University of Baltimore Law Review

Volume 46 | Issue 1 Article 5

2016

Friends, Followers, Connections, Lend Me Your Ears: A New Test for Determining the Sufficiency of Service of Process Via Social Media

Christopher M. Finke
University of Baltimore School of Law, christopher.finke@ubalt.edu

FRIENDS, FOLLOWERS, CONNECTIONS, LEND ME YOUR EARS: A NEW TEST FOR DETERMINING THE SUFFICIENCY OF SERVICE OF PROCESS VIA SOCIAL MEDIA*

*Christopher M. Finke***

I. INTRODUCTION

The emergence of social media as a driving force in modern society has brought it to the forefront of legal discussion in all areas of law.[1] Fields of study such as evidence, ethics, and constitutional law are all currently wrestling with how social media ought to be handled.[2] In particular, courts have attempted to determine whether service of process (or simply "service") should be satisfied by the use of communication through social media.[3]

Since 1950, courts have relied upon the same test, regardless of the method used, to determine the sufficiency of service: the *Mullane* test.[4] *Mullane* as currently applied, however, does not sufficiently scrutinize service via social media in a manner conducive to

---

* *See* WILLIAM SHAKESPEARE, JULIUS CAESAR act 3, sc. 2.

** J.D. Candidate, University of Baltimore School of Law, 2017. Special thanks to my wife for putting up with the craziness that is law school life, and to my parents for the opportunities they gave me by choosing homeschooling.

1. *See generally* Keely Knapp, Comment, *#Serviceofprocess @Socialmedia: Accepting Social Media for Service of Process in the 21st Century*, 74 LA. L. REV. 547 (2014) (arguing that "[b]ecause of social media's pervasiveness, the legal system would be doing itself an injustice to ignore this new technology as a means to effectuate service when other methods fail").

2. *See, e.g.*, Laura E. Diss, *Whether You "Like" It or Not: The Inclusion of Social Media Evidence in Sexual Harassment Cases and How Courts Can Effectively Control It*, 54 B.C. L. REV. 1841, 1846 (2013) (discussing the role of social media evidence in sexual harassment cases); *Ethical Obligations for Attorneys Using Social Media*, PA. BAR ASS'N (2014), http://www.danieljsiegel.com/Formal_2014-300.pdf (discussing problems of legal ethics arising from the use of social media); Tehrim Umar, Comment, *Total Eclipse of the Tweet: How Social Media Restrictions on Student and Professional Athletes Affect Free Speech*, 22 JEFFREY S. MOORAD SPORTS L.J. 311, 312–313 (2015) (discussing social media in the field of constitutional law and arguing social media platforms are protected by the First Amendment).

3. *See* Baidoo v. Blood-Dzraku, 5 N.Y.S.3d 709, 711 (N.Y. Sup. Ct. 2015); Andrews v. McCall (*In re* Adoption of K.P.M.A.), 341 P.3d 38, 51 (Okla. 2014).

4. *See infra* Section II.C.

understanding the peculiarities of this method of communication.[5] This Comment will not attempt to determine whether the use of social media to effect service of process is constitutional.[6] Rather, it will show how the current application of the *Mullane* standard leads courts to categorically accept or reject service as effected, and, therefore, a new test ought to be adopted to measure the individual social media communication method used to attempt service.[7] This test ought to be utilized to determine whether a particular use of a specific social media platform has fulfilled the constitutional requirements for service, vis-à-vis *Mullane*.[8]

This Comment will begin by examining the standard for sufficient service of process established by the Supreme Court in *Mullane*, followed by the cases expanding that decision; in particular *Greene v. Lindsey*, *Mennonite Board of Missions v. Adams*, and *Jones v. Flowers*.[9] This Comment will also survey the technological advancements that have affected courts' determinations regarding service.[10] It will then observe how foreign courts have treated issues of electronic service, as well as review the development of this issue in the United States.[11] Finally, this Comment will scrutinize current methods of service, propose a new test that courts ought to use to determine the sufficiency of service effected via social media, and compare the test's advantages to the current test.[12]

II. *MULLANE* AND ITS PROGENY

A. *Define: Service of Process*

Service of process is the system by which common law courts give defendants notice of the proceeding pending against them.[13] When a suit is filed in a United States District Court, the plaintiff has a short

5. *See infra* Section IV.A.
6. That is, constitutional by way of application of current service jurisprudence. For further discussion about the constitutionality, see William Wagner & Joshua R. Castillo, *Friending Due Process: Facebook as a Fair Method of Alternative Service*, 19 WIDENER L. REV. 259, 263–264 (2013).
7. *See infra* Sections IV.A–IV.B.
8. *See infra* Section IV.B.
9. *See infra* Sections II.A–II.D.
10. *See infra* Section II.D.2.
11. *See infra* Part III.
12. *See infra* Sections IV.A–IV.C.
13. *See* James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 195 (2004).

amount of time in which he must notify the defendant.[14] The procedure for giving this notice in federal courts is governed by Rule 4 of the Federal Rules of Civil Procedure.[15] For state suits, the procedures are governed by local law or rules similar to the Federal Rules of Civil Procedure.[16] The Constitution requires that a certain floor be established for any process of supplying notice to be sufficient.[17]

There are various types of service that have been acceptable, but two bear mentioning. First, when a defendant is handed a set of service papers by someone else, that is termed "personal service" and it is preferable to nearly all other forms of service.[18] Sending notice by certified mail has been almost universally accepted,[19] whereas service by publication (i.e., publishing a notice in a newspaper over the period of a few weeks) has been acceptable only under certain circumstances.[20] Any type of service not expressly enumerated by the federal or state rules of procedure is labeled "alternative service."[21]

B. *Providing Notice in the World Before Mullane*

The Supreme Court has long hinted that notice requirements may be an issue of constitutional rights.[22] These ideas, however, have been tied to a confusing and unhelpful categorization of types of actions.[23] Actions in rem had different service requirements than an

---

14. FED. R. CIV. P. 4(m) (requiring defendants to be served within ninety days from the filing of the lawsuit).
15. *See* FED. R. CIV. P. 4(c)–(m).
16. *See generally* U.S. CONST. amend. X (stating that powers not delegated to the Federal Government are delegated to the States or to the people).
17. *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313–14 (1950) (declaring service of process a due process concern).
18. *See* Matthew R. Schreck, *Preventing "You've Got Mail"™ from Meaning "You've Been Served": How Service of Process by E–Mail Does Not Meet Constitutional Procedural Due Process Requirements*, 38 J. MARSHALL L. REV. 1121, 1129 (2005).
19. *See id.* at 1144 n.175.
20. *See Mullane*, 339 U.S. at 314 (holding that service is sufficient provided the notice is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action").
21. Wagner & Castillo, *supra* note 6 at 263–264.
22. *See In re* The Mary, 13 U.S. (9 Cranch) 126, 144 (1815) ("[I]t is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him.").
23. *Id.* (noting differences between notice of actions in personam and in rem); *see also* Pennoyer v. Neff, 95 U.S. 714, 733–34 (1877) (describing claims that are only "in the

action in personam.[24] As law became more "settled," the categories became more unsettling, with actions that clearly fit into in rem or in personam categories being distinguished from those "sometimes termed in rem, or more indefinitely quasi in rem, or more vaguely still, 'in the nature of a proceeding in rem.'"[25] Such classifications were later determined unnecessary, as the demands of the Fourteenth Amendment are independent from the categorization of the claim being brought.[26]

C. *Mullane v. Central Hanover Bank & Trust Co.*

The Supreme Court's 1950 decision in *Mullane v. Central Hanover Bank & Trust Co.* melded prior notions of notice into a single coherent rule.[27] The litigation in *Mullane* involved the notice requirements of a New York statute regulating the creation of common trust funds.[28] The increasing costs of administering a small trust became overly burdensome during and following World War II, leading many states to allow the pooling of many small trusts into a single common trust fund to be administered by a single entity.[29] The New York statute allowed the creation of a common fund, pending approval of a state board, from any number of smaller trusts held by a single trustee.[30] A judicial settlement would establish the assets of

---

nature of a proceeding *in rem*" rather than actually in rem, and allowing alternative service for such claims in particular circumstances). The distinctions created by courts "concerned the presence of a person or thing and the type of notice required" to sustain that type of action. RESTATEMENT (SECOND) OF JUDGMENTS § 5 (AM. LAW INST. 1982). In personam actions required that the court have jurisdiction over, and notice be given to, a particular person. *See id.* In rem actions, by contrast, would impose legal liability only upon the physically present property which was the subject of the lawsuit. *Id.* Notice was given for this type of action when property was seized. *See id.* Notice was formerly, therefore, a facet of personal jurisdiction. *See id.* With the various types of actions subsumed into the same set of requirements, these categories are effectively eliminated in personal jurisdiction analysis, *Shaffer v. Heitner*, 433 U.S. 186, 212 n.39 (1977), and service of process analysis, *see Mullane,* 339 U.S. at 312–13.

