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Taking Notice and Service of Process Digital

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A. Introduction

In the United States, notice and opportunity to be heard is a cornerstone of due process – the constellation of rights guaranteed by the Fifth and Fourteenth amendments to the U.S. Constitution. Lawsuits typically end in binding judgments enforceable in all U.S. jurisdictions. In order to litigate, adverse parties must know about the existence of pending litigation. Where are they being sued? For what? And what remedy is demanded? Awareness of the lawsuit is a cornerstone of due process. In the worst-case scenario, a court might enter a default judgment against an absent party in which it is now responsible for the judgment, regardless of the merits of the underlying claims. Even in the absence of default judgment, adverse parties need adequate time and key information to begin mounting a defense.

Given that notice and service of process plays such a vital function, one would expect American jurisdictions to be at the forefront of developing and deploying cutting edge technology for finding and serving parties to lawsuits, as well as other parties entitled to notice in litigation, such as absent class members in certain types of class action lawsuits. Indeed, many jurisdictions and private entities have developed sophisticated technologies and platforms that facilitate the conduct of litigation once it is underway. But notice and service of process itself remains trapped in a mostly pre-digital space. Moving forward requires an historical and doctrinal understanding of why notice practices remain so stubbornly analog as well as an attentiveness toward the needs of all litigants so that digitization efforts make service of process a healthy addition to our system of notice rather than a wholesale replacement.

B. The Origins of Lagging Digitization

The constitutional boundaries of acceptable notice practices are governed by a 1950 Supreme Court decision, *Mullane v. Central Hanover Bank & Trust Co.*[1] There the Court announced that "notice must be reasonably calculated under the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." At first glance, this standard appears to be both flexible and adaptable to changing circumstances in the law, as well as innovations in communication practices and technology which comprise the social and economic background against which modern litigation occurs. But since the mid-twentieth century decision, the United States' constitutional test of notice has not sufficiently adapted to broader social and societal changes to the circumstances in which modern litigation proceeds.

In its time, *Mullane* signaled procedural innovation and a liberalization of the methods of notice. *Mullane* was an equitable action for accounting of a trust fund, the outcome of which would produce a binding judgment affecting the rights of many trust beneficiaries. The Supreme Court held that notice could be given to beneficiaries by delivering notices to known beneficiaries via first class mail accompanied by publication of the notice in a periodical for successive weeks. In so doing, the Court acknowledged the utility of first-class mail (as compared with formal service of process or notice), and also affirmed that the suit could proceed without expensive and likely impossible efforts to identify, locate, and notify unknown beneficiaries. The "reasonable under the circumstances" language would presumably allow courts in the coming decades to evaluate rules and practices of notice and service of process. Yet, despite *Mullane's* ostensibly flexible doctrine, courts and lawmakers have been slow to adapt to the rapid changes in communication and litigation that have marked the seven decades since *Mullane* was decided.

Law practice and the business of adjudication look quite different than they did in the mid twentieth century. Lawyers research, draft, and exchange documents electronically. Parties communicate electronically with each other and with courts, many of which have developed electronic document management systems. Drafting, exchanging, and even consuming documents electronically is (usually) cheaper and more efficient than in person transmission of physical documents. This is why many court systems offer and even sometimes *require* e-filing. But notice and service of process are left behind. Until the proverbial lawsuit ball is rolling, parties are locked out of systems of electronic transmission.

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[1] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

In earlier work I have hypothesized why this is so. The *Mullane* framework encourages judges make factually specific decisions about the adequacy of notice against a background of older methods. This allows them to consider the individual issues, costs, and logistics of particular notice practices in a given case. But context-specific analyses limited to the facts of notice in a given case often exclude attention to the broader changes to the societal circumstances and background within which litigation takes place.

Judges and lawmakers are beholden to certain "invisible circumstances" of notice that stymie the expansion of acceptable and encouraged service to include digitized methods.[2] These are a set of shared assumptions about what "real" or "good notice" is, namely it involves physical documents transmitted by and to human beings. Digitization is not a solution for all litigants and litigation. When jurisdictions begin to offer and promote digitized notice and service of process it must not be done in a way that disadvantages vulnerable populations. But the status quo, which still privileges older, analog methods of transmission, fails to serve many litigants.[3] Courts need to understand how the invisible circumstances of notice have created barriers to e-notice reform, not only to ensure that the actual notice given is more effective, but also to bring notice procedure into the 21st century.

