notice plans and for courts faced with new technologies").

155. The question of serving individual notice utilizing electronic means is addressed below. *See infra* notes 175–76 and accompanying text.

156. *See* Aiken, *supra* note 74, at 992 (explaining that targeted electronically published notice "allows parties to harness large amounts of information about potential class members to discern where they are likely to see notice, and post such notice accordingly"); Bartholomew, *supra* note 13, at 257–58 (describing possibilities for hypertargeting in electronically published notice); Rose, *supra* note 13, at 526–27 (suggesting an alternative to Aiken's algorithm model in which a government registry database mediates targeted content and generates notices and lists of potential class members).

157. *See* Scheibel, *supra* note 79, at 1359 ("Use of the internet and mobile devices generates large amounts of data that could be exploited for notice and allow information about class actions to reach the right people.").

158. For a summary of the facts behind the Equifax breach, see *Equifax Data Breach*, ELEC. PRIV. INFO. CTR., https://epic.org/privacy/data-breach/equifax/ [https://perma.cc/QUZ4-M84X].

followed. The Federal Trade Commission ("FTC"), Consumer Financial Protection Bureau ("CFPB"), forty-eight states, and a class of affected consumers all brought actions that were consolidated before Judge Thrash in the Northern District of Georgia.[159] In July of 2019, the parties reached a global settlement of around $650 million.[160] A portion of the proposed settlement consisted of fines paid to the FTC and CFPB, and some covered attorney's fees. The compensation for consumers consisted of three options: (1) free credit monitoring for a number of years through Equifax or one of its competitors; (2) a cash payment of up to $125; or (3) other sums of money available to claimants who could document specific losses stemming from the data breach.

On July 22, 2019, the parties announced the details of the proposed settlement and the plaintiffs moved the court to direct notice to class members. Major news outlets reported on the details of the settlement that day. Then on July 26 at 12:27 PM, Slate published an article, *You Have a Moral Obligation To Claim Your $125 from Equifax*.[161] Later that afternoon at 4:21 PM, CNBC columnist Dan Mangan posted his column, *I May Have Banked up to $125 by Filling Out this Equifax Claim in Seconds—What Are You Waiting For?*[162] Then, at 4:35 PM, Alexandria Ocasio-Cortez, the freshman congressional representative with a substantial national reputation and extensive social media following, tweeted out the following missive to her nearly five million followers: "Everyone: go get your check from Equifax! $125 is a nice chunk of change. Get that money and pay off a bill, sock it away, take a day off, treat yourself, whatever you'd like - but cash that check! It takes one minute. Do it here."[163]

She included a link to the third-party settlement administrator and a link to the CNBC article. Within just a few hours, the story went viral. Numerous people retweeted the CNBC and Slate articles or posted them on other social media sites, including Facebook and Instagram.[164]

159. *See generally In re* Equifax, Inc., 362 F. Supp. 3d 1295 (N.D. Ga. 2019) (hearing the consolidated cases from the Equifax data breach).

160. *See generally* Order Granting Final Approval of Settlement, Certifying Settlement Class, and Awarding Attorney's Fees, Expenses, and Service Awards, 362 F. Supp. 3d 1295 (2020) (No. 1:17-md-02800-TWT) (granting approval of the final settlement in the Equifax data breach claim); *see also* Lily Hay Newman, *$700 Million Equifax Fine Is Still Too Little, Too Late*, WIRED (July 22, 2019, 3:58 PM), https://www.wired.com/story/equifax-fine-not-enough/ [https://perma.cc/A2NM-L6S4].

161. Josephine Wolff, *You Have a Moral Obligation To Claim Your $125 from Equifax*, SLATE (July 26, 2019, 12:27 PM), https://slate.com/technology/2019/07/equifax-settlement-money-how-to-claim.html [https://perma.cc/HPF6-9BH5].

162. Dan Mangan, *I May Have Banked up to $125 by Filling Out this Equifax Claim in Seconds—What Are You Waiting For?*, CNBC (July 26, 2019, 4:21 PM), https://www.cnbc.com/2019/07/26/you-could-make-125-by-filling-out-this-equifax-data-breach-claim-form.html?__source=twitter%7Cmain [https://perma.cc/MLL3-4CY6] (last updated July 30, 2019, 9:46 AM).

163. Alexandria Ocasio-Cortez (@AOC), TWITTER (July 26, 2019, 4:35 PM), https://twitter.com/AOC /status/1154852681523093 50 [https://perma.cc/E92A-ED66].

164. Analytics for the Slate article can be found at the following website: *Lookup Social Share Counts for Slate Article*, SHAREAHOLIC, https://www.sharescore.com/?url=https://

Consumers began filling out claim forms that evening, creating panic among the parties who had negotiated the settlement. No one had banked on high participation rates, and the prospect of many of the 147 million consumers filing claims for the cash payment threatened to drive the compensation amount down to just a few cents per consumer.[165] By 10:04 PM that evening, Ocasio-Cortez tweeted: "Okay everyone UPDATE on Equifax: for most people the better deal is 10 years of free credit monitoring. There's apparently a run on settlements so there's anxiety people are going to get 16 cent checks. But if you choose 10 years of credit monitoring, Equifax *must* cover it."[166]

Since then, consumers have continued to file claims with the settlement administrator, but the fate of the overall settlement remains unclear.[167] As of early 2020, only about ten percent of affected consumers had filed claims.[168] Still, that number was sufficiently high that the cash option is predicted to pay out only about $7 per person—a far cry from the original $125 announced in the proposed settlement.[169] What happened that day was remarkable, but also should have been predictable. A few provocative articles and well-placed tweets achieved in one day what statutory and constitutional notice fail to accomplish over the life of a class action: they conveyed to affected consumers information about the pendency of a lawsuit and instructions about how to participate in the settlement.[170]

slate.com/technology/2019/07/equifax-settlement-money-how-to-claim.html [https://perma.cc/295B-AHKR]. Analytics for the CNBC article can be found at the following website: *Lookup Social Share Courts for CNBC Article*, SHAREAHOLIC, https://www.sharescore.com/?url=https://www.cnbc.com/2019/07/26/you-could-make-125-by-filling-out-this-equifax-data-breach-claim-form.html [https:// perma.cc/MW44-UA6S].

165. *See* Jon Levine, *Sorry AOC, but Equifax Probably Won't Be Paying People $125 Apiece*, N.Y. POST (July 27, 2019, 11:28 AM), https://nypost.com/2019/07/27/sorry-aoc-but-equifax-probably-wont-be-paying-people-125-apiece/ [https://perma.cc/5GYK-DPZ3]; Shahar Ziv, *Here's Why You Could Get as Little as $0.21 from Equifax's Data Breach Settlement*, FORBES (Aug. 1, 2019, 7:15 AM), https://www.forbes.com/sites/shaharziv/2019/08/01/you-might-only-get-21-cents-from-the-equifax-data-breach-settlement-instead-of-125/#39307cec4cbe [https://perma.cc/72KJ-U5WJ (dark archive)].

166. Alexandria Ocasio-Cortez (@AOC), TWITTER (July 26, 2019, 10:04 PM), https://twitter.com/AOC /status/1154935657527222272 [https://perma.cc/RNQ3-34EP].

167. *See* Kelly Tyko, *Consumers Must Deal with More Red Tape to Get Cash from Equifax Settlement*, USA TODAY (Sept. 10, 2019, 3:33 PM), https://www.usatoday.com/story/money/2019/09/10/equifax-data-breach-settlement-new-step-added-get-cash/2276645001/ [https://perma.cc/XLD5-7ZG6] (last updated Sept. 10, 2019, 4:54 PM) (noting that in order to be considered for a settlement check from Equifax, a consumer must: (1) verify enrollment in a credit monitoring service by October 15 and (2) follow further steps detailed in an email from Equifax).

168. Tara Siegel Bernard, *Equifax Breach Affected 147 Million, but Most Sit Out Settlement*, N.Y. TIMES (Jan. 22, 2020), https://www.nytimes.com/2020/01/22/business/equifax-breach-settlement.html [https://perma.cc/LZU4-AENS (dark archive)].

169. *Id.*

170. *See* Alison Frankel, *More than 900 Equifax Class Members Have Filed Objections to Settlement – Class Action Inc*, REUTERS (Nov. 25, 2019, 3:45 PM), https://www.reuters.com/article/us-otc-equifax/more-than-900-equifax-class-members-have-filed-objections-to-settlement-class-action-inc-idUSKBN1XZ2E3 [https://perma.cc/9FXY-P29W] (discussing the 900 members of the class action

This startling notice story reveals that, in many mass actions, the parties on *all sides* of the action were banking on low class participation rates. This was a completely reasonable assumption—class participation rates are abysmally low, especially in consumer class actions.[171] The Equifax settlement lays bare how deeply connected class compensation is to notice. Once news of the Equifax settlement went viral and steps for filing a claim were clearly communicated, consumers flocked to the settlement site. This challenges a growing narrative that class participation rates are not really "that bad,"[172] or that low rates exist because consumers do not really care about corporate misconduct, or perhaps consumers are just lazy.[173] But more importantly, the Equifax story poses a stark contrast between the ordinary "best practices" of notice and the realities of how people *actually learn* of a pending action.

