

FRIENDING DUE PROCESS: FACEBOOK AS A FAIR METHOD OF ALTERNATIVE SERVICE

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“No longer do we live in a world where communications are conducted solely by mail carried by fast sailing clipper . . . ships.”¹

Facebook revolutionized interpersonal communication. From its humble beginning in a Harvard dorm room, it quickly emerged as the world’s most visited website.² Today, this same technology holds the potential to transform service of process.³ Imagine seeing the following document posted to the wall of your Facebook page:

NOTICE TO THE DEFENDANT: In the name of the people of the State you are notified:

1. You are being sued.
2. YOU HAVE 21 DAYS after receiving this summons to file a written answer with the court and serve a copy on the other party or take other lawful action with the court (28 days if you were served by mail or you were served outside this state).
3. If you do not answer or take other action within the time allowed, judgment may be entered against you for the relief demanded in the complaint....

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1. *New England Merchs. Nat’l Bank v. Iran Power Generation & Transmission Co.*, 495 F. Supp. 73, 81 (S.D.N.Y. 1980).

2. Britney Fitzgerald, *Most Popular Sites 2012: Alexa Ranks The 500 Most-Visited Websites*, THE HUFFINGTON POST (Aug. 10, 2012, 11:30 AM), http://www.huffingtonpost.com/2012/08/09/most-popular-sites-2012-alexa_n_1761365.html#slide=1339003.

3. Abigail S. Crouse & Michael C. Flom, *Social Media for Lawyers*, 67 BENCH & B. MINN., Nov. 2010, at 16, 16 (changing the way attorneys and non-attorneys communicate); Julianne Pepitone, *Facebook Traffic Tops Google for the Week*, CNN MONEY, (Mar. 16, 2010, 2:13 PM), http://money.cnn.com/2010/03/16/technology/facebook_most_visited/. During the week ending on March 13, 2010, 7.07% of all U.S. web traffic was on Facebook, making it the most visited website in the world for the week. *Id.* See also Alan J. Tabak, *Hundreds Register for New Facebook Website*, THE HARVARD CRIMSON (Feb. 9, 2004), <http://www.thecrimson.com/article/2004/2/9/hundreds-register-for-new-facebook-website/>.

In this article we analyze whether service via Facebook complies with the requirements of Constitutional Due Process.⁴ Part I introduces the need for, and utility of Facebook-type technology as an alternative means of serving process. Parts II and III discuss the historical development of service of process and service of process in the United States. Parts IV and V peel back the label of “social networking website” and analyze what Facebook is, how it works, and how to employ it as a constitutional means of alternative service of process. Here, we also analyze potential criticisms facing service via Facebook. Finally, in Part VI we conclude that while service via Facebook is a novel concept, it will likely become common practice.

I. INTRODUCTION

Embedded in the deeply rooted legal traditions and history of our nation, one finds the underpinnings of an unalienable right of due process.⁵ These timeless truths articulate the inviolable, objective standard that fairness in legal matters matters. While technology continues to “advance on a scale and at a speed that staggers the imagination . . . the old methods for serving process endure as the only methods specifically prescribed by statute.”⁶ In an increasingly mobile society, the failure to apply new technology for serving process undermines our commitment to fairness under the rule of law through due process.⁷

Moreover, when courts fail to embrace effective contemporary alternatives to traditional methods of service, they remain shackled in the midst of technological progress, allowing tech-savvy defendants to evade liability without inhibition.⁸

4. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1. The authors recognize that Facebook frequently updates its service. Facebook's continued improvements make it even more reasonable to utilize it as a medium that gives actual notice comporting with the Constitution.

5. *See, e.g.*, *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 608–09 (1990).

6. *Snyder v. Alt. Energy Inc.*, 857 N.Y.S.2d 442, 449 (N.Y. Civ. Ct. 2008); *see also* Marta Sparago, *The Global Intelligence Network: Issues in International Intelligence Cooperation*, PERSP. ON GLOBAL ISSUES (2006), <http://www.perspectivesonglobalissues.com/0101/GlobalIntelligenceNetwork.html> (stating that “[t]he United States is home to the most advanced technology in the world”).

7. *See* *Krueger v. Williams*, 300 N.W.2d 910, 917 (Mich. 1981) (“Our mobile society affords elusive defendants the potential to escape liability by avoiding service of process.”); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314–15 (1950).