24. *See Pennoyer*, 95 U.S. at 733–34.
25. *Mullane*, 339 U.S. at 312.
26. *See id.* at 312–13.
27. *Id.* at 314. For a general history of *Mullane* as well as the statute that the Supreme Court overturned, see John Leubsdorf, *Unmasking* Mullane*: Due Process, Common Trust Funds, and the Class Action Wars*, 66 HASTINGS L.J. 1693, 1694 (2015).
28. *Mullane*, 339 U.S. at 307.
29. *Id.* at 307–08.
30. *Id.* at 308–09.

each individual owner to determine how much each investor should gain from the investment.[31]

Central Hanover Bank and Trust established a common fund in 1946.[32] The following year, it petitioned the New York courts for settlement.[33] One hundred thirteen small trusts were to be added to the common pool, with total investment dollars valued at approximately three million.[34] The Court noted that the record was unclear as to how many individual beneficiaries there were and where those beneficiaries resided.[35]

Notice to the beneficiaries of the petition was provided in compliance with the statute;[36] the banking law required that notice be made to beneficiaries by publishing "the name and address of the trust company, the name and date of establishment of the common trust fund, and a list of all participating estates, trusts or funds" in a newspaper once a week for four weeks.[37] In addition to the statutory demands, Central Hanover Bank mailed notices to the beneficiaries for which it readily had names and addresses.[38] Mullane objected to the service of process as insufficient under the Fourteenth Amendment.[39] The New York Surrogate Court presiding over the matter overruled the objection.[40] On appeal, the Appellate Division and the Court of Appeals affirmed in turn.[41]

Mullane argued to the Supreme Court that, under the doctrines of *Pennoyer v. Neff*,[42] the trial court lacked jurisdiction.[43] No property

---

31. *Id.* at 309.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 309–10.
38. *Id.* at 310.
39. *Id.* at 310–11. Mullane was appointed by the New York Surrogate Court to represent all persons known and unknown who had an interest in the income of the common trust fund. *Id.* at 310. Mullane was joined by James Vaughan, who represented those who had an interest in the principle. *Id.*
40. *Id.* at 311.
41. *Id.*
42. *Pennoyer v. Neff*, 95 U.S. 714, 720 (1878), held that service of process for in rem proceedings where the property is owned by a non-resident is only sufficient where the non-resident owner is given personal service. In that case, the failure to provide personal service deprived the state court jurisdiction over the proceeding. *Id.*
43. *Mullane*, 339 U.S. at 311–12. It was clear some of the beneficiaries were not residents of New York. *Id.* at 309.

was under contest in the settlement of the common trust;[44] the proceeding would have disposed of the beneficiaries' right to sue the trustee of the common fund for negligence or breach of trust.[45] Without actual property under contest, the case would be categorized as an in personam proceeding, requiring the parties to have been notified via personal service.[46] The Court, however, determined that "the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally . . . ."[47]

Instead of relying on these unstable and inconsistent rules, the Court stated that constitutional notice requirements must meet a balance between two values: the interest of the state in resolving fiduciary issues and the interest of the individual as defined under the Fourteenth Amendment.[48] The Court held that because the foundation of due process rights are in the right to be heard, notice is necessarily an element of due process, as it allows a person to "choose for himself whether to appear or default, acquiesce or contest."[49] The Court undertook the task of building an effective test to determine whether service was constitutionally sufficient.[50]

The Supreme Court determined that for service of process to comport with the Fourteenth Amendment, the method of notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an

---

44. *Id.* at 313.

45. *Id.* at 311.

46. *See Pennoyer*, 95 U.S. at 727.

47. *Mullane*, 339 U.S. at 312.

48. > But the vital interest of the State . . . can be served only if interests or claims of individuals who are outside of the State can somehow be determined. A construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified. Against this interest of the State we must balance the individual interest sought to be protected . . . . "The fundamental requisite of due process of law is the opportunity to be heard." This right to be heard has little reality or worth unless one is informed that the matter is pending . . . .
>
> *Id.* at 313–14 (citations omitted).

49. *Id.* at 314.

50. *Id.* ("The Court has not committed itself to any formula achieving a balance between these interests . . . ."); *see also* Jo-Leo W. Carney-Waterton, Note, *The Postman Must Always Ring Twice: When Preliminary Attempts at Notice Are Unsuccessful, Is the State Obligated to Take Additional Reasonable Steps to Ensure That a Person Receives Adequate Notice?*, 34 S.U. L. REV. 65, 79 (2007) (describing *Mullane* as "a seminal, if not watershed, case in the historical succession of cases on the issue of service").

opportunity to present their objections."[51] The analysis came in two parts. First, the notice must reasonably convey the information necessary for the defendant to respond.[52] Second, the notice must be received in such time as to give the defendant time to respond.[53] And with that, the old demarcations between proceeding types and notice requirements were gone.[54] This test remains the test used today.[55]

Ultimately, the Court held that notice was sufficient regarding the beneficiaries who could not be found with reasonable diligence.[56] Because contact information for those individuals could not be found, it was reasonable under the circumstances that publication would be the most effective method to convey the information about the settlement proceeding.[57] For those beneficiaries for whom Hanover Central did have contact information, however, it was determined that service was not sufficient.[58] The known beneficiaries could have been contacted by mail to alert them of the settlement of the trusts, just as they had been notified a few years earlier to alert them of the creation of the common trust.[59]

The *Mullane* test was meant to be flexible.[60] The Court explicitly considered the practical considerations of a strict test and rejected it for those same reasons.[61] This flexibility is not unlimited, as "a mere gesture is not due process."[62] Yet, a party is only required to provide notice to the extent "that the form chosen is not substantially less likely to bring home notice than other of the *feasible and customary*

51. *Mullane*, 339 U.S. at 314.
52. *Id.*; *see also* Brody v. Vill. of Port Chester, 434 F.3d 121, 130 (2d Cir. 2005).
53. *Mullane*, 339 U.S. at 314; *see also* Oneida Indian Nation v. Madison Cty., 665 F.3d 408, 434–35 (2d Cir. 2011).
54. *Mullane*, 339 U.S. at 315 ("The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals." (quoting American Land Co. v. Seiss, 219 U.S. 47, 67 (1911))). *But see* Greene v. Lindsey, 456 U.S. 444, 450–51 (1982).
55. *See* Jones v. Flowers, 547 U.S. 220, 226 (2006).
56. *Mullane*, 339 U.S. at 317.
57. *Id.* at 317–18. The Court explained that only "ordinary standards of diligence" would apply. *Id.* at 317. Even this diligence would be seen through the context "of the character of the proceedings and the nature of the interests . . . involved . . . ." *Id.*
58. *Id.* at 318.
59. *Id.* at 319.
60. *See id.* at 315 ("The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals." (quoting Am. Land Co. v. Zeiss, 219 U.S. 47, 67 (1911))).
61. *Id.* at 314–15.
62. *Id.* at 315.

substitutes."[63] This element of reasonableness allows for various methods of service to find use and to be considered equally with other methods.[64]

D. *Service Through the Years Since Mullane*

Because the test laid down in *Mullane* was meant to be flexible,[65] development of service jurisprudence was necessary.[66] The contours of what would, or would not, sufficiently effect service would become a point of discussion for the court over a series of cases through the next few decades.[67] The Court created this task for itself by rejecting a stricter test.[68] This element of reasonableness, however, allowed the Court with room enough to accept new methods of service, while protecting the rights of defendants.[69]

1. The Development of Service Jurisprudence

The Court explored the contours of the test it laid down in the years to follow.[70] The *Mullane* test, however, did not face its first true challenge until a string of cases reached the Supreme Court in the early 1980s.[71] Evictions, along with other real estate related financial