The Equifax story was one of unintentional viral notice. Thus, it is unsurprising that once the initial news story passed, claims dropped back to lower rates when email messages were the main vector of notice. One wonders what a more sustained "viral publication" approach might have garnered.

Hyper-targeted e-notice can provide potential class members with the repeated exposure to notice that successive weekly publication in paper periodicals never could. Notice by publication should no longer be considered inferior, simply by virtue of the fact that it is impersonalized and calls back to the previously ineffective notice by publication. That does not mean, however, that notice by publication should sit atop a new hierarchy (particularly for class actions), or that it is otherwise superior or easy to execute. The new frontier of

who are objecting over the fairness of the settlement, given that Equifax had such sensitive information from their users); Peter Hayes, *Equifax Data Breach Settlement Approval to be Challenged*, BLOOMBERG L. (Feb. 11, 2020, 3:48 PM), https://news.bloomberglaw.com/class-action/equifax-data-breach-settlement-approval-to-be-challenged [https://perma.cc/RXE3-LBZA (dark archive)] (noting that the official complaint and challenge to the Equifax settlement will be heard by the Eleventh Circuit) For the final settlement details, see Peter Hayes, *Equifax to Pay $380.5 Million to Settle Data Breach Class Claims*, BLOOMBERG L. (Jan. 14, 2020, 9:11 AM), https://news.bloomberglaw.com/class-action/equifax-to-pay-380-5-million-to-settle-data-breach-class-claims [https://perma.cc/KS3K-VMXG (dark archive)].

171. *See* Bartholomew, *supra* note 13, at 248 n.171 ("Customer class actions generate some of the lowest claims rates."); Omri Ben-Shahar, *The Paradox of Access Justice, and Its Application to Mandatory Arbitration*, 83 U. CHI. L. REV. 1755, 1810 (2016) (discussing low participation rates in settlements with boilerplate notices); Alison Frankel, *FTC's Comprehensive Study Finds Median Consumer Class Action Claims Rate Is 9%*, REUTERS (Sept. 10, 2019, 6:04 PM), https://www.reuters.com/article/us-otc-claimsrate/ftcs-comprehensive-study-finds-median-consumer-class-action-claims-rate-is-9-idUSKCN1VV2QU [https://perma.cc/H5GT-UGTM] ("[A]fter collating data on 149 consumer class actions from seven different claims administrators: The median claims rate in these cases is 9%.").

172. *See* Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions*, 11 N.Y.U. J.L. & BUS. 767, 792 (2015) ("[W]e think our findings should lead to optimism rather than pessimism about the compensatory potential of consumer class actions.").

173. *See* Rose, *supra* note 13, at 498–99 (discussing the standard explanations for low class participation rates).

doctrinal and logistical questions for publication by e-notice have already been ably discussed by Professors Bartholomew, Rose, and other commentators.[174]

The *Pennoyer*/*Mullane* model exerts considerable influence on how courts and lawmakers confront the new dimensions of notice. The spirit of *Mullane* appears to leave ample room for evaluating the costs and benefits of e-notice, both as a general matter, and in the particular circumstances of a given action. But the reality is that the invisible circumstances of the *Pennoyer*/*Mullane* framework leave judges evaluating the "costs" of notice against a benchmark of the dollar amount of assembling databases, printing notices, and mailing them.

Thus, it is no surprise that district judges have been uncertain about how to integrate an entirely new dimension "cost" into the calculus—namely, the question of whether electronic publication notice might be "too good," causing the court or the parties to lose control over the content and dissemination of notice. As Professor Bartholomew has documented, judges have responded in various ways to defendants' claims that notice by electronic publication might damage the defendant's reputation[175] or become a tool for internet fraudsters and scammers.[176] These are serious concerns that should not be brushed off as inconsequential, nor seen as insurmountable roadblocks to effective publication by notice.

What is lacking in this discussion is a fresh constitutional and sub-constitutional framework within which courts can evaluate and balance these concerns within the "reasonable under the circumstances" rubric. So long as courts, lawmakers, litigants, and commentators are explicitly or implicitly tying their expectations of circumstances and reasonableness to the printed and mailed notices of the pre-internet era, these questions will only be tentatively resolved in fits and starts. The broader consideration of how the benefits, costs, and circumstances of notice by publication should be evaluated in the digital age will remain unresolved.

## III. THE CIRCUMSTANCES OF LITIGATION

Just as modern litigation notice doctrine is shaped by the invisible circumstances of service and the invisible circumstances of process, it is also shaped by a set of normative assumptions regarding a model of "typical"

174. *Id.* at 487; Bartholomew, *supra* note 13, at 217; Aiken, *supra* note 74, at 967 (2017); Scheibel, *supra* note 79, at 1331.

175. *See* Bartholomew, *supra* note 13, at 251–52 ("[A] distorted understanding of this tailoring requirement leads some courts to forgo E-Notice.").

176. *See id.* at 242–43 (quoting and discussing fears of alteration and fraudulent reproduction of e-notice); *see, e.g.*, Kuznyetsov v. W. Penn Allegheny Health Sys., Inc., No. 09-CV-379, 2009 WL 1515175, at *6 (W.D. Pa. June 1, 2009) (worrying that "electronic communication inherently has the potential to be copied and forwarded to other people via the internet with commentary that could distort the notice approved by the Court." (quoting Reab v. Elec. Arts, Inc., 214 F.R.D. 623, 630–31 (D. Colo. 2002))).

litigation against which variants are evaluated. Unlike service and process, where *Mullane* did not really shift the underlying norms of notice, *Mullane* did account for some genuine changes in the norms of litigation in the decades since *Pennoyer*. Along with *International Shoe*, it solidified interstate disputes (and the accompanying need for broader service and personal jurisdiction rules) as routine.[177] And while *Pennoyer* arose from a lawsuit with the simple structure of one plaintiff, one defendant, and one claim, *Mullane* arose out of an equitable accounting action that, with its numerous known and unknown absent-party beneficiaries, resembles much of modern complex litigation.[178] Despite this expansion image of "litigation," *Mullane* still entrenched some aspects of the older picture of litigation. The lingering concept of what litigation "really is" continues to constrain ideas for what notice and service can and should be.

### A. *Complex Litigation Is Litigation*

Complex litigation, the field of litigation that concerns large, multiparty (and usually multiclaim) lawsuits, differs from "traditional" litigation on numerous dimensions. It is sensible that lawyers, academics, and even judges specialize in the area so they can best handle and understand the unique features of complex litigation. The proliferation of mass litigation, particularly outside of class actions in the form of multidistrict litigation and other forms of consolidation has prompted debates regarding whether and to what extent complex procedural forms should be governed by a set of different procedural rules.[179]

Class action notice is its own cottage industry, with specialized rules in federal and state courts and a bevy of third-party providers who design and administer notice plans.[180] There is nothing wrong with treating class action notice as a separate category in need of its own rules and practices, even to the

177. *See* Effron, *The Lost Story of Notice and Personal Jurisdiction*, *supra* note 27, at 48 (describing *Mullane* and *International Shoe* as a joint turning point in the ability to litigate cases across state lines).

178. *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 307–09 (1950) (describing the common trust accounting action).

179. There has been considerable discussion and debate amongst scholars about the endless stream of complex paperwork and forms that are considered the norm for large, complex litigation in federal courts. *See generally, e.g.*, Elizabeth Chamblee Burch, *Nudges and Norms in Multidistrict Litigation: A Response to Engstrom*, 129 YALE L.J. F. 64, 64–66 (2019) (discussing how all of the procedures and paperwork for modern litigation not found in the Federal Rules of Civil Procedure negatively impact plaintiffs of all sizes); Nora Freeman Engstrom, *The Lessons of* Lone Pine, 129 YALE L.J. 2, 10–12 (2019) (discussing how courts should scale back the complex procedural devices found in multidistrict litigation in order to benefit the federal judicial system and litigants).