8. *See* *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1017 (9th Cir. 2002); *see also Snyder*, 857 N.Y.S.2d at 450 (“In the proper circumstances, such as those presented here, plaintiffs need not wait for the [statute governing service] to be amended in order to be able to resort to service by e-mail. Our state courts already have the power to grant [plaintiffs] the relief they seek.”).

Generally, courts hold authority to allow means of service “reasonably calculated” to notify defendants of a pending legal action.⁹ Nonetheless, lawyers continue using ineffective, conventional means such as posting and publication to serve parties. They do so even though practical and effective alternatives like service via Facebook exist. Moreover, the practice continues even though service via Facebook provides parties with actual notice, while use of conventional means often does not.¹⁰

Justice Stephen Breyer recently acknowledged that even the Supreme Court is handicapped by its “limited grasp of technological developments.”¹¹ After watching *The Social Network*, a film about the development of Facebook, Justice Breyer conceded he was perplexed and never realized Facebook’s implications for legal institutions.¹² Nonetheless, about three-quarters of attorneys are already wholly cognizant of Facebook and social media.¹³ Since service requirements are driven by due process, and due process by fairness,¹⁴ how soon before we see more service via Facebook?

II. HISTORICAL BACKGROUND OF AN INALIENABLE RIGHT OF DUE PROCESS

Our nation’s founders enshrined the liberty recognized in divine, natural, and common law traditions, first in the Declaration and then in the Constitution. Drawing upon these legal traditions, our founders, in 1776, boldly stated:

WE hold these Truths to be self-evident, that all . . . are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.¹⁵

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

10. *See Snyder*, 857 N.Y.S.2d at 449–50; *see also Mullane*, 339 U.S. at 315 (“In weighing [publication’s] sufficiency on the basis of equivalence with actual notice, we are unable to regard this as more than a feint.”).

11. *Justice Breyer: High Court Must Adapt to Facebook World*, THE DAILY RECORD (Nov. 16, 2010, 7:37 PM), www.mddailyrecord.com/2010/11/16/justice-breyer-high-court-must-adapt-to-facebook-world/. Justice Breyer stated that during a privacy case, Justices John Roberts and Antonin Scalia were uncertain about how text messaging enabled people to communicate. *Id.*

12. *See id.* (“If I’m applying the First Amendment, I have to apply it to a world where there’s an Internet, and there’s Facebook . . .”).

13. Crouse & Flom, *supra* note 3, at 16 (citing LEADER NETWORKS, 2009 NETWORKS FOR COUNSEL STUDY: A GLOBAL STUDY OF THE LEGAL INDUSTRY’S ADOPTION OF ONLINE PROFESSIONAL NETWORKING, PREFERENCES, USAGE AND FUTURE PREDICTIONS 5 (2009), available at http://www.leadernetworks.com/documents/Networks_for_Counsel_2009.pdf). “A 2009 global study of the legal industry’s use of social media technology found that 75% of lawyers were members of a social networking site, up from about 54% in 2008.” *Id.* The study also indicated about 25% of attorneys believe online social networks will change the legal field within the next five years. *Id.*

14. *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 609 (1990).

15. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

We see the promise of the Declaration in the structure and text of the Constitution. Here, we the people delegated power to the government, with which to secure our freedom, while expressly limiting government's ability to take away an individual's life, liberty, or property without due process. Specifically, the Fifth and Fourteenth Amendments to the U.S. Constitution respectively limit the federal and state governments from depriving an individual of life, liberty, or property without due process of law.¹⁶

If due process limits government action, we must understand what due process requires.¹⁷ At a minimum, due process requires that an individual receive notice and the opportunity to respond in a legal proceeding where he or she stands to lose life, liberty, or property.¹⁸ While the right to be heard is the fundamental charge of due process, this right is of little value without notice.¹⁹

The Supreme Court in *Pennoyer v. Neff*²⁰ held that due process requires a defendant to be served within the boundaries of the state where the legal action was pending.²¹ *Pennoyer* coalesced a court's power over a defendant and a court's territorial reach into one due process requirement.²² As America's economy flourished, the growing importance of intangible property and interstate commerce upset *Pennoyer*'s presence requirement.²³ Accordingly, in *International Shoe Co. v. Washington*,²⁴ the Court augmented the due process requirement by evaluating a defendant's minimum contacts within the state, as well as the defendant's physical presence within the state to determine whether a court could exercise jurisdiction over a defendant without violating due process.²⁵ Then, in *Shaffer v. Heitner*,²⁶ the Court went a step further by

16. U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

17. See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (noting that the Court has debated the meaning of the Due Process Clause for decades).