---

63. *Id.* (emphasis added). The Court faced a similar issue in *Walker v. Hutchinson City*, 352 U.S. 112, 115–16 (1956).
64. *See Mullane*, 339 U.S. at 317, 319.
65. *See supra* note 60 and accompanying text.
66. *See* Jones v. Flowers, 547 U.S. 220, 223 (2006)
67. *See infra* note 71.
68. *Mullane*, 339 U.S. at 314–15.
69. *See id.*
70. *See* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 13–14, n.13 (1978); Schroeder v. New York, 371 U.S. 208, 211, 212–13 (1962); Walker v. City of Hutchinson, 352 U.S. 112, 115–16, 116 n.5 (1956). The Court in *Walker* rejected notice by publication for condemnation proceedings. 352 U.S. at 117. *Schroeder*, relying on *Walker* and *City of New York v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 293, 296 (1952), rejected the use of a town paper and signs posted around town (but not on the property in question) to provide notice to a landowner during proceedings to divert a river when the landowner's name and address could have easily been ascertained from town records. 371 U.S. at 211. Finally, in *Craft*, the court entered into a lengthy discussion of due process to determine that the "final notice" mailed to the Crafts was sufficient to alert them that the gas and electricity supplies would be terminated, but not that the Crafts had the opportunity to object to the billing. 436 U.S. at 13. Therefore, the Crafts' rights in this regard were not foreclosed. *Id.*
71. *See* Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 795–96 (1983); Greene v. Lindsey, 456 U.S. 444, 447, 448–50 (1982); Logan v. Zimmerman Brush Co., 455 U.S. 422, 428–29 (1982); Texaco, Inc. v. Short, 454 U.S. 516, 517 (1982). *Greene*

issues, pressed the Court to explore the deeper meaning of the *Mullane* test.[72]

In *Greene v. Lindsey*, the Court was faced with the eviction of various inhabitants of apartments operated by the Housing Authority of Louisville, Kentucky.[73] The Housing Authority began detainer actions for repossession in 1975.[74] If the defendant could not be found by the local police to effect personal service, state law directed the police to leave a copy of the notice with someone in the residence or post a copy "in a conspicuous place on the premises."[75] The evicted tenants alleged never to have seen the postings or even have learned of the eviction until a default judgment had already been entered against them.[76]

The district court dismissed Lindsey's case on cross-motions for summary judgment because of a Sixth Circuit Court of Appeals case, which predated the *Mullane* test.[77] On review, the Court of Appeals reversed based on *Mullane*.[78] Greene argued that because the action sits under the in rem category, notice by public posting is adequate under *Pennoyer*.[79] The Supreme Court determined this argument to be inapposite and agreed with the Court of Appeals.[80]

The Supreme Court again rejected the notion that questions of service ought to be determined by the property or person categorization of the case.[81] While the Court noted that posting notice of eviction would generally be enough to satisfy due process,[82] this particular reliance on posting notices did not satisfy constitutional requirements.[83] The Court stated that these *particular process servers* were well aware that such notices were often

---

and *Adams* hold the most regard of the four, and therefore, only those two cases will be discussed here.

72. *See* Jones v. Flowers, 547 U.S. 220, 223 (2006) (tax sale); *Adams*, 462 U.S. at 792–93 (tax sale); *Greene*, 456 U.S. at 447 (eviction).
73. *Greene*, 456 U.S. at 446.
74. *Id.*
75. *Id.* (quoting KY. REV. STAT. § 454.030 (1975)).
76. *Id.* at 446–47.
77. *Id.* at 447 (citing Weber v. Grand Lodge of Ky., F. & A. M., 169 F. 522 (6th Cir. 1909)).
78. *Id.* at 448–49.
79. *See id.* at 450; *see also supra* note 23 and accompanying text.
80. *Greene*, 456 U.S. at 456.
81. *Id.* at 450 (citing Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 312 (1950)).
82. *Id.* at 452.
83. *Id.* at 453.

removed by other people in the common areas in which the notices were posted.[84]

The Court combined this information with other factors to grade the reasonableness test outlined in *Mullane*.[85] A more reasonably calculated method to give notice would have been to send the notice by mail.[86] Mailing the notice would be "efficient and inexpensive" and was a method "upon which prudent men will ordinarily rely in the conduct of important affairs."[87] Ultimately, the Court held that, "where an inexpensive and efficient mechanism . . . is available to enhance the reliability of an otherwise unreliable notice procedure,"

---

84. *Id.* at 453–54. Evidence in the record demonstrated that the individuals charged with posting notice had personal knowledge that children from the apartment complex often removed similar postings at the location of the eviction. *Id.* Footnote 7 of the opinion includes the following exchange during a deposition:

> The children-we had problems with children. They would take [the writs] off. They never took them off when we were present, but we, you know, assume-the Housing Authority told us that they would take them off, so we always put them up high.
>
> Q. Did you ever see kids pulling them off?
>
> A. Yes.
>
> Q. You did?
>
> A. Uh-huh.
>
> Q. Did you see many?
>
> A. No, not too many. I did see it in one place over there.
>
> Q. Where was that?
>
> A. Village West.
>
> Q. How many times did you see that happen?
>
> A. Well, probably a couple of times.
>
> Q. . . . Were you aware of there being any problem with children ripping the Writs off?
>
> A. Oh, we had plenty of trouble.
>
> Q. You had trouble?
>
> A. With kids, yeah. Yeah.
>
> Q. Did you ever see kids ripping them off?
>
> A. Yeah. I have seen them take them off of the door and I would go back and tell them to put it back. They don't know. They didn't know. They just-
>
> Q. Were there any particular places where you saw kids ripping them off the doors?
>
> A. Well most of that was in Village West.

Id. at 453 n.7 (citations omitted).

85. *Id.* at 454 (citing *Mullane*, 339 U.S. at 315).

86. *See id.* at 455–56.

87. *Id.* at 455 (quoting *Mullane*, 339 U.S. at 319).

continued reliance upon the ineffective means does not meet the *Mullane* standard for sufficiency of notice.[88]

About a year later, the Supreme Court once again set out to explore the due process requirements of service of process.[89] In *Mennonite Board of Missions v. Adams*, a tax sale gave rise to the issue of service.[90] The Mennonite Board of Missions (MBM) sold a parcel of land to Alfred Jean Moore on mortgage.[91] According to the terms of the agreement, Moore was to pay the taxes on the land;[92] she failed to do so and the property went to sale.[93] The county initiated the procedure for the tax sale, posted and published notice, and sent notice via certified mail to Moore.[94] Without a response from Moore, the property was sold to Adams at an auction.[95] MBM, although the owner of the property, was never notified of the impending tax sale.[96]

When MBM finally found out about the tax sale, the redemption period had already run, leaving litigation as the only option to regain the property.[97] When MBM contended that notice was not sufficient, the trial court rejected the argument and upheld the state statute requiring the outlined notice process.[98] Indiana's highest court affirmed that decision, but the Supreme Court reversed.[99]

The Court again rejected the use of service by publication because a more reliable means of communication was available.[100] The state's failure to utilize an effective, yet reasonable, means of notice

88. *Id.* at 455–56 (citing *Mullane*, 339 U.S. at 319).
89. *See* Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 794–95 (1983).
90. *Id.* at 795.
91. *Id.* at 792.
92. *Id.*
93. *Id.* at 794.
94. *See id.* Moore was the mortgagee and therefore, not the actual owner of the property. *Id. at* 792. Note, however, that this case, decided only a year after *Greene*, incorporated the method of service expressly held in *Greene* to be an acceptable alternative to posting.
95. *Id.* at 794.
96. *Id.*
97. *Id.* at 794–95.
98. *Id.* at 795.
99. *Id.*
100. *Id.* at 799. The Court did not address the use of certified mail for notice because the letter would have only given Moore the required notice. Because MBM was the owner of the property, it was entitled to the notice. *See id.* at 792. Moore was a mere mortgagee. *Id.* The certified mail would have no effect on service requirements for MBM. Ergo, only the publication remained for the Court to consider. *See id.* at 793 (illustrating that certified mail should have been sent to the owner of the property, not the resident). The mailed notice was sent to Moore. *Id.* at 794.

invoked the ire of the Court: "[I]t does not follow that the [s]tate may forego even the relatively modest administrative burden of providing notice by mail to parties who are particularly resourceful."[101] Furthermore, "a State must provide 'notice reasonably calculated, under all circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections.'"[102] The county's use of publication, when direct mail to the owner of the property is still "an inexpensive and efficient mechanism,"[103] led the Court to hold that the local government did not demonstrate the intended desire to actually inform the party of the proceedings.[104]

The Court also rejected the contention that a party must take steps to "safeguard its interests."[105] The Court stated that even a sophisticated party, such as MBM, is not required to go out of their own way to protect their property interests;[106] rather, it is the responsibility of the party providing notice to do so in accordance with due process requirements.[107] The county's easy access to tax records—and hence MBM's mailing address—made it clear to the Court that the "minimum constitutional precondition" of notice was not satisfied.[108]

Adams, however, went beyond the mere affirmance of the *Mullane* rule.[109] The Court in *Adams* clarified that the accuracy of the delivery of service and intent of the delivering party are factors to be considered in the analysis.[110] The reasonableness of the method of

101. *Id.* at 799–800.