180. For an overview of class action notice practices and procedures, see generally WILLIAM B. RUBERSTEIN, 3 NEWBERG ON CLASS ACTIONS § 8:12 (5th ed. 2020) (outlining certification notice content); Klonoff et al., *supra* note 51, at 729–31 (focusing "on the capacity of the internet to foster true participation by absent class members").

extent that the current class action notice landscape does not harness the power of modern technological tools.[181]

The problem stems from treating complex litigation as an exception insofar as it is a deviation from an imagined "norm" of litigation; a norm that sets the benchmark for typical and against which all perceived deviations must be judged. Complex litigation exceptionalism has had two consequences for the conceptual development of notice doctrine: first, that class action notices should closely resemble the forms used for traditional service of process; and second, that the different forms of notice that necessarily evolved for use in complex litigation do not and cannot inform notice and service rules in so-called "traditional" litigation.

This Article has already demonstrated much of the first point in Section I.B. The *Pennoyer*/*Mullane* model of notice largely equated notice with paper documents that required physical transmission to a (preferably known and identifiable) recipient. This invisible circumstance is at least partially to blame for the suspicion surrounding e-notice and the skepticism of viewing notice by publication as a presumptively acceptable method of service in class and mass actions. When class actions are viewed as exceptional rather than just different, notice practices have never fully been evaluated on their own terms. Even with scant references to actual service of process practices in noncomplex cases, the invisible circumstances of what "typical" litigation is looms large and acts as the lens through which almost all class action notice practices are judged. Thus, complex litigation should be recognized as one category of litigation, rather than as "exceptional" and defined by its deviations from a perceived litigation norm. This would liberate lawmakers to truly look at class action (and other complex litigation) notice on its own terms, without a benchmark reference to other forms of litigation.

This recognition would also allow lawmakers to view class action notice practices as equally valid, and thus presumptively instructive to the promulgation and evaluation of notice and service procedures in other types of litigation. E-notice and notice by publication could assume a far greater role in notice and service of process in ordinary actions. Comfort with the use of these tools in class actions stemmed from the necessity of using exceptional methods to serve notice in "exceptional" forms of litigation because the traditional tools of notice and service were either logistically impossible or prohibitively expensive. The common forms of substituted service in class actions (first-class mail or postcards, e-notice, and notice by publication) lashed to the exceptionalist mast of complex litigation. Then, once the form of litigation and form of notice were so bound, few lawmakers or commentators have paused to

181. *See* Klonoff et al., *supra* note 51, at 731–34 (discussing the inadequacy of traditional methods of notice for class actions due to changes in technology).

evaluate the merits of these forms of substituted service in their own right, discounting the possibility that such tools might be used in noncomplex cases. If the invisible circumstances of notice are neutralized, it becomes more plausible to formalize the use of e-notice or even notice by publication in ordinary litigation.

### B. *Litigation in an Era of Contracts of Adhesion*

Another changed circumstance of litigation is the extent to which pre-suit agreements, particularly contracts of adhesion,[182] have shaped the litigation options for parties to consumer, commercial, and employment contracts. *Mullane*, decided in 1950, came from a time when courts and commentators were just emerging from the era of the ouster doctrine in which most efforts to alter the rules of jurisdiction of a public tribunal were considered unenforceable.[183] The Supreme Court's approval of forum selection clauses, arbitration clauses, and other contractual provisions altering procedural rules and rights in commercial transactions postdate *Mullane* by a few decades.[184] The boom in the use of such clauses can be attributed to the ubiquity of boilerplate contracts in consumer and commercial life.

While many of these devices (especially arbitration clauses) have been the target of extensive scholarly commentary, contractual provisions that alter notice have gone almost entirely unremarked upon. This silence continues against a three-decade backdrop of a marked increase in default judgments in state court, and a recent uptick in the use of waivers of notice to allow creditors to bypass adversarial proceedings and obtain quick default judgments.[185] The trend of contract procedure is a significant change in the circumstances of litigation since *Mullane*. Its effect has blurred the distinction between

182. Andrew A. Schwartz, *Consumer Contract Exchanges and the Problem of Adhesion*, 28 YALE J. REGUL. 313, 346 (2011) ("A 'contract of adhesion,' in the parlance of contract law, is a take-it-or-leave-it standard form agreement, usually presented to a consumer by a business entity.").

183. *See* Robin J Effron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, 98 B.U. L. REV. 127, 134 (2018) [hereinafter Effron, *Ousted*] (describing the older form of ouster doctrine under which parties could not make agreements with a jurisdictional selections clause that would "oust" an otherwise proper court of its power).

184. The Supreme Court approved of forum selection clauses in federal cases in federal court. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 587–88, 596–97 (1991) (examining forum selection clauses in consumer contracts of adhesion); Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 2, 15 (1972) (considering forum selection clauses in commercial, arms-length transactions). The Court also authorized confession-of-judgment clauses in *D.H. Overmyer Co. of Ohio v. Frick Co.*, 405 U.S. 174, 182–83, 187 (1972).

185. *See* Zachary R. Mider & Zeke Faux, *"I Hereby Confess Judgement": How an Obscure Legal Document Turned New York's Court System into a Debt-Collection Machine That's Chewing Up Small Businesses Across America*, BLOOMBERG BUSINESSWEEK (Nov. 20, 2018), https://www.bloomberg.com/graphics/2018-confessions-of-judgment/ [https://perma.cc/DH3U-MLLD (dark archive)] (describing the increase in default judgments and notice waivers as a method for obtaining quick judgments).

procedural events that happen *within* litigation and procedural events that *precede* litigation. But contracts of adhesion have chipped away at notice, and it is time to reevaluate whether this question should be folded back into the *Mullane* due process inquiry.

Confession-of-judgment clauses (also known as "cognovit notes") are a fast track to default judgments, which are the worst-case result of bad or deficient notice in adversarial litigation.[186] The specter of a binding and enforceable judgment entered against a party without their participation or even knowledge has driven the discourse of notice as an instrumental right.[187] A judgment entered against a party who does not appear in an action is a drastic remedy, but one that has long been accepted as a fair result when the no-show party seems to have knowingly and voluntarily made the choice not to appear in the action.[188]

The procedures for obtaining a default judgment reflect a balancing act. The magnitude and finality of the judgment convey the seriousness with which the judicial system expects parties to take the pendency of a lawsuit. But all states and the federal system have statutes and procedures for setting aside a default judgment.[189] In addition to a few hard-and-fast rules,[190] these procedures amount to a tangle of standards permitting judges to use their discretion to set aside a default judgment when the defaulting party can provide some sort of reasonable explanation for their failure to appear or participate.[191] This state of affairs is used to justify the network of rules and practices in which *constructive*

186. S*ee D.H. Overmyer Co.*, 405 U.S. at 176 ("The cognovit is the ancient legal device by which the debtor consents in advance to the holder's obtaining a judgment without notice or hearing, and possibly even with the appearance, on the debtor's behalf, of an attorney designated by the holder.").

187. *See* Lafayette Ins. Co. v. French, 59 U.S. 404, 406 (1855) (describing that the ability to participate in proceedings is a "principle of natural justice which requires a person to have notice of a suit before he can be conclusively bound by its result").

188. *See generally, e.g.*, Sindhi v. Raina, 905 F.3d 327 (5th Cir. 2018) (holding that the default judgment entered against defendant was not an abuse of discretion because the defendant ignored several district court warnings and orders); Prime Rate Premium Fin. Corp. v. Larson, 930 F.3d 759 (6th Cir. 2019) (holding that the default judgment entered against defendant did not violate her due process or notice rights); Bookman v. 816 Belmont Realty, LLC, 121 N.Y.S.3d 134 (N.Y. App. Div. 2020) (holding that property owner's failure to keep secretary of state apprised of current address over significant period of time did not constitute a reasonable excuse for its default that would entitle property owner to vacatur of default judgment).

189. *See, e.g.*, N.Y. C.P.L.R. 5015(a) (McKinney 2021) (listing grounds for relief from judgment); WISC. STAT. ANN. § 806.07(1) (Westlaw through 2021 Act 19) (listing grounds for relief from judgment).

190. For example, a showing of defective or improper service of the motion "deprives the court of jurisdiction to entertain the motion . . . and any default judgment procured in the absence of valid service is a nullity." Adames v. N.Y.C. Transit Auth., 126 A.D.2d 462, 462 (N.Y. App. Div. 1987) (citation omitted). A showing that the court lacked jurisdiction over the parties or action is another straightforward rule for vacating a default judgment. N.Y. C.P.L.R. 5015(a)(4) (McKinney 2021).

191. For example, many states allow judges to set aside a default judgment in cases of "excusable default." *See, e.g.*, N.Y. C.P.L.R. 5015(a)(1) (McKinney 2021).

notice is almost always constitutionally sufficient notice.[192] It is a standard which gives the plaintiff the structure and incentives to serve process in a way that is "reasonably calculated" to reach the adversary and ensures that the defendant is not incentivized to evade service in order to avoid legal entanglements altogether.