18. *Id.*

19. See *Id.*

20. 95 U.S. 714 (1877).

21. *Id.* at 727; see also Allison MacDonald, *Youtubing Down the Stream of Commerce: Eliminating the Express Aiming Requirement for Personal Jurisdiction in User-Generated Internet Content Cases*, 19 ALB. L.J. SCI. & TECH. 519, 523 (2009) (“Traditionally, because a state would not reach beyond its physical borders to assert jurisdiction over a non-resident defendant, due process additionally required that the defendant have a presence in the forum state.”).

22. *Pennoyer*, 95 U.S. at 727; *Krueger v. Williams*, 300 N.W.2d 910, 914 (Mich. 1981).

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

24. 326 U.S. 310 (1945).

25. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316–17 (1945) (stating that a court exercise *in personam* jurisdiction over a defendant who has made certain minimum contacts with the state where the court presides so long as the exercise of jurisdiction does not violate notions of fair play and substantial justice).

26. 433 U.S. 186 (1977).

separating due process into two distinct components: the court's power over a defendant and the requirement of notice.²⁷

In *Mullane v. Central Hanover Bank & Trust*,²⁸ the Court broadened the notice component of due process by permitting constructive notice when a plaintiff could not reasonably find and serve the defendant.²⁹ Constructive notice allows the court to presume, as a matter of law, that the defendant received notice because the defendant reasonably should have received notice.³⁰ Publication is a common form of constructive notice, yet *Mullane* did not provide a formula to help judges fashion constitutionally sufficient means of notice.³¹ Nonetheless, notice must be “*reasonably calculated*, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”³²

A court determines *reasonableness* by asking: 1) whether the manner of service is likely to provide actual notice to those affected by the suit; or 2) if actual notice is not feasible, whether the alternative manner of service is more likely to notify the defendant than traditional methods of service and substitute service.³³ Additionally, due process does not require actual notice in every case because it could require plaintiffs to go to “impracticable and extended” lengths to serve evasive or unknown defendants.³⁴ Nevertheless, a

27. *Krueger*, 300 N.W.2d at 914 (interpreting *Shaffer*, 433 U.S. at 196–206).

28. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

29. *Id.* at 317; *see also* *Jones v. Flowers*, 547 U.S. 220, 225 (2006) (requiring the government to take additional reasonable steps to provide notice before the court will order alternative service).

30. BLACK'S LAW DICTIONARY 1164 (9th ed. 2009) (“Notice arising by presumption of law from the existence of facts and circumstances that a party had a duty to take notice of . . . [constructive] notice [is] presumed by law to have been acquired by a person and thus imputed to that person.”); *see also* *Schoedel v. State Bank of Newburg*, 13 N.W.2d 534, 535 (Wis. 1944) (“[C]onstructive notice is in point of literal fact neither notice nor knowledge. For the promotion of sound policy or purpose, the legal rights and interests of parties are treated as though they had actual notice and knowledge. The term ‘constructive’ is the mere trade mark of a fiction.”). In *Mullane*, the Court acknowledged that constructive notice is an ineffective means of providing actual notice. 339 U.S. at 315–17.

This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. . . . [I]n the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights.

Id. at 317.

31. *See Mullane*, 339 U.S. at 317.

32. *Id.* at 314 (emphasis added).

33. *Id.* at 315.

34. *Id.* at 317–18; *see also* *Lawrence M. Clarke, Inc. v. Richco Constr. Inc.*, No. 285567, 2009 WL 3837400, at *4 (Mich. Ct. App. Nov. 17, 2009), *rev'd* 803 N.W.2d 151 (Mich. 2011) (quoting *Mullane*, 339 U.S. at 317–18) (“[A]ll that is required is that the notice be reasonably calculated under the circumstances to provide notice of the lawsuit . . . [t]o find otherwise would be tantamount to requiring ‘impracticable and extended searches [that] are not required in the name of due process.’”).

plaintiff's right to be made whole does not eclipse the defendant's right to be notified of an impending suit; efforts to find and serve the defendant must be genuine.³⁵ Today, the reasonably calculated standard, ("the *Mullane* standard") remains the standard for alternative service of process.³⁶