C. Moving Beyond the Primacy of Paper and the Dominance of Service by and on Natural Persons

In the Anglo-American legal tradition, service of process serves two distinct purposes. The term "process" refers to any judicial notice by which a court obtains jurisdiction over a person or property. In a lawsuit, process is most commonly the "summons," which along with the complaint informs adverse parties of the pendency of an action and the claims asserted against it. These, then, are the two functions of process: the state's assertion of power and the provision of notice. As such, the tangible quality of a paper document has special significance in American jurisdictions. The in-hand, personal service of process on a defendant replaced a much older practice of physically arresting and detaining a defendant while awaiting a civil trial.[4] So the transmission of a tangible document still carries with it the significance of the state exercising adjudicative power over the party. Thus, service of process by intangible means ("e-service") requires a

2 *Effron*, N. C. L. Rev. 2021, 1527.
3 *Gottshall*, Arkansas Law Review 2018, 813; *Budzinski*, U. Colo. L. Rev. 2019, 167.
4 Pennoyer v. Neff, 95 U.S. 714 (1878).

conceptual leap. Electronic transmission lacks the tangible and territorial quality of in-hand service, or even service of a summons using the postal service.

When *Pennoyer* and *Mullane* were decided, physical transmissible documents were the gold standard of notice, with other forms of notice such as notice by publication and notice by posting on property were considered second-best alternatives. Publication notice in particular has long been treated by courts and lawmakers as sub-optimal, a last resort method of notifying a defendant or large group of absent parties of pending litigation. This skepticism helped to ground assumptions about tangible paper-based notice, that paper forms of process documents are ideal, and any alternative form should hew as closely as possible to paper summons (or other forms of legal process).

For many persons and entities, paper is no longer the dominant or even default mode of written communication, but courts and lawmakers have been slow to adapt to these realities. Email, secure forms of electronic document transmission, and even text messages and social media are, in many places, ubiquitous and an easy means of reaching people. While paper is still a necessary and important means of communication for many Americans, there is no reason to categorically privilege its use over electronic means, especially to the point where any use of electronic means of service is considered exceptional and requiring of extra permission or extraordinary circumstances.

Just as tangible documents have been the default form of process, transmission by and on natural persons has been the default and preferred form of service. In-hand personal service on the adverse party has the supposed advantages of ensuring that the litigant actually received service of process, and thus courts assumed that service using persons instead of systems was more reliable and even ultimately cost effective. Even substituted service on another natural person, usually an appointed agent of a person or business, or a person of "suitable age and discretion"[5] meant that two humans, the server and the recipient, could verify delivery and receipt via affidavit or other means of affirmation.

Service using systems instead of persons requires verification to confirm that process has been delivered to and received by the correct parties. Nevertheless, jurisdictions err in assuming that service by systems, especially electronic systems, are inherently less trustworthy. Just as jurisdictions have developed protocols for ensuring that service by postal service is not complete until the adverse party has formally acknowledged receipt, so can they develop comparable electronic systems for acknowledgement and verification. As this Chapter will elaborate, most jurisdictions already have such systems in place for the transmission and receipt of documents filed in an ongoing lawsuit.

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5 Federal Rules of Civil Procedure (Fed. R. Civ. P.), Rule 4 (e) (2) (B).

More importantly, the casual assumptions about the reliability of natural persons have resulted in a surprising level of indifference to problems with service of process. The problems affect plaintiffs and defendants alike. For defendants, personal service is not a guarantee of receipt. The phenomenon of "sewer service" in which process servers falsely claim to have served process is alive and well, and its victims are usually Americans from marginalized communities living in economically disadvantaged neighborhoods.[6] Some members of immigrant communities are wary of interacting with law enforcement officers or persons who appear to be deputized by governments to transmit legal papers. For plaintiffs, the use of natural persons is also suboptimal. Aside from the high expense of paying a process server (or the sophistication needed to attain government assistance in process serving), plaintiffs must contend with defendants who attempt to evade service by absenting themselves from the jurisdiction. States have long recognized these problems, thus the history of methods of substituted service and the ability to use first-class mail for service or waiver of formal service. Yet somehow, the paradigm of in hand service by and on natural persons persists and stymies efforts to harness technology for newer electronic alternatives.

Some jurisdictions purport to be at the vanguard of modernizing the tools of service of process, but they still are remarkably conservative in their approach. For example, the Texas state legislature amended its procedural rules in 2019 to explicitly permit service of process "via social media, email, or other technology".[7] This made Texas among the first states to codify a pattern of *ad hoc* decisions by American courts to allow certain forms of e-service. Most of these decisions came from statutes or rules that permitted e-service in "exceptional circumstances". The Texas rule attracted some attention for being among the first to explicitly name email and social media as distinct methods for service of process. But in reality, the Texas rule did not do much to enable or encourage parties to use and explore e-service beyond existing practices. Parties must still demonstrate by motion that in-hand personal service and service by mail has failed. And to the extent that one of the benefits of e-service is that it is inexpensive, requiring parties to make a motion before using any e-service method means that parties cannot capture the benefits of avoiding the high costs of in-hand service.