The continued existence of default judgments, then, is not a *per se* failure of constitutionally sufficient notice. *Patterns* of default judgments, however, are a different story. They are a clue that constructive notice no longer reflects a constitutionally appropriate allocation of the risks and burdens of notice and service of process. However, more importantly, they are a symptom of rules and practices that have dipped below *Mullane*'s aspiration: a notice standard based on what steps are reasonable to apprise a party that an action against them has been filed.

Cognovit notes, or "confession-of-judgment"[193] clauses, are the canaries in the default judgment coal mine. A cognovit note allows a creditor to obtain summary judgment against the debtor in the event of default without serving the defendant with notice of the pending action.[194] Typically, the contract contains a clause called a "warrant of attorney" in conspicuous typeface that explains to the debtor that, by agreeing to the contract, the creditor may seek a default judgment from the court without notice to the debtor or a court trial.[195] When the debtor is (allegedly) in default, the creditor goes to court, complaint and confession of judgment in hand, and obtains a default judgment that is now fully enforceable in all jurisdictions under the Full Faith and Credit Clause.[196]

State and lower federal courts have limited the enforceability of confession-of-judgment clauses, at least formally, to the commercial context,

192. *See* Dusenbery v. United States, 534 U.S. 161, 170–71 (2002) (explaining that the Court has "never required actual notice" as a condition of meeting the *Mullane* standard).

193. "Cognovit" refers to "[a]n acknowledgment of debt or liability in the form of a confessed judgment . . . in which the consumer relinquished, in advance, any right to be notified of court hearings in any suit for nonpayment." *Cognovit*, BLACK'S LAW DICTIONARY (11th ed. 2019). "Confession of judgment is '[a] person's agreeing to the entry of judgment upon the occurrence or nonoccurrence of an event, such as making a payment.'" *Confession of Judgment*, BLACK'S LAW DICTIONARY (11th ed. 2019).

194. Sutton Bank v. Progressive Polymers, LLC, 163 N.E.3d 546, 550–51 (Ohio 2020).

195. For example, Ohio's Warrant of Attorney must read:

> Warning—By signing this paper you give up your right to notice and court trial. If you do not pay on time a court judgment may be taken against you without your prior knowledge and the powers of a court can be used to collect from you regardless of any claims you may have against the creditor whether for returned goods, faulty goods, failure on his part to comply with the agreement, or any other cause.

OHIO REV. CODE ANN. § 2323.13(D) (Westlaw through Files 1 to 10 of the 134th Gen. Assemb. (2021–22)).

196. *See infra* Appendix.

and the Supreme Court in *D.H. Overmyer Co. v. Frick Co.* upheld[197] accepted the legality of these clauses in commercial, arms-length negotiated contracts.[198] Even with use confined to commercial transactions, cognovit notes have persisted and, in some states, their use has burgeoned in the past decade.[199] Successful challenges to a default judgment entered pursuant to a confession-of-judgment clause are rare, their pursuit is expensive, and most defendants only learn about the entry of the judgment when their assets have been frozen, or their property has been seized pursuant to an enforcement action.[200]

Enforcement of confession-of-judgment clauses raise serious public policy and due process concerns.[201] Even when agreed upon between well-resourced and sophisticated parties, the ability to obtain an enforceable money judgment without even notifying one's adversary is a serious proposition.[202] For this reason, some states completely prohibit the use of confession-of-judgment clauses on the grounds that they violate public policy.[203]

Outside of total prohibition, there is a good deal of variation among the states as to the legality and scope of such clauses. A majority of states permit the use of cognovit clauses, some on more restrictive conditions than others.[204] The restrictions mirror the larger policy concerns with cognovit clauses. States that permit cognovit notes have procedures that require that the clause appear "more clearly and conspicuously than anything else on the document,"[205] or that

197. 405 U.S. 174 (1972).

198. *Id.* at 187–88.

199. Mider & Faux, *supra* note 185.

200. *Id.*

201. *See* Albert A. Ehrenzweig, *Contracts in the Conflict of Laws*, 59 COLUM. L. REV. 973, 1020 (1959) (referring to the "vigor of the public policy [argument] against [confession of judgment] agreements"); Hank Skelton, Note, *POVERTY LAW—Judgment by Confession—Entry of Judgment by Confession Without Notice of Hearing is a Violation of Due Process if the Warrant is Executed in a Consumer Sales or Financing Transaction by a Maker Who Earns Less Than 10,000 Dollars a Year*. Swarb v. Lennox, *—F. Supp.— (W. D. Pa. 1970)*, 49 TEX. L. REV. 169, 172–73 (1970) ("[J]udgment by confession is objectionable not only because it fails to provide for notice and hearing, but also because it is perfectly designed for harassment and intimidation.").

202. *See, e.g.*, Eric B. Smith, Comment, *The Process Due upon Confession of Judgment in Pennsylvania and § 1983 Liability upon the Private Attorney: A Proposed Solution*, 100 DICKINSON L. REV. 991, 1000–01 (1996); John E. Murray, Jr., *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1, 19–20 (1969) ("Perhaps confession of judgment clauses are so pernicious that they should be declared illegal.").

203. ALA. CODE. § 8-9-11 (Westlaw through Act 2021-295); Wright v. Robinson, 468 So. 2d 94, 97 (Ala. 1985) ("[A]greements to confess judgment are void as against public policy.").

204. *See infra* Appendix (grouping states into four categories: (1) states that do not enforce cognovit clauses except via enforcing an out-of-state judgment via the Full Faith and Credit Clause; (2) states that have remained silent on the matter; (3) states where clauses are enforced but with heightened requirements; and (4) states where clauses are enforceable on similar terms to the *Overmyer* decision).

205. OHIO REV. CODE. ANN. § 2323.13(D) (Westlaw through Files 1 to 10 of the 134th Gen. Assemb. (2021–2022)).

the contract "indicate[s] conscious assent."[206] States enforce cognovit clauses when there is a showing of consent, but the "showing must be clearer than that necessary to sustain ordinary contract provisions."[207] Given, however, the very low bar many courts have set for "consent" in ordinary contracts of adhesion,[208] one wonders just how strictly courts scrutinize the use of such clauses. After all, in most instances, the device itself prevents a real-time contestation of the invocation of the clause. Ex post challenges are expensive and time-consuming, particularly from the position of a debtor who may have already found herself in challenging circumstances.[209]

Due process concerns lurk in the current commercial contract use of cognovit clauses, and the specter of expansion into the personal and consumer context should be a cause for high alert. The commercial/consumer barrier is not always effective in protecting ordinary persons from the surprise and devastation of the enforcement of a cognovit note. This occurs primarily in states such as New York that take an open stance toward enforcement of cognovit clauses, with little more than lip service paid to the sophisticated party context that the Supreme Court approved in *Overmyer*.[210] Clever use of choice of law and forum clauses allow lenders to choose a forum in which the confession is enforceable.[211] And thanks to the Full Faith and Credit Clause of the Constitution, only a few willing states are needed.[212]

New York, in particular, has come under scrutiny in the past decade for a cottage industry that uses and enforces confession-of-judgment clauses.[213] Lenders have moved beyond ordinary small business loans into a market of

206. Drew J. Gentsch & Danya M. Keller, *The Use of Confession of Judgment Clauses Within Indemnity Agreements*, 2015 FID. & SUR. L. COMM. NEWSL. (A.B.A., Chicago, Ill.), Fall 2015, at *18 (citing Pennsylvania cases that support heightened assent and writing requirements for cognovit clauses).

207. JRD, Inc. v. Edwards, 14 Pa. D & C. 4th 170, 173 (Ct. Com. Pl. 1992). In Pennsylvania, the courts have characterized cognovit notes as "perhaps the most powerful and drastic document known to civil law[,]" but the clauses are still enforceable. Cutler Corp. v. Latshaw, 97 A.2d 234, 236 (Pa. 1953).

208. *See* Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. Rev. 2255, 2260 (2019) ("[A] party is normally bound by the terms of the contract notwithstanding its failure to read them.").

209. Mider & Faux, *supra* note 185 (reporting that "[b]orrowers rarely try" to get a judgment entered pursuant to a confession clause overturned and that the few borrowers who try almost always fail, thus leading some lawyers to counsel their clients not to even bother contesting the judgment).

210. Gentsch & Keller, *supra* note 206, at 18.

211. Mider & Faux, *supra* note 185 (finding that, for example, "[i]n one month, a single clerk's office in Orange County, New York, issued 176 [cognovit] judgments against small businesses in 38 states and Puerto Rico.").

212. Under the Full Faith and Credit Clause of the Constitution, all states must enforce the valid judgments of other states, regardless of whether the enforcing state has the same laws. U.S. CONST. art. IV, § 1. Thus, a state that does not directly enforce a confession of judgment clause would recognize the valid judgment of another state (like New York) that does.