102. *Id.* at 795 (quoting Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950)). Even though the parcel was occupied by Moore, her use of the land was based upon a mortgage. Under Indiana law at the time, the mortgagee still retained a property interest in the parcel. *Id.* at 798. Therefore, due process protections are triggered, including service of process requirements. *See Mullane*, 339 U.S. at 314.

103. *Adams*, 462 U.S. at 799 (quoting Greene v. Lindsey, 456 U.S. 444, 455 (1982)).

104. *Id*. (citing *Mullane*, 339 U.S. at 315).

105. *Id.*

106. *Id.*

107. *Id.* at 799–800.

108. *Id.* at 800.

109. *Compare id.* at 799–800 (expanding the *Mullane* analysis by discussing the accuracy of and the intent behind service of process), *with Mullane*, 339 U.S. at 314–15 (establishing a flexible service of process test which requires the method of service to be reasonable).

110. *Adams*, 462 U.S. at 799–800 (emphasizing that particular methods of service do not demonstrate a desire to provide notice to a party and that accuracy of service is essential despite the sophistication of the party).

service, therefore, was to include both objective factors[111] and subjective factors.[112]

The passing of years has not relegated the *Mullane* test to collect dust on law library shelves.[113] A situation of divorce allowed the Supreme Court the chance to halt the extension of the *Mullane* test in 2006.[114] The plaintiff, Jones, moved out of his Arkansas home and into an apartment in Little Rock.[115] Nevertheless, he continued to pay the mortgage for the home, and the mortgagor would in turn pay the property taxes for the home every year.[116] After thirty years the mortgage was paid off, leaving the property taxes to the responsibility of the owner.[117] Three years later, the state sent a letter to the home to notify Jones that the property taxes for the home were delinquent.[118] The letter would have informed Jones that the property would be sold if the taxes remained unpaid for two more years;[119] unfortunately, no one was present at the home to receive the letter and it was returned as "unclaimed."[120] Shortly before the date of the sale, the state published a notice of the public sale in a local newspaper.[121] Flowers negotiated a purchase for barely a quarter of the market value of the house.[122] The state sent another notice to the home in an attempt to contact Jones, but the letter was again returned unclaimed.[123]

Jones filed suit for the state's failure to provide notice and deprivation of property without due process of law.[124] On cross-motions for summary judgment, the trial court concluded that the state's actions were proper, denying Jones's motion and granting Flowers's motion.[125] The Arkansas Supreme Court affirmed the trial court's judgment that the state tax sale statute complied with due

111. *See id.* at 799.
112. *See id.*; Greene v. Lindsey, 456 U.S. 444, 453–54 (1982).
113. *See* Jones v. Flowers, 547 U.S. 220, 238 (2006).
114. *Id.* at 238.
115. *Id.* at 223.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 223–24.
121. *Id.* at 224.
122. *Id.* Flowers negotiated for approximately twenty-one thousand dollars. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*

process requirements regarding service.[126] The Supreme Court, however, reversed.[127]

In a "new wrinkle," the Court noted that precedent clearly required state governments to take action beyond what is normally required when it is known that the notice failed to reach the intended recipient.[128] The Court found that since the state's certified letter was returned unclaimed, it would be proper for the Court to inquire "what the State does when a notice letter is returned unclaimed" before determining the reasonability of the notice.[129]

The Court held that the state's lack of further conduct was unreasonable.[130] Prior to the sale of the land, the state learned that its method of notice had *actually* failed.[131] The Court analogized the returned letter to the state officer handing a stack of letters to a postman, see that postman drop the letters down a storm drain, and do nothing.[132] "Failure[,]" wrote Chief Justice Roberts, "to follow up would be unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman."[133] Failure to take additional action demonstrated that the state was not "desirous of actually informing" the defendant Jones.[134]

Just as in *Adams*, the state in *Jones* argued that ignorance of the law is no excuse: the owner of property should know that a tax sale ensues from a failure to pay taxes.[135] Again, the Court rejected this argument because it was the state's burden to serve the opposing party.[136]

The Court further held that there were viable alternatives to the use of certified mail.[137] The use of regular mail would allow the letter "to

126. *Id.* at 225.
127. *Id.* at 239.
128. *Id.* at 227, 230 ("In *Robinson v. Hanrahan*, we held that notice . . . was inadequate when the State knew that the property owner was in prison. . . . In *Covey v. Town of Somers*, we held that notice of foreclosure by mailing, posting, and publication was inadequate when town officials knew that the property owner was incompetent and without a guardian's protection.") (citations omitted).
129. *Id.* at 227, 231.
130. *See id.* at 234–35.
131. *Id.* at 223–24.
132. *Id.* at 229.
133. *Id.*
134. *Id.* at 230.
135. *See id.* at 231–32; Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 799 (1983).
136. *See Jones*, 547 U.S. at 233 (using *Miranda* rights as an example of well-known rights that must still be respected by government actors).
137. *See id.* at 234–35.

be examined at the end of the day" rather than only "retrieved from the post office."[138] The state, however, was not required to check local income tax rolls or other records.[139] Requiring this would place too great a burden with little return, because a certified letter marked "unclaimed" denotes only that no one was home, not that it was the wrong address.[140]

Jones defined how broadly the actual knowledge of a party may be drawn out.[141] The reasonably calculated notice may be reasonably calculated when it was used, but if it is shown that actual notice was not effected, a follow up of some kind is required on risk of failing to demonstrate a desire to effect service.[142]

2. Bringing New Technology into the Fold

Courts generally have to play "catch up" with the application of legal doctrines regarding service due to the ever-changing technological landscape.[143] As discussed above, the Supreme Court readily accepted the use of both regular and certified mail as acceptable methods of service.[144] Generally, the acceptance of other methods of service has been left to lower courts to decide.[145] Federal trial courts accepted the use of telex machines during the Iranian crises of the 1980s to serve businesses whose assets were being attached for suit.[146] Likewise, federal courts have also allowed fax communication when that method was provided by a defendant as the primary method of communication.[147] The defendant in *Broadfoot* was adamant that all communication between him and the plaintiff

138. *Id.* at 235.
139. *Id.* at 236.
140. *Id.*
141. *See id.* at 225.
142. *See id.* at 230.
143. *See, e.g.*, Broadfoot v. Diaz (*In re* Int'l Telemedia Assocs.), 245 B.R. 713, 721 (Bankr. N.D. Ga. 2000). The court allowed service via fax machine decades after the creation of the first commercially available fax machine. *Id.*; *see The History of Fax—from 1843 to Present Day*, FAX AUTHORITY, http://faxauthority.com/fax-history/ (last visited Oct. 31, 2016).
144. *See supra* Section II.D.1.
145. *See generally* New Eng. Merchs. Nat'l Bank v. Iran Power Generation & Transmission Co., 495 F. Supp. 73, 78 (S.D.N.Y. 1980) ("[T]he [Foreign Sovereign Immunities Act] provides that if the other methods of service are unavailable, the court may fashion a mode of service 'consistent with the law of the place where service is to be made.'" (quoting 28 U.S.C. § 1608 (1976))).
146. *Id.* at 81.
147. *Broadfoot*, 245 B.R. at 721.

was to be conducted through fax.[148] In the use of these two technologies, courts were spared from considering a dueling of method reliability because telex or fax were "the only means of communication" available between the two parties.[149] Because of the unique circumstances and limited availability of alternative methods of communication, and thus methods by which to serve process, both courts held service to be sufficient.[150]