III. DEVELOPMENT OF SERVICE ON AN INDIVIDUAL

The tools available for serving process increase as courts seek ways to extend their reach and ensure that litigants are afforded due process.³⁷ *Pennoyer v. Neff* marked the beginning of the Supreme Court's discussion concerning service of process. Here, the Court required personal service upon an individual within the state boundaries where the action was pending.³⁸ In 1980, a New York federal court authorized service of process via telex on defendants who were evading service of process.³⁹ Then, in 1988 a New York Civil Court allowed service of process via fax machine on another evasive defendant.⁴⁰

In 2002, a court ordered alternative service via email when a plaintiff was unable to serve a defendant who worked and lived in a high security-engineering compound in Saudi Arabia.⁴¹ Here, it was impossible to serve the

35. *Mullane*, 339 U.S. at 315 ("The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.").

36. *See, e.g.*, *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1372 (2010); *Jones v. Flowers*, 547 U.S. 220, 226 (2006); Jo-Leo W. Carney-Waterton, *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? A Critique of Jones v. Flowers*, 126 S. Ct. 1708 (2006), 34 S.U. L. REV. 65, 79–83 (2007). *Mullane* is a "seminal, if not watershed" case on service. *Id.* at 80. Additionally, *reasonably calculated* involves balancing government and private interests. *Id.* at 83.

37. *See* Aaron R. Chacker, *E-effectuating Notice: Rio Properties v. Rio International Interlink*, 48 VILL. L. REV. 597, 597–98, 606–07 (2003) (stating that courts have devised new ways to catch evasive defendants while simultaneously working to ensure due process for all litigants).

38. *Pennoyer v. Neff*, 95 U.S. 714, 727 (1877) (allowing service by publication when real property was the subject of the suit, but requiring actual service for *in personam* action).

39. *New England Merchs. Nat'l Bank v. Iran Power Generation & Transmission Co.*, 495 F. Supp. 73, 81 (S.D.N.Y. 1980) (allowing service via telex). A telex is "a two-way teletypewriter service channeled through a public telecommunications system for instantaneous, direct communication between subscribers at remote locations." *Telex*, DICTIONARY.COM, <http://dictionary.reference.com/browse/telex> (last visited Apr. 14, 2013).

40. *Calabrese v. Springer Pers. of N.Y., Inc.*, 534 N.Y.S.2d 83, 84 (N.Y. Civ. Ct. 1988).

41. Service via email would not provide proof of service or receipt of notice; however, the Court has established that due process does not require proof of service when defendants cannot reasonably be served by traditional means and the proposed means of alternative service is reasonably calculated to provide actual notice. *Hollow v. Hollow*, 747 N.Y.S.2d 704, 705, 708 (N.Y. Sup. Ct. 2002) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)); *see also Snyder v. Alt. Energy Inc.*, 857 N.Y.S.2d 442, 447–48 (N.Y. Civ. Ct. 2008).

defendant because he essentially hid behind a “steel door, bolted shut” and communicated solely with his children via email.⁴² Then in 2008, a New York Civil Court authorized alternative service via email on an individual whose physical whereabouts were simply unknown, a far more common circumstance.⁴³ In both instances, the plaintiffs’ motions for alternative service established that the defendants regularly communicated via email, and the email address provided in the motion actually belonged to the defendants.⁴⁴ Moreover, the court found that service via email was more likely to provide the defendant with actual notice of the suit than publication—despite arguments that email was not certain to reach the defendant.⁴⁵

Australia and New Zealand employed even more innovative technologies to effect service of process.⁴⁶ The Australian Supreme Court authorized service of process via Facebook message on two defendants during a bankruptcy proceeding.⁴⁷ To overcome the court’s concern about the authenticity of the defendants’ profiles, the moving attorney demonstrated that information on the defendants’ Facebook profiles matched the information the defendants provided the plaintiff in their initial loan paperwork.⁴⁸ Additionally, the moving attorney verified that the defendants were related to, or friends with, some of the “friends” the defendants had on Facebook.⁴⁹ A New Zealand court also authorized service of process via Facebook.⁵⁰ The attorney moving for service via Facebook argued that the defendant maintained a social presence on Facebook, even though his exact physical whereabouts were unknown.⁵¹ In Australia and New Zealand, the parties affected service using

42. *Hollow*, 747 N.Y.S.2d at 708.

43. *Snyder*, 857 N.Y.S.2d at 447–48.