213. Confession of judgment clauses are enforceable in New York state. N.Y. C.P.L.R. 3218(b) (McKinney 2021).

"merchant cash advances,"[214] a lending market that bears a troubling resemblance to the payday loan industry—a market already considered predatory in an environment *without* the accompanying procedural device of the cognovit clause.

While the cognovit notes are issued in transactions that are technically commercial and to parties that are nominally "businesses," the reality is that a large number of these contracts are signed by relatively unsophisticated people who operate small businesses or sole proprietorships. A blistering 2018 Bloomberg Businessweek report and data analysis documented the rise in the use of cognovit notes in the years after the 2008 Great Recession and the havoc that it has wreaked on small business owners.[215] Comparing lenders who use cognovit clauses to old-school mafia loan sharks who "have co-opted New York's court system and turned it into a high-speed debt-collection machine,"[216] the report documents instances of outright forgery in some of the signed confessions that the creditors filed as judgments with the courts.[217] Many other legitimate documents led to asset seizures and bankruptcies that the debtors did not fully understand and were generally unable to challenge, even though they might have had legitimate defenses.[218]

The ease with which operators in states like New York have harnessed cognovit notes demands a serious and nationwide reevaluation of the due process status of confession-of-judgment clauses. The Mider and Faux report led to bipartisan congressional interest in passing a proposed Small Business Lending Fairness Act to curb the enforceability of confession-of-judgment clauses, but the sponsors have been unable to generate sufficient support to pass the bill.[219] The New York State legislature passed a bill that prohibits the enforcement of confession-of-judgment clauses against out-of-state residents and mandates that actions must be brought in the county in which the defendant resides.[220] While this dampens the ability of New York based lenders to run a nationwide confession-of-judgment default-judgment mill out of New York state, it does nothing to protect non-consumer borrowers residing within New York's borders.

Although limiting the enforcement of confession-of-judgment clauses to sophisticated parties has some conceptual appeal, one can sense a background hum of general unease connected to the idea of relinquishing the right to future

214. Mider & Faux, *supra* note 185 (showing that in 2014, only a handful of cognovit judgments were entered in New York State, but by 2018, judgments topped over 3,500 per quarter).

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *See* S. 1961, 116th Cong. (2019).

220. S. 6395, 2019–2020 Reg. Sess., 2019 N.Y. Laws 1106–07 (codified as amended at N.Y. C.P.L.R. 3218(b) (McKinney 2021)).

notice that one's adversary has commenced a lawsuit. But even assuming that sophisticated parties can sign away their due process rights of notice, one should be concerned about the ability to ensure that confession-of-judgment clauses really meet due process norms. As the New York example shows, using the business/consumer distinction as a dividing line does little to protect ordinary people from the direct effects of the enforcement of such clauses. The so-called business debtors in New York are tantamount to consumers. This is not to say that the proprietors of small businesses are helplessly inept or incompetent. Rather, it is an acknowledgement that the sophistication needed to truly understand and waive the right of notice is probably not the priority of a business proprietor whose main focus is the substance of their business for which they are seeking a loan. Given that bright-line rules that would purport to separate businesses from consumers are a poor sorting mechanism for sophistication, one wonders if there should be a more searching test to examine whether the party who agrees to the cognovit note is truly in a position to make a knowing and voluntary waiver. But such a procedure would still rely on post-judgment enforcement, a stage at which the debtor, now stripped of her assets, is at a tremendous litigation disadvantage. Moreover, that sort of substantive test would theoretically strip cognovit notes of their purported advantage—the efficient administration of judgments without the messiness of litigation.

The *Pennoyer*/*Mullane* model has little to say about this phenomenon. *Mullane* came at a time when contract procedure was in its infancy,[221] and uses of confession-of-judgment clauses were rare.[222] Moreover, confession-of-judgment clauses were not considered as much of a notice problem as they were a contract problem.[223] Conceptually, problems of notice belonged to lawsuits in which notice would presumably not happen at all.

Confession-of-judgment clauses short-circuited this loop by cutting out the notice question before a dispute even materialized. The Supreme Court in *D.H. Overmyer* did not even cite *Mullane*. The *pre*-litigation question of whether notice could be waived had little to do with the question of whether notice *during* litigation was reasonably calculated under the circumstances. But the modern circumstances of litigation should cause courts and lawmakers to reevaluate this assumption. The widespread use of contract procedure means that procedural questions are no longer limited to litigation itself. Due process

221. *See* David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 611–15 (2010) (describing the history of contract procedure and noticing its ascendancy in the second half of the twentieth century, particularly after 1980).

222. *See* Colter L. Paulson, *Evaluating Contracts for Customized Litigation by the Norms Underlying Civil Procedure*, 45 ARIZ. ST. L.J. 471, 505–06 (2013) ("Confession of judgment clauses fell out of favor for many years but may be enjoying something of a renaissance in some states.").

223. *Cf. id.* at 475–85 (grouping confession of judgment clauses with other "contract procedures" which are often analyzed as problems of consent and contract, rather than on their own procedural terms).

questions need to extend backward in time to account for the fact that the terms of litigation are set before a dispute ever arises.

## IV. THE CIRCUMSTANCES OF THE CIRCUMSTANCES

The final invisible circumstance of notice is the idea of the circumstances themselves. When Justice Jackson penned the phrase "notice reasonably calculated, under all the circumstances"[224] he was almost certainly referring to the circumstances of the litigation at hand and the parties thereto. The rules, practices, and norms of notice and service of process are themselves circumstances under which parties must execute and finance notice, but these were all but invisible to the Supreme Court in 1950. The circumstances of notice themselves appeared to be fixed, and it was the individual circumstances of the parties that were variable. Although the rules for notice and service of process grew and evolved with time, the deeper circumstances and assumptions documented in this Article stood still as undisturbed benchmarks.

This Article has documented several assumptions about notice that should be questioned or even discarded. These are the "invisible circumstances of notice" that have prevented a supposedly flexible and adaptable standard from evolving alongside twenty-first century changes in society, technology, and communications. The way that courts and commentators have conceptualized the "circumstances" under which notice is "reasonably calculated" has a distinctive passive quality. The circumstances, usually described in the passive voice, are a given and assumed set of background conditions. They predate the dispute at hand and, in some ways, are seen to exist outside of the dispute resolution system entirely. The financial and logistical circumstances may *vary* among litigants and lawsuits, but large-scale *changes* in the circumstances of notice have been integrated at a sluggish and timid pace by judges and lawmakers.

Very little about the circumstances of notice, however, needs to be taken as a given. Judges (and litigants, for that matter) tend to describe the circumstances of notice as fixed; the judgment about what is reasonable is made against the background of circumstances that seems to stand apart from the court, the state, and the litigants. But this final "invisible circumstance," like those in the prior three parts of this Article, can change. It is time to reevaluate the role of the state and courts as institutions that *create* and *maintain* the circumstances of notice.

The development of the norms and practices of notice and service of process over time have led to a state of affairs in which the state is both over- and under-involved in these functions. In short, the state could play a bigger role in the administration and execution of ordinary notice and service of

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

process. But when the state *is* involved, the extent to which these measures are uncomfortably adjacent to law enforcement is a matter of some concern. Clarifying the role of the state in creating the circumstances of notice can remove many of the perceived obstructions in the path of innovative and cost-effective changes to notice and service of process procedures.

### A. *The State's Role in the Circumstances of the Cost and Feasibility of Notice*

In the earliest days of Anglo-American litigation, the state played a maximalist role in notice and service of process, with a law enforcement official arresting and serving the defendant.[225] While that monopoly on forceful notice disappeared before the founding, the state never fully relinquished its role in providing state officials as process-servers for certain types of cases, or certain classes of plaintiffs who are either presumed to need the assistance of the state or can demonstrate that they are entitled to such help.[226]

In most ordinary cases, however, service of process is performed and funded by the parties.[227] Much like discovery in which the court oversees few threshold matters and mostly adjudicates *post hoc* disputes, service is accomplished without the involvement of the court or the state.[228] In most run-of-the-mill cases, the plaintiff is on their own to locate and serve the defendant. In many instances, the ability to either serve or seek a waiver of service by mail makes this process inexpensive and logistically easy.[229] But in circumstances where a defendant can be difficult to locate, is evading service, or is a type of defendant who must be served personally, service can be expensive and logistically difficult.[230] Assistance from the court or the state only comes after another logistical hurdle—asking the court for a necessary intervention.[231] Even in class actions, state involvement is minimal. Notice is almost always funded and organized by the plaintiff class (who typically outsources this task to a third-party administrator).[232] Although the judge may be involved in approving a

225. Pennoyer v. Neff, 95 U.S. 714, 727 (1878) (describing the limited situations in which "[s]ubstituted service by publication, or in any other authorized form, may be sufficient").