Electronic mail (email) was incorporated in *Rio Properties v. Rio International Interlink*, a groundbreaking case decided by the Ninth Circuit Court of Appeals in 2002.[151] That court allowed service via email, a holding noted by the court to be "upon untrodden ground."[152] No prior decision by a federal appeals court had ever addressed service of process by email.[153] The Ninth Circuit's analysis of the facts relied heavily on the defendant's structuring of its business "such that it could be contacted *only* via its email address."[154] Therefore, the courts were again spared from grappling with dueling service options.[155] The Ninth Circuit recognized that email had its limitations: proof of receipt problems, compatibility issues, and "[i]mprecise imaging technology" making official documents difficult to read.[156] Nevertheless, the appeals court trusted in a district court's ability to "balance the limitations of email service against its benefits in any particular case," and declared the service sufficient.[157]

Some courts have gone to the extreme to provide service to a defendant.[158] In July 2015, the Domestic Violence Unit of the D.C. Superior Court engineered an interesting solution to a defendant attempting to evade service.[159] The defendant had managed to evade

148. *See id.* at 718 ("From now on, you may contact me by FAX . . . ." (alteration in original) (quoting the Pl.'s Aff. ¶ 11)).
149. *Id.* at 718–20; *see New Eng. Merchs. Nat'l Bank*, 495 F. Supp. at 74.
150. *See New Eng. Merchs. Nat'l Bank*, 495 F. Supp. at 74; *Broadfoot*, 245 B.R. at 719.
151. 284 F.3d 1007 (9th Cir. 2002).
152. *Id.* at 1017.
153. *Id.*
154. *Id.* at 1018.
155. *See id.*
156. *Id.*
157. *Id.* at 1018–19.
158. *See infra* notes 159–62 and accompanying text.
159. *See* Anonymous v. Anonymous, Case No. 2015-CPO 002, at *1–3 (D.C. Super. Ct. July 29, 2015) (order granting temporary protective order), https://s3.amazonaws.com/lawgical/assets/data/2730/original.pdf, *noted in* Kimberly Faber, *Defendant Served Temporary Protective Order via Text Message*, SERVE NOW (July 29, 2015), http://www.serve-now.com/articles/2112/defendant-served-temporary-protective-order-via-text-message.

more than twelve service attempts of varying methods.[160] The judge determined the numerous attempts to be demonstrative of the plaintiff's diligence.[161] The court decided the best, and perhaps only, way to effect service via a means reasonably calculated to provide notice was to send the notice via a text message.[162]

Social media has become the next layer of technology to be used to effect service of process.[163] Facebook,[164] Twitter,[165] LinkedIn,[166] and other websites all sit within this realm of digital interaction. Facebook boasts 1.71 billion monthly active users who can interact with other users through pictures, video, text, documents, webpage hyperlinks, etc.[167] Facebook also offers flexibility in that it can be connected to various platforms or even other social media services.[168] Twitter users are more limited in their communication as messages are restricted to one hundred forty characters or less.[169] Even still, the so-called "microblogging service" nets more than three hundred million users.[170] LinkedIn, while very similar to other services, garnered more than four hundred million users due to its different

160. *Id.* at *2–3.
161. *Id.* at *4–5.
162. *See id.* at *5–6.
163. *See* Lisa McManus, *Service of Process Through Facebook*, LEXISNEXIS (Nov. 9, 2011), https://www.lexisnexis.com/legalnewsroom/lexis-hub/b/legal-technology-and-social-media/archive/2011/11/09/service-of-process-through-facebook.aspx?Redirected=true; *Service of Process via Social Media Becoming a Reality?*, BLOOMBERG BNA (Mar. 18, 2013), http://bna.com/service-process-via-b17179872848/. Social media is defined as any form of electronic communication through which people interact with one another through various communications and communities. *See Social Media*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/social%20media (last visited Oct. 31, 2016).
164. FACEBOOK, http://www.facebook.com (last visited Oct. 31, 2016).
165. TWITTER, http://www.twitter.com (last visited Oct. 31, 2016).
166. LINKEDIN, http://www.linkedin.com (last visited Oct. 31, 2016).
167. *Number of Monthly Active Facebook Users Worldwide as of 2nd Quarter 2016 (in Millions)*, STATISTA, http://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/ (last visited Oct. 31, 2016).
168. *See id.*
169. *Number of Monthly Active Twitter Users Worldwide from 1st Quarter 2010 to 2nd Quarter 2016 (in Millions)*, STATISTA, http://www.statista.com/statistics/282087/number-of-monthly-active-twitter-users/ (last visited Oct. 31, 2016).
170. *Id.*

purpose.[171] LinkedIn acts as a way to create professional relationships, search for jobs, or replace hard copy résumés.[172]

III. CURRENT TREATMENT OF SERVICE VIA SOCIAL MEDIA

A. *International Treatment*

Nations around the world have been dealing with the issue of service via social media for years.[173] The United Kingdom, Australia, New Zealand, and Canada have all approved service via social media in certain cases.[174] Of note, the Australian decision allowed service of a default judgment via Facebook where the biographical information of an account matched prior known biographical information of the defendants.[175] Each of the decisions held concerns for accuracy, but every time the court allowed service via social media because of the parties' inability to contact the defendant.[176]

B. *Domestic Treatment*

Courts in the United States have been lukewarm to the idea of effecting service via social media.[177] They have not, however, entirely rejected the idea.[178] In *Baidoo v. Blood-Dzraku*, a New York trial court examined the possibility of service via Facebook.[179] The plaintiff had attempted to serve her husband with a divorce summons, but he refused to meet and his last known address had been empty for

171. *See Number of Monthly Active LinkedIn Members from 1st Quarter 2009 to 2nd Quarter in 2016 (in Millions)*, STATISTA, http://www.statista.com/statistics/274050/quarterly-numbers-of-linkedin-members/ (last visited Oct. 31, 2016).

172. *Id.*

173. *See Court Order Served over Twitter*, BBC NEWS, http://news.bbc.co.uk/2/hi/technology/8285954.stm (last updated Oct. 1, 2009, 17:44 GMT).

174. Michael C. Lynch, *You've Been 'Poked'! 'PCCare247' and Service of Process by Social Media*, 249 N.Y. L.J. (2013), http://www.kelleydrye.com/publications/articles/1728/_res/id=Files/index=0/1728.pdf.

175. *Id.*

176. *See* Pedram Tabibi, *Facebook Notification – You've Been Served: Why Social Media Service of Process May Soon Be a Virtual Reality*, 7 PHX. L. REV. 37, 40–41 (2013).

177. *See* Andrews v. McCall (*In re* Adoption of K.P.M.A.), 341 P.3d 38, 50–51 (Okla. 2014); Fortunato v. Chase Bank USA, N.A., No. 11 Civ. 6608(JFK), 2012 WL 2086950, at *2–3 (S.D.N.Y. June 7, 2012).

178. *See* FTC. v. PCCare247 Inc., 12 Civ. 7189(PAE), 2013 WL 841037, at *5–6 (S.D.N.Y. Mar. 7, 2013); Baidoo v. Blood–Dzraku, 5 N.Y.S.3d 709, 713–14, 716 (N.Y. Sup. Ct. 2015).

179. 5 N.Y.S.3d at 713–14, 716.

years.[180] With the defendant evading service and no accurate address to send a letter to, the court had few other choices.[181] The court, citing New York rules that allow other methods of service provided that the method can be shown to satisfy the *Mullane* test,[182] allowed the plaintiff to follow through with her proposed method of service—sending the summons to the defendant's Facebook account via a private message.[183] Just as *Rio Properties* noted that email service was "untrodden ground,"[184] the court in *Baidoo* stated that allowing social media service would be "beyond the safe harbor of statutory prescription."[185] Even so, the trial judge found that, because the plaintiff was able to show with reasonable certainty that the account was used by the defendant and that publication was less likely to reach the defendant, the use of Facebook to provide service passed constitutional due process requirements.[186]

In *FTC v. PCCare247*, the federal district court wrestled with whether service by both email and social media would be sufficient for a foreign defendant.[187] The defendants were alleged to have run a fraudulent business charging Americans for "fixing" problems with their computers.[188] Even though a different Federal Rule of Civil Procedure applies to international defendants,[189] both analyses must look to whether due process is satisfied by the method of service.[190] Service by Facebook message alone would bring a "substantial question" for consideration, particularly because of the ability to fake profile information.[191] The plaintiff's use, however, of email and significant facts which demonstrated that the targeted account would be the correct one, assuaged the court's fears.[192] Notably, the court stated that "courts must remain open to considering requests to