44. *See, e.g., id.* at 448 (demonstrating that email was reasonably calculated to notify the defendants); *Hollow*, 747 N.Y.S.2d at 705; Andriana L. Shultz, *Superspoked and Served: Service of Process via Social Networking Sites*, 43 U. RICH. L. REV. 1497, 1524 (2009) (stating that courts that have ordered alternative service via email generally focus on the defendant’s affinity for communicating via email).

45. *Snyder*, 857 N.Y.S.2d at 448–49.

46. John G. Browning, *Served Without Ever Leaving the Computer: Service of Process via Social Media*, 73 TEX. B.J. 180, 181 (2010) (describing an Australian court’s decision to permit service via Facebook as “the shot heard ‘round cyber space”).

47. Ronald J. Hedges et al., *Electronic Service of Process at Home and Abroad: Allowing Domestic Electronic Service of Process in the Federal Courts*, 4 FED. CT. L. REV. 56, 68–71 (2009), available at <http://www.fclr.org/fclr/articles/html/2009/hedges.pdf>.

48. *See* Browning, *supra* note 46, at 181 (relying on the defendant’s birth dates, email addresses, and friends to show authenticity).

49. *See id.* (explaining that this information was readily available because the defendants did not have privacy settings to limit who could view their Facebook profile information). *See* discussion *infra* Part IV(B) for a more cogent analysis of Facebook’s privacy policy.

50. Hedges et al., *supra* note 47, at 68.

51. Ian Llewellyn, *NZ Court Papers Can Be Served Via Facebook, Judge Rules*, THE NEW ZEALAND HERALD (Mar. 16, 2009, 2:22 PM), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10561970. Justice Gendall authorized service via Facebook without hesitation because the plaintiff was unable to serve the defendant, and the court was not prepared to allow the defendant, who had allegedly stolen \$241,000 from the plaintiff, to escape liability by simply evading service of process. *Id.* *See generally* *Krueger v. Williams*, 300 N.W.2d

Facebook Messenger.⁵² Facebook Messenger is similar to email, especially in its ability to provide notice.⁵³

On May 10, 2011, a Minnesota trial court ordered service via Facebook.⁵⁴ Marking the first time an American court authorized service via Facebook, the Minnesota court emphasized the critical importance of service.⁵⁵ The court criticized publication and posting as a waste of money and a futile means of providing actual notice.⁵⁶ As an alternative, the court endorsed Facebook technology as a potentially more effective and cost efficient means of service.⁵⁷

IV. FACEBOOK IN CONTEMPORARY SOCIETY: WHAT IT IS AND HOW IT WORKS

A. *How Facebook Manages User Information*

An online social network, Facebook facilitates communication amongst friends, family, and coworkers.⁵⁸ Since its launch in 2004, Facebook remains free and open to the public.⁵⁹ Users utilize a myriad of features to connect and share information with other users.⁶⁰ For instance, users send each other personal messages, engage in live chat, post on the walls of other users, and update their personal status.⁶¹ Additionally, Facebook enables users to share photos, events, videos, and websites.⁶² One of Facebook's recent applications,

910, 914–15 (Mich. 1981) (emphasizing that the drafters of the Michigan Court Rules intended to give courts the discretion to authorize *any means of service* in order to preclude defendants from escaping liability by dodging service of process).

52. Browning, *supra* note 46, at 181.

53. *See Sending a Message*, FACEBOOK, <http://www.facebook.com/help/?page=185978111452491> (last visited Apr. 14, 2013). Facebook Messenger allows users to exchange private messages, which are automatically stored like emails. *Id.*

54. Mpafe v. Mpafe, No. 27-FA-11-3453 (D. Minn. May 10, 2011), *available at* <http://www.scribd.com/doc/70014426/Mpafe-v-Mpafe-order>. *See also* Stephanie Francis Ward, *Our Pleasure to Serve You*, 97 A.B.A. J., Oct. 2011, at 14–16 (discussing *Mpafe*).

55. Mpafe v. Mpafe, No. 27-FA-11-3453 (D. Minn. May 10, 2011), *available at* <http://www.scribd.com/doc/70014426/Mpafe-v-Mpafe-order>.

56. *Id.*

57. *Id.*

58. *Key Facts*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited Apr. 14, 2013).

59. *Common Myths About Facebook, Will Facebook ever charge for service?*, FACEBOOK, <https://www.facebook.com/help/myths> (last visited Apr. 14, 2013).