226. *See, e.g.*, FED. R. CIV. P. 4(c)(3) ("At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. § 1915 or as a seaman under 28 U.S.C. § 1916.").

227. *See* Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478, 1481–83 (2019) (describing *in forma pauperis* assistance for service of process in federal court).

228. *See id.* at 1494.

229. David S. Welkowitz, *The Trouble with Service by Mail*, 67 NEB. L. REV. 289, 311 (1988).

230. *See id.* at 305–06.

231. *See, e.g.*, LA. CODE. CIV. PROC. ANN. art. 5185 (2020) ("When an order of a court permits a party to litigate without the payment of costs until this order is rescinded, he is entitled to . . . [a]ll services required by law of a sheriff, clerk of court, court reporter, notary, or other public officer in, or in connection with, the judicial proceeding, including, but not limited to, the filing of pleadings and exhibits. . . .").

232. 3 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 8:27 (5th ed. 2020).

notice plan,[233] the execution of the plan is rarely the state or the court's responsibility.

Thus, when a judge encounters a question about "what notice would cost" or "how difficult notice would be," those issues do not arise in a vacuum. Many of the background costs and logistical hurdles have already been set by the extant norms and rules. Nothing about the due process right of notice and opportunity to be heard specifies that the parties (particularly the plaintiff) rather than the state must be responsible for funding and executing notice and service of process. What would happen if the state proactively *created* the circumstances of notice, rather than waiting to passively react to the circumstances that arrived at the courthouse steps? In the following two sections, I sketch out two possible paths (which are not mutually exclusive) for state involvement: *shifting* the default site of costs and logistics and *changing* the costs and logistics themselves.

1. Shifting the Default Rules About Payment and Execution of Notice

One way to proactively change some of the circumstances of notice is to change the default assumptions about how notice is financed and executed. The concept, in broad strokes, would be simple: each jurisdiction would establish a new system (or enlarge an existing one) for designing and serving process. The default assumption would be that all litigants would be entitled to the use of this service, billed at predetermined rates posted by the relevant court system.

Rates would be determined by certain assumptions about the process being served, such as the need to serve a defendant personally as opposed to by mail or electronically, and presumptions about the plaintiff's ability to pay. This would not need to be a replacement for private methods of service or waiver of service. In fact, jurisdictions could utilize pricing models to strive for a sort of equilibrium: the state would, with little added administrative friction, pay for and provide notice when needed or desired, but well-designed rates would still incentivize plaintiffs to engage in private service or waiver methods when those would be more efficient.

This path would not, on its own, alter too much of the practical landscape of notice and service of process. It is, however, a first step on an important rhetorical journey. In the current world of notice and service, courts look rather helplessly on the possibilities for notice and ask, "how much would notice cost?" or "how difficult would service of process be for this plaintiff?" as if the need for notice and the market for process serving exists entirely outside of the existence and actions of the state. Shifting the default rules about the provision

233. In federal court, Rule 23(c)(2) states that the court must "direct" notice to (b)(3) classes and "may" direct notice to (b)(1) and (b)(2) classes. FED. R. CIV. P. 23(c)(2). In practice, the parties draw up a notice plan which the judge can evaluate and approve.

and payment of service of process highlights the idea that the costs and difficulties of notice are not beyond the control of the state. The state itself enables the underlying conditions that are at least in part responsible for making the costs and logistics of notice what they are.

### 2. Changing the Costs and Logistics of Notice Itself by Increased State Involvement

There is a deeper way in which state involvement with notice and service of process can fundamentally change the cost and logistics structure of the existing system. The proposal above would simply shift the default assumptions about costs and burdens from private parties to the state but would leave most of the rules and mechanics of the current system in place. When the state executed service of process, it would mostly be doing what private parties are doing now. The biggest shift would be that parties could opt *out* of state involvement, rather than the current system of demonstrating the need for state provision or state assistance.

There are, however, much more sophisticated ways in which the state could become involved with systems of notice and service of process. Doing so would accomplish more than leveraging economies of scale. It could fundamentally change some of the invisible circumstances of notice that appear so intractable and have been overlooked as forces constraining innovation in notice and service of process itself.

Professor Rose offers one such proposal in *Classaction.gov*. Her essay suggests how a centralized governmental program for administration of certain aspects of class actions, including notice, would improve class action litigation and, in particular, enhance class participation rates.[234] One advantage of such a plan is that a system of publicly built and maintained databases could aggregate information, thus improving the accuracy of contacting plaintiffs.[235] But Rose's key insight is that it is not enough to hope that private individuals or markets will develop better strategies and technologies for harnessing the power of e-notice.[236] Proactive state involvement can standardize notices for clarity and authenticity and trade on the government's status as a trusted actor.[237]

Rose's work is directed at the particular problems that plague class action notice, administration, and settlement. But there is no reason that these insights should not apply more broadly to other areas of notice. Recall the difficulties that most jurisdictions have had in harnessing the power of electronic communication in any meaningfully systematic way for purposes of notice.[238]

234. Rose, *supra* note 13, at 491–93.
235. *Id.* at 517–18.
236. *Id.* at 517–19.
237. *Id.* at 512–13.
238. *See supra* notes 38–43 and accompanying text.

Much of this is due to the invisible circumstances that constrain how courts and lawmakers think of "process" and "service." But some of the problem is a failure of governments to proactively participate in the creation of *new* circumstances to match evolving technologies.

Judicial rhetoric about e-notice reveals this passivity. Courts and lawmakers have more or less accepted electronic communication as a given state of affairs, rather than one that can be shaped by dynamic interaction. Professor Bartholomew has shown the inherent distrust that many judges have in using "too much" electronic technology in e-notice.[239] This extends to how judges view e-service in noncomplex cases. In an early leading case authorizing service by email, the Ninth Circuit acknowledged that the defendant at hand "had neither an office nor a door; it had only a computer terminal. If any method of communication is reasonably calculated to provide [the defendant] with notice, surely it is email—the method of communication which [it] utilizes and prefers."[240] But even after this acknowledgement, the court turned to a stern observation that, as a more general matter, email is untrustworthy and judges should use discretion in authorizing its use.[241] Courts observe that, absent an affirmative showing by the plaintiff, a court cannot be sure that a particular email address or social media account actually belongs to or is regularly accessed by the defendant.[242]

While these are well-founded concerns, they are not immutable facts. States have developed systems for e-filing; there is no reason they should not be able to build out such systems (in the style of the *Classaction.gov* proposal) to create a reliable, verifiable method for sending and receiving process, as well as other government notices. The hope is that the development and implementation of such systems would be iterative. Undoubtedly, some methods and designs will prove to be better than others. These systems would need to standardize communications, identify the best means of connecting with a recipient (email, text message, social media account, or other avenue), verify receipt, and develop a format for transmitting lengthy or complex documents such as a complaint and exhibits, in an easy, readable way.

E-service could not replace all other methods of service. There will always be a need to reach some defendants personally, whether it is because of the recipients' relative access to a computer, or because of the same problems of evasion of service that have plagued the analogue world for centuries.

239. Bartholomew, *supra* note 13, at 223.

240. Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1018 (9th Cir. 2002).

241. *Id.*

242. *See, e.g.*, Fortunato v. Chase Bank USA, N.A., No. 11 Civ. 6608(JFK), 2012 WL 2086950, at *3 (S.D.N.Y. June 7, 2012); Lim v. Nojiri, No. 10-cv-1480, 2011 WL 2533568, at *2 (E.D. Mich. June 27, 2011).

The point is not to elevate e-service to the only or even the most preferred method of service. Rather, it is to see how the invisible circumstances of notice have blocked innovation, and how the circumstances themselves can be changed to enable a truly flexible notice regime that matches the aspirations of *Mullane*'s flexible standard.

### B. *Defund the "Process Police"*

The previous section explored how the state can be more proactive in developing systems, platforms, and performance of notice and service of process in order to enable positive innovations in notice policy and practice. But one must note that, while the state has been passive towards participating in and fostering systems for notice and service, the ways in which the state *currently* interacts with the provision of notice can be problematic.

There are still (and will always be) situations in which in-hand service is the best way of serving notice. Plaintiffs proceeding *in forma pauperis* or who meet other requirements are entitled to enlist the state to help serve process.[243] In most jurisdictions, litigants are entitled to ask the state to serve process so long as they file the necessary paperwork and pay a fee.[244] And in most jurisdictions, this means a law enforcement officer. This Article has already noted the long-standing relationship between notice and the sheriff who would serve it.[245]

In many jurisdictions, service by the state means service by a marshal,[246] a sheriff,[247] or an officer of another law enforcement agency. These are often the same agencies that are responsible for executing prejudgment remedies such as attachment, or for the enforcement of judgments.[248] It is unclear why notice and service of process are presumptively lumped in with the agencies responsible for the enforcement aspects of the judiciary. Deteriorating relationships between law enforcement officers and communities contribute to poor service

243. *See supra* note 226 and accompanying text.