180. *Id.* at 712.
181. *See id.* at 713.
182. *Id.* at 712.
183. *Id.* at 715.
184. Rio Props. v. Rio Int'l Interlink, 284 F.3d 1007, 1017 (9th Cir. 2002).
185. *Baidoo*, 5 N.Y.S.3d at 713.
186. *Id.* at 715–16.
187. *See* FTC v. PCCare247 Inc., 12 Civ. 7189(PAE), 2013 WL 841037, at *2 (S.D.N.Y. Mar. 7, 2013).
188. *Id.*
189. FED. R. CIV. P. 4(f) (rules of service for international defendants); FED. R. CIV. P. 4(e) (rules of service for domestic defendants).
190. *See PCCare247*, 2013 WL 841037, at *2 (quoting SEC v. Anticevic, No. 5 CV 6991 (KMW), 2009 WL 361739, at * 3 (S.D.N.Y. Feb. 13, 2009) (citation omitted)).
191. *Id.* at *5.
192. *Id.* at *5–6.

authorize service via technological means of then-recent vintage."[193] This was especially important to the court because as defendants become more involved in modern technology, it more closely "comports with due process to serve them by those means."[194]

Likewise, the court in *Who'sHere, Inc. v. Orun* dealt with a foreign defendant.[195] The plaintiff alleged that the defendant infringed upon its trademark.[196] The defendant was in contact with the plaintiff, but only through electronic means.[197] The plaintiff asked the court to allow service by both email and social media.[198] This time, however, the court recognized that any of the individual methods of service would likely have been sufficient.[199] The various factual supports, such as cross-references of the name and email from the account with information provided by the defendant, led the court to hold that service via social media was sufficient.[200]

Not all courts have been as open-minded regarding service.[201] In *Fortunato v. Chase Bank*, the court was concerned with the accuracy of the targeted account.[202] The court declared social media service "unorthodox" and remained "skeptical" that delivery of the notice would actually apprise the recipient account of the proceedings against the party.[203] Even though the defendant went through various other attempts to effect service, the court was leery of the defendant's desire to actually provide notice.[204] The court ordered service by publication in local newspapers.[205]

In the only case on point to be opined upon by a jurisdiction's highest court, the Supreme Court of Oklahoma declared that service via social media—Facebook in particular—categorically cannot be sufficient to provide service on par with constitutional requirements.[206] An adoption case, *Andrews*, dealt with a father's

193. *Id.* at *5.
194. *Id.*
195. WhosHere, Inc. v. Orun, No. 1:13-cv-00526-AJT-TRJ, 2014 WL 670817, at *1 (E.D. Va. Feb. 20, 2014).
196. *Id.*
197. *Id.*
198. *Id.* at *2.
199. *Id.* at *4.
200. *Id.* at *4–5.
201. *See* Fortunato v. Chase Bank USA, N.A., No. 11 Civ. 6608(JFK), 2012 WL 2086950, at *1 (S.D.N.Y. June 7, 2012).
202. *Id.* at *2–3.
203. *Id.*
204. *Id.*
205. *Id.* at *3.
206. *See* Andrews v. McCall (*In re* Adoption of K.P.M.A.), 341 P.3d 38, 51 (Okla. 2014).

loss of custody rights.[207] The Oklahoma Supreme Court held that notice via Facebook does not comport with constitutional requirements.[208] Even though the court could have created a narrow holding that there were other more reasonable methods of effecting service,[209] the court decided to boldly state that "[t]his Court is unwilling to declare notice via Facebook alone sufficient to meet the requirements [of the federal and state constitutions] because . . . [i]t is . . . a mere gesture."[210] The court flatly rejected Facebook, and likely all other social media platforms, as a viable means of effecting service.[211]

C. *Future Proposals*

Ultimately, courts around the nation have decided the issue fairly evenly.[212] Because of this disparity of answers, even in similar factual situations, some have called for changes to the way courts view the issue.[213] Legislative enactments could be used to explicitly allow for service by electronic communication.[214] Other advocates state that because electronic communication methods are reliable, traditional service should be dispensed with as "time-consuming, overly expensive, or unsuccessful."[215] The efficiency of electronic communication, combined with modern society's reliance on such communication, often allows it to be a more reasonable method than traditional methods.[216] At the very least, some scholars have noted that courts should use particular sets of factors to determine if a particular use of social media is sufficient.[217] Often included are: (1) the nature of the media platform in relation to the needs of effective service; (2) the existence of corroborative evidence to verify accuracy

207. *Id.* at 40–41.
208. *Id.* at 50 (quoting Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 315 (1950)).
209. The two parents had been in physical contact with one another during the proceeding and were even on speaking terms. *Id.* at 51.
210. *Id.* (first citing Booth v. McKnight, 70 P.3d 855, 862–63 (Okla. 2003); then citing *Mullane*, 339 U.S. at 315).
211. *Id.*
212. *See supra* Section III.B.
213. *See* Tabibi, *supra* note 176, at 39.
214. *See id.* at 52–56.
215. Svetlana Gitman, Comment, *(Dis)Service of Process: The Need to Amend Rule 4 to Comply with Modern Usage of Technology*, 45 J. MARSHALL L. REV. 459, 470 (2012).
216. *See id.* at 472–74.
217. *See* Knapp, *supra* note 1 at 575–76.

in the targeted account; and (3) the existence of evidence that the targeted account is actually used.[218]

IV. THE TEST

A. *Failures of Prior Tests*

The *Mullane* test's flexibility allows it to move with the changing times.[219] The various courts' application of that test is not always as flexible as intended.[220] The use of the three factors outlined above is strongly advocated when a court allows service by social media.[221] These factors alone, however, do not delve deeply enough into an understanding of the discrete particularities of each social media platform.[222] Likewise, flat statements rejecting social media as always failing to comport with constitutional requirements tends to show a lack of understanding of the systems and their ever-increasing use in modern communication.[223] Therefore, more detail is needed and more factors should be considered when examining the individual methods of communication.[224]

B. *New Test*

A new, more detailed test should make it evident as to whether the use of social media can be reasonably calculated to effect service.[225] The test proposed here should take the following factors into consideration. First, are the broader means of communication publicly accessible? Second, is the direct method to be used private to the defendant? Third, is the communication directly targeted to the defendant? Fourth, is there corroborative evidence that the targeted

218. *Id.* at 576.

219. *See supra* note 60 and accompanying text.

220. *Compare* Rio Props. v. Rio Int'l Interlink, 284 F.3d 1007, 1016–17 (9th Cir. 2002) (quoting Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950)) (allowing email as a form of service under the same *Mullane* test), *with* Andrews v. McCall (*In re* Adoption of K.P.M.A.), 341 P.3d 38, 50–51 (Okla. 2014) (first citing Booth v. McKnight, 70 P.3d 855, 862 (Okla. 2003); then citing *Mullane*, 339 U.S. at 314–15) (denying email as a form of service under *Mullane*).

221. *See* Baidoo v. Blood–Dzraku, 5 N.Y.S.3d 709, 714–16 (N.Y. Sup. Ct. 2015).

222. *See Rio Props.*, 284 F.3d at 1018 (calling into question limitations on service of process by email, such as lack of receipt confirmation, limited use of electronic signatures, system compatibility issues, and imprecise imaging technology); *Andrews*, 341 P.3d at 54 (Winchester, J., dissenting) (noting that Facebook has two types of message formats).

223. *See Andrews*, 341 P.3d at 51.

224. *See id.*; *see also Rio Props*., 284 F.3d at 1017–18.

225. *See supra* Section IV.A.

user is the correct one, and further, that the account is active? Fifth, are there terms of service requirements that force users to display their actual identifying information? Sixth and finally, do the broader means and the specific method of communication have the ability to transmit entire documents? These factors, taken together, would give courts a better understanding of whether service by social media can be reasonably calculated to apprise the other party of proceedings against them.[226]

1. Public Means

The means by which notice is given should be public. Just as anyone has access to a person walking in public, the mail, or even a newspaper, notice should only be allowed through electronic means to which anyone has access.[227] This would exclude means such as private forum sites, where joining the forum requires a screener who has the option to accept or deny you.[228] A private forum may exclude anyone it chooses.[229] Rather, a public means would include most major social networks, such as Facebook or Twitter, which require only that the proper information be provided with no other delay or option to deny at the time of registration.[230] Forcing a party to provide notice via public means would protect most individuals' access to justice and keep the goals of service consistent: protecting the due process rights of individuals.[231] Anyone with internet access

226. *Cf.* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314–15 (1950). The old *Mullane* test was "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action . . . ." *Id.* Compare this with the proposed 5-factor test.