60. *See Products*, FACEBOOK, <http://newsroom.fb.com/Products> (last visited Apr. 14, 2013).

61. *Id.*; *See Statement of Rights and Responsibilities*, FACEBOOK, <https://www.facebook.com/legal/terms> (last revised Dec. 11, 2012).

62. *Products*, *supra* note 60.

Facebook Places, allows users to share their precise location with other users using a mobile device.⁶³

The primary elements of Facebook are the *user profile* and the *News Feed*.⁶⁴ Upon creating a profile, an individual must provide Facebook with the following information: name, active email address, gender, and birthday.⁶⁵ At their discretion, users provide additional personal information to their profile including: relationships, relatives, school, work history, personal interests, photos, addresses, organizations/causes the user supports, as well as plans to attend future events.⁶⁶

An individual user's Wall is the centerpiece of each user profile.⁶⁷ The Wall serves as a customizable bulletin board tracking a user's activity while allowing the user and others to post comments, images, videos, events, and websites.⁶⁸ A "wall post" is any information a user publishes on a Facebook user's Wall.⁶⁹

Facebook prominently displays the News Feed in the center column of the user's home page.⁷⁰ The News Feed provides an actively updated log allowing a user to track activity of other users or other Facebook pages.⁷¹ Each user can customize the content of the News Feed display.⁷² The News Feed gives live reports of Facebook activity including, among other things: 1) when a user posts on another user's wall, 2) the content of the post, and 3) any comments made concerning the wall post.⁷³ Additionally, the News Feed indicates the

63. *Share Where You Are*, FACEBOOK, <https://www.facebook.com/about/location> (last visited Apr. 14, 2013); see also *Location Privacy*, FACEBOOK, <http://www.facebook.com/help/location/privacy> (last visited Apr. 14, 2013). Facebook's *Places* does not automatically post the user's location; the user must input their location. *Id.* The application allows users to browse location updates to see if other users are nearby. *Id.* Users can restrict who can see their location by adjusting their personal privacy settings. *Id.*

64. One Young Kashmir, *Facebook Factsheet*, FACEBOOK (Oct. 26, 2010, 12:31PM), http://www.facebook.com/note.php?note_id=164122353611720.

65. See *Statement of Rights and Responsibilities*, *supra* note 61; *Confirm Your Email Address*, FACEBOOK, <https://www.facebook.com/help/signup/confirmemail> (last visited Apr. 14, 2013). After a new user sets up an account, a confirmation email will be sent to the email address used to set up the account. *Id.* The new account is not activated until the user replies to the confirmation email. *Id.* Therefore, the user must have an active, accessible email account to setup a Facebook account. *Id.*

66. One Young Kashmir, *supra* note 64.

67. *Share, Star & Hide Stories*, FACEBOOK, <http://facebook.com/help/timeline/edit> (last visited Apr. 14, 2013).

68. *Id.*

69. *Id.*

70. *How News Feed Works: What is News Feed?*, FACEBOOK, <https://www.facebook.com/help/327131014036297/> (last visited Apr. 14, 2013) [hereinafter *How News Feed Works*].

71. *Id.*

72. *Id.*

73. *Id.*; see also Christo Wilson, et al., *User Interactions in Social Networks and their Implications*, 4 EuroSys '09 205, 206 (2009) available at <http://www.cs.ucsb.edu/~ravenben/publications/pdf/interaction-eurosys09.pdf> ("Each profile includes a message board called the 'Wall' that serves as the primary asynchronous messaging mechanism between friends. Users can upload photos, which must be grouped into albums, and can mark or 'tag' their friends in them. Comments can also be left on photos.").

exact time and date that each account activity takes place, as well as indicating whether an individual initiated the action from a mobile device.⁷⁴

When users log onto their Facebook account, they see both the News Feed and any notifications of unread messages, pending friendship requests, and unread wall posts.⁷⁵ Facebook highlights these notifications, indicating the type of activity occurring on the user's account.⁷⁶ Facebook also sends notice of any account activity directly to the user's email address.⁷⁷ The notification feature allows users to monitor any activity on their Facebook without logging onto Facebook after the initial account setup.⁷⁸

Facebook also allows users to display their various relationships (e.g., the name of one's spouse, fiancée, sibling, and other familial designations).⁷⁹ Here, one user must confirm a relationship request from another user.⁸⁰

Additionally, Facebook allows users to connect by hyper-linking all user actions to the user's profile page or Wall⁸¹ and any action a user takes appears on his or her Wall. Facebook also allows users to "tag" pictures of one another by creating a hyperlink between a photo and a profile page.⁸² The combination of the News Feed and the unique system of hyperlinks allows users to stay up-to-date with the lives of friends, family, acquaintances, and others.