244. Hammond, *supra* note 227, at 1481.

245. *See supra* note 89 and accompanying text.

246. The federal courts use the U.S. marshals to serve process in these situations. FED. R. CIV. P. 4(c)(3).

247. In Illinois, for example, the county sheriffs are responsible for service of process. 735 ILL. COMP. STAT. 5/2-202(a) (Westlaw through the end of the 2020 Reg. Sess. of the 101st Gen. Assemb.).

248. In New York City, for example, the sheriff's department is responsible for service of process, while the marshals are responsible for other judgment enforcement work. *See Serving Process*, N.Y.C. DEP'T OF FIN., https://www1.nyc.gov/site/finance/sheriff-courts/sheriff-serving-legal-papers.page#:~:text=The%20Sheriff's%20Office%20notifies%20defendants,service%20is%20to%20be%20made [https://perma.cc/WY3Y-G4Y9]. It is unclear, however, whether most residents would be able to distinguish between various uniformed law enforcement agencies.

and even sewer service that disproportionately affects poor communities and communities of color.[249]

For several years, activists and commentators working in the criminal justice reform space have been calling for states and the federal government to "defund the police."[250] During the nationwide protests in the spring of 2020, that message broke through to its broadest audience yet. One tenet of that movement is that police forces are tasked with far more responsibilities than are necessary for maintaining safe and secure communities, that ubiquitous police involvement leads to poor outcomes for minority communities, and that using the police to perform such a wide variety of state functions takes resources away from the trained professionals who are better equipped to address community issues.[251] Activists and commentators have identified numerous functions currently performed by police that should be redirected to non-police personnel.[252] Service of process should be one of them. Without passing judgment on an overall goal of defunding or abolishing law enforcement as a whole, the project of redirection and reassignment of resources is compelling.

Just as the state can be involved in the development of better bureaucratic systems to create better circumstances for innovations in electronic or mail-based notice and service, the state could be proactive in designing systems for initiating lawsuits and serving defendants in a way that does not interpose the state as a hostile or adverse actor.

This idea extends beyond hitching service of process to the current political moment of questioning the role of law enforcement in various aspects of society. Notice has always carried with it the weight and threat of state authority. The invisible circumstances of process and service that have been discussed in this paper are not an accident of history or a failure of imagination. The deep-seated need to center natural persons as both the servers and recipients of tangible documents demonstrates the subtle control operating in the background. Yes, notice is about protecting rights, facilitating the opportunity to be heard, and enabling fair judicial process. But it is also a reminder of the exercise of jurisdiction[253] and of the enforcement control awaiting parties at the other end of litigation.

249. *See* Kaplan, *supra* note 47 (describing how sewer service problems falls unevenly on poor communities with heavy minority populations).

250. Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 786 (2021) (discussing that among the wide variety of police reforms in the last few years, the "defund the police" movement has gained considerable attention).

251. *Id.* at 781 ("There are demands to defund the police, to have the people decide how budgets are allocated, and to give communities control over how to define public safety.").

252. *Id.* at 790–92 (touching upon the debate about how some police activity could be carried out by non-police personnel to achieve the same goals).

253. Effron, *The Lost Story of Notice and Personal Jurisdiction*, *supra* note 27, at 25–26.

That exercise of control cannot be completely discarded. Process servers must sometimes go into dangerous or difficult situations, especially when a defendant has been evading process.[254] But it is unclear why law enforcement must be the *default* state officer serving process. Instead, lawmakers should consider a civilian agency trained to locate and serve adverse parties. A law enforcement officer might still be necessary in some situations. But this should be something that the process server *asks* for from the court, and the law enforcement officer should not themselves be the process server.

These suggestions demonstrate how the state can change the circumstances of notice by shifting resources and shifting expectations. Litigation and circumstances will continue to change with time. But the state should recognize that it is always a participant in the changing circumstances and cannot position itself as a mere bystander.

## CONCLUSION

This Article has demonstrated the hidden structure that supports the notice doctrine as it plays out in several areas of litigation. What would it look like to rethink the meaning of service and the meaning of process? At bottom, it would mean letting go of the idea of a single, or perhaps single plus backup, method of service. The biggest thing that has changed since the 1950s is that it is, on balance, both easier and cheaper to *find* and *reach* people. On the other hand, there are also more sources of information that compete for people's attention. All of these sources of input into people's lives, even when trustworthy and verifiable, may or may not "register," as it were. The point is to avoid thinking about notice as a false dichotomy—the old ways or the new ways? The advantages of technology do not *obviate* the old standbys of in-hand personal service and associated substituted service practices. But they should make us question why technologically enhanced service methods are still so marginalized.

Going forward, one could further investigate how the invisible circumstances define and constrain notice in other realms such as bankruptcy, and even into non-adversarial contexts. Innovation in communication, commerce, and dispute resolution will continue whether or not lawmakers and judges choose to make *Mullane*'s flexible standard into a truly adaptive doctrine. But the gap will only widen, and with it the court-access problems brought on

254. *See* David Segal, *Big Year for the Bad News Bearers*, WASH. POST (Dec. 24, 1998), https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/subpoena122498.htm [https://perma.cc/T8QF-GRK6 (dark archive)] ("[T]he job becomes a high-stakes game of tag -- and occasionally a dangerous one. Process servers are sometimes threatened, even attacked."); Ted Kleine, *The Uneasy Life of a Process Server Even Those Living Life in the Fast Lane Aren't Exempt*, CHI. TRIB. (Mar. 1, 1998), https://www.chicagotribune.com/news/ct-xpm-1998-03-01-9803010424-story.html [https://perma.cc/6EGU-7VCN].

by notice that is difficult, expensive, or poorly executed. The time has come to refigure the underlying structure of the standard in order to facilitate needed change.

## APPENDIX

The chart below provides a state-by-state description of the laws regarding the permissibility and enforcement of cognovit notes. Forty-five states either permit confession-of-judgment clauses in some form or have reported decisions stating that out-of-state judgments rendered pursuant to confession-of-judgment clauses are enforceable due to the Full Faith and Credit Clause. The remaining five states do not have any cases explicitly stating that such judgments are enforceable; however, none of these states have caselaw that suggests that the confession-of-judgments issue is somehow outside of or an exception to full faith and credit.

| State | Do They Allow Cognovit Notes? | Source |
|---|---|---|
| Alabama | Allowed under full faith and credit. | Ohio Bureau of Credits, Inc. v. Steinberg, 199 So. 246, 247–48 (Ala. Ct. App. 1940). |
| Alaska | Permitted by caselaw and statute. | Princiotta v. Mun. of Anchorage, 785 P.2d 559, 560 (Alaska 1990). |
| Arizona | Recognizes full faith and credit on sister-state judgments; unable to find a case stating that cognovit judgments are honored via full faith and credit. | Lofts v. Superior Ct. *ex rel.* Maricopa Cnty., 682 P.2d 412, 413 (Ariz. 1984). |
| Arkansas | Allowed under full faith and credit. Note that the case cited here held that the original Pennsylvania court lacked jurisdiction in the first place to rule on the cognovit note, and therefore the note was null under the Full Faith and Credit Clause. | Strick Lease, Inc. v. Juels, 780 S.W.2d 594, 594–96 (Ark. Ct. App. 1989). |

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| California | Allowed under full faith and credit. | Cap. Tr., Inc. v. Tri-Nat'l Dev. Corp., 127 Cal. Rptr. 2d 360, 365 (Cal. Ct. App. 2002). |
| Colorado | Recognizes full faith and credit on sister-state judgments; unable to find a case stating that cognovit judgments are honored via full faith and credit. | Marworth, Inc. v. McGuire, 810 P.2d 653, 657 (Colo. 1991). |
| Connecticut | Allowed under full faith and credit. | Seaboard Sur. Co. v. Waterbury, 451 A.2d 291, 293 (Conn. Super. Ct. 1982). |
| Delaware | Recognizes full faith and credit on sister-state judgments; unable to find a case stating that cognovit judgments are honored via full faith and credit. | Pyott v. La. Mun. Police Emps.' Ret. Sys., 74 A.3d 612, 615–16 (Del. 2013). |
| Florida | Allowed under full faith and credit. | Trauger v. A.J. Spagnol Lumber Co., 442 So. 2d 182, 182 (Fla. 1983). |
| Georgia | Allowed under full faith and credit. | Melnick v. Bank of Highwood, 259 S.E.2d 667, 669 (Ga. Ct. App. 1979). |
| Hawaii | Recognizes full faith and credit on sister-state judgments; unable to find a case stating that cognovit judgments are honored via full faith and credit. | Cobb v. Willis, 752 P.2d 106, 109 (Haw. Ct. App. 1988). |
| Idaho | Recognizes full faith and credit on sister-state judgments; unable to find a case stating that cognovit judgments are honored via full faith and credit. | Andre v. Morrow, 680 P.2d 1355, 1362–63 (Idaho 1984). |