227. Knapp, *supra* note 1, at 576.

228. *Compare About Facebook*, FACEBOOK, https://www.facebook.com/facebook/info?tab=page_info (last visited Oct. 31, 2016) (an example of a public website that anyone can access), *with About*, DRUPAL, https://www.drupal.org/about (last visited Oct. 31, 2016) (a private forum with a screening process).

229. *See, e.g.*, *Private Forums and Member-Only Sites*, DRUPAL (Jan. 22, 2007), https://www.drupal.org/node/111576 ("A private forum is one which is only available to registered members, or to only a certain class of users (or 'members').").

230. Registration for either Facebook or Twitter requires only the input of identifying and contact information. *See How Do I Sign Up for Facebook?*, FACEBOOK, https://www.facebook.com/help/188157731232424 (last visited Oct. 31, 2016); *Signing Up with Twitter*, TWITTER, https://support.twitter.com/articles/100990 (last visited Oct. 31, 2016).

231. *See* Knapp, *supra* note 1, at 549–50.

(or even a local library) would have the ability to serve their opponent.[232]

2. Private Method

While the means of serving process should be public, the specific method of contact should be private. Courts have attempted to protect privacy where possible.[233] While anyone has access to the mail, only the intended recipient is allowed to open and read the contents of the letter.[234] This would ensure that only the targeted individual is the most likely to be served.[235] A standard Facebook post, or even a post on someone's page would not be private.[236] Only a post viewable solely by the recipient or a direct message would provide both reasonable notice and actual information to the intended recipient.[237]

3. Direct Communication

In order to ensure that the intended recipient of the communication actually receives the communication, the notice should be targeted directly to the intended user.[238] Because sufficient service requires reasonable efforts to effect service, an indirect communication (such as a tweet) is no better than publication.[239] Indirect communication is

232. Libraries serve a particularly important part of communities where affluence is uncommon. *U.S. Public Libraries Provide Critical Access to Internet Services*, AM. LIBR. ASS'N, http://www.ala.org/research/sites/ala.org.research/files/content/initiatives/plftas/issuesbriefs/connectivitybrief_2009_10_final.pdf (last visited Oct. 31, 2016) ("Nearly all of America's 16,604 public library buildings offer free public access to computers, to the Internet and to trained staff equipped to help . . . .").

233. *See generally* Planned Parenthood v. Casey, 505 U.S. 833, 901 (1992) (upholding a woman's right to privacy); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (recognizing privacy rights in a marriage and holding government interference with that privacy right to be unconstitutional).

234. 18 U.S.C. § 1702 (2012).

235. *See id.*

236. Creating a standard Facebook post merely publishes the content to any number of your social connections on the site. *See* FACEBOOK, http://www.facebook.com (last visited Oct. 31, 2016). Posting directly to another user's "Timeline" will notify them of the publication, but will be viewable by anyone visiting that user's page. *Id.*

237. *See How Do I Send a Private Message to a Page?*, FACEBOOK, https://www.facebook.com/help/142031279233975 (last visited Oct. 31, 2016).

238. *See* Knapp, *supra* note 1, at 576.

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

offered in the hopes that, if the intended recipient does not see the notice, someone who knows the intended recipient will realize that the notice should be passed along.[240] Electronic communication should be directed at the recipient to avoid the various, and well-documented, problems that come along with publication.[241]

4. Corroborating Evidence to Prove Accuracy and Activity

Currently, courts examine the likelihood of a targeted user account being the correct user.[242] That analysis should continue. *Mullane* requires that notice be reasonably likely to apprise the opponent of the suit.[243] For service to be effective, the plaintiff must have some evidence to show that the notice was served on the correct user's account.[244] There may be fifty different men named David Johnson in any given metro locale; the plaintiff must use corroborating indicators to show that the account served belongs to the correct David Johnson.[245] Digital interactions such as events, pictures, or "check-in" locations, coupled with date and time stamps, can be used to show that the intended user owns and operates the account being served.[246]

Furthermore, just as the correct user account should be corroborated, so too should some proof be given to show that the account is actually used.[247] Proof of actual use would safeguard the *Mullane* requirements.[248] This evidence is not difficult to attain from

---

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."). The statement made in *Mullane* holds true today for the public posting of social media content as it did in the mid-twentieth century for newspapers. *See id.*

240. Such intent is a hallmark of failure to provide sufficient notice. *See supra* notes 130–134 and accompanying text.

241. *See Mullane*, 339 U.S. at 315–17.

242. *See* FTC v. PCCare247 Inc., 12 Civ. 7189(PAE), 2013 WL 841037, at *4 (S.D.N.Y. Mar. 7, 2013) ("Service by email alone comports with due process where a plaintiff demonstrates that the email is likely to reach the defendant." (citing Gurung v. Malhotra, 279 F.R.D. 215, 220 (S.D.N.Y. 2011))).

243. *Mullane*, 339 U.S. at 314 (citing Milliken v. Meyer, 311 U.S. 457, 463 (1940); Grannis v. Ordean, 234 U.S. 385, 394 (1914); Priest v. Board of Trs., 232 U.S. 604, 613 (1914); Roller v. Holly, 176 U.S. 398, 404 (1900)).

244. *See* Knapp, *supra* note 1, at 575–76; Wagner & Castillo, *supra* note 6, at 276–77.

245. *See* Knapp, *supra* note 1, at 576.

246. *See id.*

247. *Id.*

248. *Mullane*, 339 U.S. at 314–15 (chosen method of service must "reasonably" inform the defendant of the suit); *see* Wagner & Castillo, *supra* note 6, at 277–78 (following

most social networks.[249] Any post would show activity, but many social media platforms and email services also allow for some form of read receipt.[250] These receipts would allow the sender to confirm that the account was actually in use and provide reasonable assurance that the intended target was served.[251]

5. Terms of Service Requirements

Ensuring accuracy is a must when determining whether service of process was sufficient.[252] Under current law, the primary inquiry for electronic service is to determine whether the account is correct.[253] While that inquiry should continue, courts should not end the analysis there; they should also consider the terms of service for the social media platform being used for service.[254] Some social media platforms have terms of service that require the user to provide accurate identifying information when registering under pain of being banned from using the platform.[255] Others, especially forums created for a small club or group, may be allowed or even encouraged to hide their true identity.[256] Because of the low reliability of the information provided and stored by these platforms, they should be excluded from providing sufficient service of process if it is found that the terms of service for the webpage: (a) do not require correct information or (b) do not have the penalty of expulsion for failing to provide the correct information.[257] This would include nearly all major social media

service via Facebook, the defendant's activity on his or her account would indicate whether or not there was proof of service).

249. *See* Knapp, *supra* note 1, at 575–76; Wagner & Castillo, *supra* note 6, at 277–78.

250. *See* Wagner & Castillo, *supra* note 6, at 277–78; *see also Send Messages*, FACEBOOK, https://www.facebook.com/help/487151698161671/?helpref=hc_fnav (last visited Oct. 31, 2016).

251. *See* Knapp, *supra* note 1, at 575–76 (citing Philip Morris USA Inc. v. Veles Ltd., No. 06 CV 2988(GBD), 2007 WL 725412 (S.D.N.Y. Mar. 12, 2007)); Wagner & Castillo, *supra* note 6, at 277–78.

252. *See* Knapp, *supra* note 1, at 576; Wagner & Castillo, *supra* note 6, at 276–77.

253. Baidoo v. Blood–Dzraku, 5 N.Y.S.3d 709, 714–15 (N.Y. Sup. Ct. 2015).

254. *See* Wagner & Castillo, *supra* note 6, at 276 (acknowledging during a discussion of account authenticity that "Facebook's Statement of Rights and Responsibilities requires users to provide real names and accurate, up-to-date information on their profile" and the Australian Capital Territory Supreme Court accepted that "information on the defendant's Facebook profile matched birth dates, lists of friends, and email addresses provided by defendant . . . .").

255. *See id.* Even though there is little to stop someone from using a fake identity, any encouragement to aid societal decisions is helpful.