E-service should be on par with the existing alternative of first-class mail. E-service is not without risks and difficulties, but that is also true of using first-class mail. In the United States, all jurisdictions have procedures by which parties can transmit process by mail instead of by in-hand personal service. Some jurisdictions, such as the federal court system, use a "waiver" system in which parties use

6 *Gottshall*, Arkansas Law Review 2018, 813 (816-818).

7 Texas Rules of Civil Procedures (Tex. R. Civ. P.), Rule 106 (b) (2) (rule adopted in 2020).

the mail to request that the adverse party waive formal service of process. For many persons and entities, a failure or refusal to waive formal service of process means that the serving party can demand that the adverse party bear the costs of formal service.[8] Other jurisdictions, such as Texas, directly authorize service of process by first-class mail. In all systems, although the details and nomenclature differ, the rules amount to the same type of procedure. The serving party uses mail to transmit the summons, complaint, and other relevant documents to the adverse party. The adverse party is generally required to respond. But service of process is not considered complete until the adverse party has acknowledged receipt of the service (or documents accompanying a waiver request). The challenge for the future is to translate current modalities of using public and private postal service transmission into electronic systems that are cost-effective, reliable, and accessible to most persons and litigants.

D. Choice of Digital Modalities or Platforms

There are a number of ways in which court systems can harness newer technologies to expand on the possibilities for service of process and move to a digitized system, but despite the ubiquity of the internet and electronic media, the use of electronic ("intangible") notice is still treated as suspect by the courts. Overcoming the hesitancy to endorse e-notice is the first step, and as this Chapter has shown, this requires lawmakers to embrace the distinct benefits of e-notice, but also engaging in an honest assessment of the shortcomings of traditional in-person and mail or waiver notice.

The most straightforward way to enable e-service is for lawmakers to amend the statutes and rules governing service of process to allow for electronic transmission. The Texas approach is still contingent on a showing that other methods of service, including service by mail, are unavailable or have failed. A wholesale adoption of electronic service as a method on par with other service methods would be a step further.

This method has some advantages. First, it would mirror traditional service in that it would be conducted by the parties, thus allowing both courts and litigants to adapt new technologies to existing systems. Aside from formal recognition of the acceptability of electronic methods, this path would not require courts, court systems, or legislatures to pass new rules and laws or to create new administrative infrastructure. This method is also cost effective in that parties can trans-

[8] Fed. R. Civ. P. Rule 4 (d).

mit multiple copies of lengthy documents to several email, text, or social media addresses at very little additional cost.

There are, however, some disadvantages to the approach of simply adding e-service as an acceptable method. Using direct communication to a party's email, cellular phone number, or social media profile is the least secure method of transmission. Parties may be understandably hesitant to transmit documents with sensitive information to and from unconfirmed and unsecured accounts. An email address or phone number may be long discarded, unused, or unchecked by the intended recipient. And the possibility for typographical errors to misdirect communications are heightened when entering only a string of numbers, letters, or relying on databases that might also have data entry errors.

Given the potential pitfalls, jurisdictions giving serious consideration to enabling parties to serve process electronically on par with postal mail should enact rules aimed at ameliorating these risks. Right now, states like Texas have it exactly backwards – by viewing e-service as less trustworthy, Texas has put it in the category of exceptional service. While this makes e-service less accessible, it does little to address the problems behind the intuitions of riskiness. Instead, rules for e-service should include guardrails for efficiency and reliability. For example, a rule might state that e-service should be made on any and all known email, phone, or social media accounts belonging to a party, and require the serving party to identify the latest known active account held by the adverse party. The rule might specify that service be made using a secure and encrypted email service in which the receiving party must log into a separate system and server in order to view the message and download attachments. Finally, the rules might specify a uniform system of response and acknowledgement by the receiving party. Although these requirements raise the cost of e-service such that it is not a completely seamless alternative to traditional service, the parties would still retain many of the cost and efficiency benefits of using electronic means. The purpose of e-service is not to eliminate cost altogether, but to offer secure and reliable lower cost digital alternatives alongside personal service and mail service.

The "allow electronic delivery just like mail" approach is simple because it extends a known system (service or waiver by mail) to a new format. But the digitalization of judicial administration should be more than just making the analog digital. Rulemakers should explore how electronic formats can create new methods of service altogether. One such possibility would be for the state to provide an electronic portal or platform through which parties can transmit and receive service of process.

Most states already have e-filing systems which typically requires parties to have counsel with access to such filing system. For example, New York state uses the NYSCEF system to allow litigants with access to NYSCEF to file court

documents electronically.[9] Filing documents to be served during a lawsuit, however, is distinct from service of process, making New York one of many American jurisdictions that have constructed e-*filing* systems, but not e-*notice* systems. New York is an example of a court system's hesitancy to adapt to a fully digitized system. Such a system would not be mandatory given the importance of protecting parties whose access to digital systems is still limited or burdensomely costly. It would, however, enable digitized service of process via a platform accessible to all litigants, regardless of whether their attorney has access to an e-filing system.