B. *How Facebook Protects Privacy*

From its genesis, Facebook indicated a commitment to user safety and privacy.⁸³ To uphold its commitment, Facebook created a Safety Advisory Board.⁸⁴ Moreover, Facebook's privacy policy is TRUSTe certified.⁸⁵

74. See *Key Facts*, *supra* note 58.

75. See *How News Feed Works*, *supra* note 70; *Notifications*, FACEBOOK, <https://www.facebook.com/help/notifications> (last visited Apr. 20, 2013).

76. See *How News Feed Works*, *supra* note 70; *Notifications*, *supra* note 75.

77. See *Confirm Your Email Address*, *supra* note 65 (explaining that the user's email address is presumed to be active, and that all notifications are sent to this email address unless the user manually changes the default email notification settings).

78. See *id.*; *Notifications*, *supra* note 75.

79. *Update Your Basic Info*, FACEBOOK, <https://www.facebook.com/help/334656726616576/> (last visited Apr. 20, 2013).

80. *Id.*

81. Josh Constine, *How to Use Facebook Timeline: A Complete Walk-Through of the Redesigned Profile*, INSIDE FACEBOOK (Sept. 23, 2011), <http://www.insidefacebook.com/2011/09/23/how-to-use-facebook-timeline-profile/>.

82. *Tagging*, FACEBOOK, <https://www.facebook.com/help/366702950069221/> (last visited Apr. 20, 2013).

83. See Tabak, *supra* note 3 (quoting Facebook's founder only four days after the website's launch); One Young Kashmir, *supra* note 64.

84. One Young Kashmir, *supra* note 64.

85. *Id.*

“TRUSTe is the leading [Internet] privacy services provider,”⁸⁶ protecting thousands of websites including Yahoo, eBay, New York Times, Comcast, and Apple.⁸⁷ In addition to providing users with state of the art security, Facebook provides users with customizable privacy settings.⁸⁸ Aside from profile pictures and user names, Facebook users customize the accessibility of their information and Facebook activity.⁸⁹

Facebook's default privacy settings continue to evolve.⁹⁰ No privacy settings exist for the Facebook user's name and profile picture.⁹¹ Moreover, under current default privacy settings, all material, except a user's contact information and birthday, is available to everyone on the Internet.⁹² Thus, under the default settings, a Google search of a Facebook user's name returns a link to the user's Facebook profile, along with access to nearly all of the user's personal information.⁹³

C. *How Facebook Emerged as the Social Phenomena*

In 2004, Harvard sophomore Mark Zuckerberg launched Facebook as a social networking website for Harvard students.⁹⁴ During its first week online, Facebook acquired 650 members, nearly 10% of the students enrolled in Harvard University.⁹⁵ By July of 2010, Facebook membership exceeded 500 million active users.⁹⁶ Facebook's rapid growth makes it one of the fastest

86. *About TRUSTe*, TRUSTe, http://www.truste.com/about_TRUSTe/ (last visited Apr. 20, 2013).

87. *See id.*

88. *Privacy*, FACEBOOK, <https://www.facebook.com/help/privacy> (last visited Apr. 20, 2013); *see also Statement of Rights and Responsibilities*, *supra* note 61 (noting that “information” includes any facts about the user, actions the user takes, and content the user posts on Facebook).

89. *Privacy*, *supra* note 88.

90. Matt McKeon, *The Evolution of Privacy on Facebook*, MATTMCKEON.COM, <http://mattmckeon.com/facebook-privacy/> (last updated May 19, 2010, 5:50 PM).

91. *Id.*

92. *Id.* (noting that the default settings allow anyone on the internet to access the following user information: user's name, profile picture, gender, friend list, wall posts, photos, places the user has visited, and other profile information, exclusive of birth date and contact information).

93. *Id.* Because, all user activity is logged on the user's Wall and hyper-linked to the site of the activity, when user *A* writes on user *B*'s Wall, *A*'s Wall will record the activity by reading “*A* wrote on *B*'s Wall,” and *B*'s Wall will bear *A*'s message. Assuming *A* and *B* have default privacy settings, if non-user *C* clicks on the News Feed update on *A*'s Wall, then *C* will be directed to the message *A* posted on *B*'s wall. *See How News Feed Works*, *supra* note 70.