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|---|---|---|
| Illinois | See law review note on cognovit notes in Illinois and its constitutional implications on full faith and credit. | Cindy F. Wile, Note, *Confessions of Judgement in Illinois: The Need for Change Persists*, 10 LOY. U. CHI. L.J. 141, 143 (1978) (discussing cognovit notes in Illinois and its constitutional implications on full faith and credit). |
| Indiana | Does not allow cognovit notes. However, cognovit notes are allowed under the Full Faith and Credit Clause when the cognovit note is issued by a competent jurisdiction in another state. | EBF Partners, LLC v. Novabella, Inc., 96 N.E.3d 87, 88 (Ind. Ct. App. 2018); Cox v. First Nat'l Bank of Woodlawn, 426 N.E.2d 426, 427 (Ind. Ct. App. 1981). |
| Iowa | Allowed under full faith and credit. | Acme Feeds, Inc. v. Berg, 4 N.W.2d 430, 432 (Iowa 1942). |
| Kansas | Allowed under full faith and credit. | Hankin v. Graphic Tech., Inc., 222 P.3d 523, 531 (Kan. Ct. App. 2010). |
| Kentucky | Allowed under full faith and credit. | Anderson v. Reconstruction Fin. Corp., 136 S.W.2d 741, 742 (Ky. Ct. App. 1940). |
| Louisiana | Recognizes full faith and credit on sister-state judgments; unable to find a case stating that cognovit judgments are honored via full faith and credit. | State Dept. of Health & Res. v. Bethune, 618 So. 2d 1045, 1047 (La. Ct. App. 1993). |
| Maine | Recognizes full faith and credit on sister-state judgments; unable to find a case stating that cognovit judgments are honored via full faith and credit. This case cites and distinguishes a federal Third Circuit decision in which that court had, under other | Roy v. Buckley, 698 A.2d 497, 502 n.6 (Me. 1997) (citing Choi v. Kim, 50 F.3d 244, 249–51 (3d Cir. 1995)). |

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| | circumstances, found that the particular confession of judgment clause at issue did not satisfy due process. | |
| Maryland | Allowed under full faith and credit. | Goshen Run Homeowner Ass'n, Inc. v. Cisneros, 223 A.3d 917, 934 (Md. 2020). |
| Massachusetts | Allowed under full faith and credit. | C.F. Tr., Inc. v. Peterson, No. CIV. A. 96-1375 H, 1997 WL 184432, at *1 (Mass. Super. Ct. Mar. 6, 1997). |
| Michigan | Recognizes full faith and credit on sister-state judgments; unable to find a case stating that cognovit judgments are honored via full faith and credit. | Hare v. Starr Commonwealth Corp., 813 N.W.2d 752, 758–59 (Mich. Ct. App. 2011). |
| Minnesota | Allowed under full faith and credit. Note that the case cited here held that the original Illinois court lacked jurisdiction in the first place to rule on the cognovit note, and therefore the note was null under the Full Faith and Credit Clause. | Hutson v. Christensen, 203 N.W.2d 535, 538 (Minn. 1972). |
| Mississippi | Allowed under full faith and credit. | Dickson v. Lindsay, 107 So. 2d 732, 732 (Miss. 1958). |
| Missouri | Allowed under full faith and credit. | Metro. Lumber Co. v. Dodge, 567 S.W.2d 729, 731 (Mo. Ct. App. 1978). |
| Montana | Allowed under full faith and credit. | Wamsley v. Nodak Mut. Ins. Co., 178 P.3d 102, 113–14 (Mont. 2008). |
| Nebraska | Allowed under full faith and credit. | First Fed. Sav. & Loan Ass'n of Colo. Springs v. Wyant, 472 N.W.2d 386, 390 (Neb. 1991). |
| Nevada | Allowed under full faith and credit. | Rosenstein v. Steele, 747 P.2d 230, 230 (Nev. 1987). |

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| New Hampshire | Allowed under full faith and credit. | Wilson v. Shepard, 469 A.2d 1359, 1360–61 (N.H. 1983). |
| New Jersey | Allowed under full faith and credit. Note that the case cited here held that the Pennsylvania court lacked jurisdiction in the first place to rule on the cognovit note, and therefore the note was null under the Full Faith and Credit Clause. | Tara Enters., Inc. v. Daribar Mgmt. Corp., 848 A.2d 27, 35 (N.J. Super. Ct. App. Div. 2004). |
| New Mexico | Allowed under full faith and credit. | Mountain States Fixture Co. v. Daskalos, 303 P.2d 698, 699–700 (N.M. 1956). |
| New York | Allowed under full faith and credit. | Fiore v. Oakwood Plaza Shopping Ctr., Inc., 585 N.E.2d 364, 366 (N.Y. 1991). |
| North Carolina | Allowed under full faith and credit. Note that the case cited here held that the Ohio court lacked jurisdiction in the first place to rule on the cognovit note, and therefore the note was null under the Full Faith and Credit Clause. | Gardner v. Tallmadge, 700 S.E.2d 755, 757–58 (N.C. Ct. App. 2010). |
| North Dakota | Allowed under full faith and credit. | 1st Summit Bank v. Samuelson, 580 N.W.2d 132, 132 (N.D. 1998). |
| Ohio | Allowed under full faith and credit. | Fifth Third Bank, N.A. v. Maple Leaf Expansion, Inc., 934 N.E.2d 366, 372 (Ohio Ct. App. 2010). |
| Oklahoma | Allowed under full faith and credit. | U.S. Mortg. v. Laubach, 73 P.3d 887, 895 (Okla. 2003). |
| Oregon | Allowed under full faith and credit. | Ames v. Ames, 652 P.2d 1280, 1282–83 (Or. Ct. App. 1982). |
| Pennsylvania | Allowed under full faith and credit. Allows cognovit notes. | Neducsin v. Caplan, 121 A.3d 498, 502, 510 (Pa. Super. Ct. 2015). |

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| Rhode Island | Recognizes full faith and credit on sister-state judgments; unable to find a case stating that cognovit judgments are honored via full faith and credit. Statutes prohibit confession of judgments against individuals; unable to find case law, but it can be inferred that commercial confessions are permissible. | Hawes v. Reilly, 184 A.3d 661, 666–67 (R.I. 2018); R.I. GEN. LAWS § 19-14.8-28(a)(15) (LEXIS through Ch. 424 of the 2021 Sess.). |
| South Carolina | Allowed under full faith and credit. | Law Firm of Paul L. Erickson v. Boykin, 681 S.E.2d 575, 578 (S.C. 2009). |
| South Dakota | Allowed under full faith and credit. | Arnoldy v. Mahoney, 791 N.W.2d 645, 650 (S.D. 2010). |
| Tennessee | Allowed under full faith and credit. | Guseinov v. Synergy Ventures, Inc., 467 S.W.3d 920, 921 (Tenn. Ct. App. 2014). |
| Texas | Allowed under full faith and credit. | Roark v. Sweigart, 848 S.W.2d 387, 387 (Tex. App. 1993). |
| Utah | Permitted per caselaw and statute. | Bradburn v. Alarm Prot. Tech., LLC, 2019 UT 33, ¶ 14, 449 P.3d 20; UTAH CODE ANN. § 78B-5-205 (LEXIS through the 2021 1st Spec. Sess. of the 64th Leg.); UTAH R. CIV. P. 58A. |
| Vermont | Recognizes full faith and credit on sister-state judgments; unable to find a case stating that cognovit judgments are honored via full faith and credit. | Wursthaus, Inc. v. Cerreta, 539 A.2d 534, 535–36 (Vt. 1987). |
| Virginia | Recognizes full faith and credit on sister-state judgments; unable to find a case stating that | Coghill v. Boardwalk Regency Corp., 396 S.E.2d 838, 840 (Va. 1990). |

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| | cognovit judgments are honored via full faith and credit. | |
| Washington | Allowed under full faith and credit. | Copeland Planned Futures, Inc. v. Obenchain, 510 P.2d 654, 657–59 (Wash. Ct. App. 1973). |
| West Virginia | Allowed under full faith and credit. | Perkins v. Hall, 17 S.E.2d 795, 798–99 (W. Va. 1941). |
| Wisconsin | Allowed under full faith and credit. | Ellis v. Gordon, 231 N.W. 585, 586 (Wis. 1930). |
| Wyoming | Permitted by case law and statute. | Westring v. Cheyenne Nat'l Bank, 393 P.2d 119, 121 (1964). |