An e-notice system could be an independent portal system or could be built out as an extension of existing e-filing systems. The most important feature would be that process itself (the summons, complaint, and any other relevant or required documents) would not be transmitted directly by electronic means to the recipient. Instead, they would be stored on a secure server and available for download. The recipient would receive a message from the state system via email, text, social media, or other electronic means, notifying them of service of process in a legal proceeding. Similar to service by mail, service would not be complete until the recipient formally acknowledged receipt through the system itself, or by opting for more traditional service (hard copies by mail or in person service). Just as with existing methods of service, rules drafters should be attentive to classes of persons needing special protection such as minors and incompetent persons. Moreover, rules drafters might create similar incentives for litigants to accept service of process in which the receiving party must pay for traditional service if electronic service is declined.

Private companies might also develop and offer such portal systems. This would be a natural extension of the services that registered agents for service of process offer,[10] or of the claims administration systems that third-party class actions administration firms offer.[11] It would be possible for a number of such companies to offer portal-based e-notice systems within a given jurisdiction, giving litigants choices for which service to use. A system of for-profit administrators, however, would make it harder to integrate e-service with existing e-filing platforms. Moreover, a well-designed public system might be seen as a more trustworthy vehicle for the transmission of e-service. Experience with the private notice and claims administration systems in class action practice have shown that class members are often suspicious of communications from private claims

9 See *N.Y. State Unified Court System*, Authorized for E-Filing, available at https://iapps.courts.state.ny.us/nyscef/AuthorizeCaseType (accessed on 27 October 2022), choose the relevant court from drop-down menu and press "select".

10 *Jennings*, JCL 46 (2020), 76 (89-90).

11 *Federal Trade Commission*, Consumers and Class Actions: A Retrospective Analysis of Settlement Campaigns, 2019, p. 6 et seqq.

administrators and will not engage in those systems for fear of spam or even fraud.[12]

E. Technology and the New "Notice By Publication"

At the far frontiers of digitalization of notice, one moves beyond service of process in ordinary lawsuits and even beyond e-notice in mass litigation to the prospect of using modern tools of media, targeting advertising, and social media algorithms to rethink the very old concept of notice by publication. Notice by publication has been an acceptable means of notice in American jurisprudence since the founding of the Republic, but it has always been considered a method of last resort. Although large companies and law firms have always had employees comb the legal notices for items relevant to their businesses and clients, notice by publication was never realistically meant to reach a high number of average litigants. Media consumed over the Internet might change that balance. Although that future is still in the distance, it is worth considering the following anecdote to illustrate how viral social media posts and algorithmic processing might accelerate and sharpen the uses of notice by publication.

In 2017, a major credit rating agency, Equifax, announced that it had been the target of one of the largest data breaches of the past decade. Several lawsuits by public officials and a consumer class action lawsuit ensued. When the parties reached a settlement in the Equifax consumer class action litigation in 2019, major news outlets reported the settlement to the public and urged them to claim their settlement proceeds. One reporter implored readers that it was a "moral obligation" to file a claim and get the proposed $100 settlement from Equifax.[13] Popular New York Congresswoman Alexandria Ocasio-Cortez then posted on her Twitter account to encourage consumers to cash in on their available proceeds and included a link to the settlement administrator.

The news items and a congresswoman's tweet brought so much attention to the settlement that consumers flocked to the site to file claims. A rather unofficial "notice by publication" had achieved what ordinary class action notice practices had been failing at for years—a high claims participation rate in the class action settlement. In fact, so many consumers filed claims that the portion of the settlement allocated to consumer claims made it impossible for the fund to actually

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12 *Rose*, UCLR 2021, 487 (489-453).

13 *Wolff*, You Have a Moral Obligation To Claim Your $125 from Equifax, 2019, available at https://slate.com/technology/2019/07/equifax-settlement-money-how-to-claim.html (accessed on 27. October 2022).

pay all valid claimants the promised $100 per claim. This suggests that the parties in the case agreed to the settlement because they had expected and counted on poor participation from class members, and that better notice practices could lead to fairer class action settlements with more equitable distributions of those settlements to aggrieved parties.

Viral tweets are hard to predict, and savvy journalists sometimes strike gold, but more often are competing in a fierce market for attention. Thus, a true revolution in notice by publication might be in the works but it is still not a realistic present-day option. Nonetheless, rules drafters, claims administrators, and those designing systems of notice for ordinary litigation might take note about the new and dynamic ways in which Americans interact with technology and information and how this can and should continue to shape the future of notice and service of process.