256. *See* Michael E. Lackey, Jr. & Joseph P. Minta, *The Ethics of Disguised Identity in Social Media*, 24 ALB. L.J. SCI. & TECH. 447, 457–59 (2014).

257. *See id.*

platforms and provide some assurance that the information used to determine whether the account is the correct one is accurate.[258]

6. Ability to Transmit the Entire Document

Every examination into sufficiency of process must examine the contents of the alleged notice.[259] An examination into service via social media is no different.[260] The court should examine whether the method of contact allows the sender to provide documentation, which would prove to the reader that the information is true.[261] One of the problems with electronic service is its believability.[262] If a Facebook user looks to his or her account and sees a direct message that states: "You are hereby notified that your presence in X Court will be required on Y Date," the user is likely to be suspicious as to its authenticity.[263] If, however, that same user were to receive a message from someone he or she knows and that message had official documents attached with the same information and the seal of the court and/or the signature of the clerk, that message would be more likely to be believed.[264]

This requirement would somewhat limit the technology capable of being used to provide sufficient service.[265] Not every platform allows a user to send a scanned or photographed copy of a document to another user.[266] Nevertheless, this requirement would allow a

258. *See id.* (discussing social media sites which do not require the use of true identities and those which purposefully provide anonymity); *see also* Wagner & Castillo, *supra* note 6, at 276–77.

259. *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314–15 (1950) (quoting Am. Land Co. v. Zeiss, 219 U.S. 47, 67 (1911)).

260. *See id.* (citing Milliken v. Meyer, 311 U.S. 457, 463 (1940); Grannis v. Ordean, 234 U.S. 385, 394 (1914); Priest v. Board of Trs., 232 U.S. 604, 613 (1914); Roller v. Holly, 176 U.S. 398, 404 (1900)); Knapp *supra* note 1, at 563.

261. *See Mullane*, 339 U.S. 306, 314; Knapp, *supra* note 1, at 563, 576.

262. So-called "spam" emails have created a culture where anything claiming to be "official" is subject to scrutiny by the reader. *See* Arik Hesseldahl, *Why the Spam Keeps Coming*, FORBES (Nov. 19, 2004, 10:00 AM), http://www.forbes.com/2004/11/19/cx_ah_1119tentech.html. By attaching a copy of the actual official document, the reader would be far more likely to believe the contents. *See* Knapp, *supra* note 1, at 576.

263. *See* Hesseldahl, *supra* note 262.

264. *See id.*; Knapp, *supra* note 1, at 576.

265. Knapp, *supra* note 1, at 576.

266. Twitter does not support full documentation, forcing users to rely on third-party services to do so. Jason Kincaid, *TwitDoc: Proving that Every File Format Will Eventually Be Shareable over Twitter*, TECHCRUNCH (May 8, 2009), https://techcrunch.com/2009/05/08/twitdoc-proving-that-every-file-format-will-

plaintiff to send accurate and official information to the targeted user with a much higher probability that the receiving user would believe the information to be accurate.[267]

7. Proof of Actual Receipt

The final note, though not a factor, is, in reality, a sufficiency of evidence analysis. The court should examine whether the method of contact within the social media platform includes some indication of a proof of receipt.[268] For example, a direct message to a Facebook user shows when the user viewed it, even if that person does not reply to the message.[269] Not all platforms, however, currently display when another person reads your message (e.g., Twitter being one of these).[270] This requirement should act as a method of weeding out weak evidence that a user has had the opportunity to see the notice.[271] If there is little or no activity on the account and there is no way to tell if the message has been received, such information tends to show a lack of notice.[272] Conversely, if there is either little activity but a read receipt or much activity and no read receipt, the court should slide the scale in the direction of allowing service.[273]

---

eventually-be-shareable-over-twitter/; *see, e.g.*, TWITDOC, http://twitdoc.com/ (last visited Oct. 31, 2016). Because of this, service via Twitter would be unlikely to comport with the test propounded here. Decisions like *St. Francis Assisi v. Kuwait Fin. House*, No. 3:16-CV-3240-LB, 2016 U.S. Dist. LEXIS 136152 (N.D. Cal. Sept. 30, 2016), though dealing with an international defendant, would likely be reversed, or at least require a deeper analysis than was offered.

267. *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950) (citing Milliken v. Meyer, 311 U.S. 457, 463 (1940); Grannis v. Ordean, 234 U.S. 385, 394 (1914); Priest v. Board of Trs., 232 U.S. 604, 613 (1914); Roller v. Holly, 176 U.S. 398, 404 (1900)); Knapp *supra* note 1, at 563, 576.

268. *See* Wagner & Castillo, *supra* note 6, at 277–78.

269. *See Help Center*, FACEBOOK, http://www.facebook.com/help/ (last visited Oct. 31, 2016).

270. *See* David Nield, *Can You See if a DM Has Been Read on Twitter?*, TECH IN OUR EVERYDAY LIFE, http://techin.oureverydaylife.com/can-see-dm-read-twitter-2123.html (last visited Oct. 31, 2016).

271. *See* Wagner & Castillo, *supra* note 6, at 278 ("[C]ourts must order the alternative notice most reasonably calculated to provide notice . . . .").

272. *Cf. id.* at 277–78 (discussing how posting on one's Facebook wall tends to provide notice).

273. *See id.* (discussing that posting on a Facebook wall is an example of "alternative service" that "present[s] an increasingly high probability of providing notice in today's tech-driven society"); *see also* Knapp, *supra* note 1, at 575–76 (quoting Philip Morris USA Inc. v. Veles Ltd., No. 06 CV 2988(GBD), 2007 WL 725412, at *2 (S.D.N.Y. Mar. 12, 2007)).

C. *Comparative Improvements*

If this test had been used by the courts in *Fortunato* and *Andrews*, the reasoning of those two decisions, if not the holding themselves, would likely have been different.[274] In *Fortunato*, the plaintiff failed to place any facts before the court to show whether the targeted user was the correct one.[275] The court's general skepticism was born out in its holding,[276] but if this new test had been considered the court would be forced to recognize that while this particular instance of service may have lacked sufficient facts and evidence, the practice of providing notice via social media can be constitutionally sufficient.[277]

Likewise, the Supreme Court of Oklahoma's broad holding in *Andrews* would have been significantly narrower, if not flipped. The court relied on the possibility that no notification would pass to the actual user.[278] This fact, however, excluded any analysis as to whether the account was actually used or if the plaintiff attained a read receipt.[279] Such an analysis may have forced the court to further examine the workings of communication by social media rather than flatly reject it.

V. CONCLUSION

Many courts' quick dismissal of social media service because of the "unorthodoxy" of new methods will push courts into further inefficiencies.[280] The movement of both state and federal courts to digital filing systems has demonstrated how efficient electronic methods may be.[281] The next step in the litigation process to go

274. Fortunato v. Chase Bank USA, N.A., No. 11 Civ. 6608(JFK), 2012 WL 2086950, at *3 (S.D.N.Y. June 7, 2012) (denying Defendant's application to serve third-party complaint by email, Facebook, and delivery to Plaintiff, but granting application for alternate service by publication); Andrews v. McCall (*In re* Adoption of K.P.M.A.), 341 P.3d 38, 50–51 (Okla. 2014) (holding that a message sent by mother to putative father via a social networking website did not provide putative father with notice (first citing Booth v. McKnight, 70 P.3d 855; then citing Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 315 (1950))).

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

276. *Id.* at *2–3.

277. *See* Baidoo v. Blood–Dzraku, 5 N.Y.S.3d 709, 715–16 (N.Y. Sup. Ct. 2015).

278. *See Andrews*, 341 P.3d at 51 (first citing *Booth*, 70 P.3d at 865; then citing *Mullane*, 339 U.S. at 315).

279. *See id.*

280. *See Fortunato*, 2012 WL 2086950, at *2.

281. *See* Knapp, *supra* note 1, at 562.

digital should be service. This is born out in the progression of technological inclusion in service jurisprudence.[282]

This new test may not create a universal method of determining service sufficiency. Its use in a court's analysis, however, would force the court to interact with the digital world and manipulate digital communication methods within the existing realm of service jurisprudence.[283] That manipulation turns into wider use of digital communication; the use turns into stronger jurisprudence and a better understanding of the due process rights belonging to citizens of the United States.

282. *See supra* Part II.
283. *See supra* Part IV.