94. *See* Tabak, *supra* note 3 (noting that Mr. Zuckerberg accomplished the feat from his dorm room after about one week of programming).

95. *Id.*; *see also* THE OFFICE OF THE PROVOST, HARVARD UNIVERSITY FACT BOOK 2004-2005, at 6 (2005), *available at* http://www.provost.harvard.edu/institutional_research/archive/2005OnlineFactBook.pdf (reporting that 6,562 students were enrolled at Harvard in Fall of 2004).

96. Robert Johnson, *Scaling Facebook to 500 Million Users and Beyond*, FACEBOOK (July 21, 2010, 11:06 AM), http://www.facebook.com/note.php?note_id=409881258919.

growing technologies in the world, surpassed only by iPhone applications.⁹⁷ Today, people spend more time on Facebook than Google, Wikipedia, YouTube, Bing, and Amazon combined.⁹⁸ During 2010, nearly one of every four webpages viewed in the United States was a Facebook page.⁹⁹ In response to its unprecedented growth, Facebook created a sophisticated infrastructure that supports one of the world's largest data management systems.¹⁰⁰

D. *How Facebook Technology Interfaces with American Legal Institutions*

The development of technology facilitates increased efficiency and effectiveness in our legal institutions; from the integration of computers and digital file management, to filing and serving court documents via the Internet, technology increasingly interfaces with the law.¹⁰¹ Moreover, parties now see social networking sites like Facebook as powerful resources for evidence gathering and investigation.¹⁰² Predictably, citizens and businesses also

97. CAROLYN ELEFANT & NICOLE BLACK, SOCIAL MEDIA FOR LAWYERS: THE NEXT FRONTIER 6 (American Bar Association 2010) (citing Erik Qualman, *Statistics Show Social Media is Bigger Than You Think*, SOCIALNOMICS (Aug. 11, 2009), <http://www.socialnomics.net/2009/08/11/statistics-show-social-media-is-bigger-than-you-think/>); *Thanks a Billion*, APPLE, <http://www.apple.com/au/itunes/billion-app-countdown/> (last visited Apr. 20, 2013).

98. *See Facebook Users Average 7 hrs a Month in January as Digital Universe Expands*, NIELSEN (Feb. 16, 2010), <http://www.nielsen.com/us/en/newswire/2010/facebook-users-average-7-hrs-a-month-in-january-as-digital-universe-expands.html> [hereinafter *Digital Universe Expands*].

99. Heather Dougherty, *Facebook.com Generates Nearly 1 in 4 Page Views in the US*, EXPERIAN (November 19, 2010), <http://www.experian.com/blogs/hitwise/2010/11/19/facebook-com-generates-nearly-1-in-4-page-views-in-the-us/>.

100. One Young Kashmir, *supra* note 64; *see also* Pepitone, *supra* note 3 (discussing Facebook's record shattering growth).

101. *See* Ronald W. Staudt, *All the Wild Possibilities: Technology That Attacks Barriers to Access to Justice*, 42 LOY. L.A. L. REV. 1117, 1137–38 (2009); *see, e.g.*, Rio Props., Inc., v. Rio Int'l Interlink, 284 F.3d 1007, 1018 (9th Cir. 2002) (authorizing service of process via email).

102. *See, e.g.*, Molly McDonough, *Trial Consultants Add Facebook/MySpace to Juror Research Toolbox*, ABA JOURNAL (Sept. 29, 2008, 11:00 AM), http://www.abajournal.com/news/article/trial_consultants_add_facebook_myspace_to_juror_research_toolbox/; *People v. Liceaga*, No. 280726, 2009 WL 186229, at *4 (Mich. Ct. App. Jan. 27, 2009) (upholding admissibility of MySpace photos to establish intent in first degree murder trial); *In re K.W.*, 666 S.E.2d 490, 494 (N.C. Ct. App. 2008) (holding that statements from the plaintiff's Myspace.com page were admissible to impeach plaintiff during a rape case); *Maxi Sopo: Fraud Fugitive Brags on Facebook, Gets Busted*, THE HUFFINGTON POST (May 25, 2011, 3:20PM), http://www.huffingtonpost.com/2009/10/13/maxi-sopo-fraud-fugitive_n_319991.html (explaining how authorities ascertained the address of a fugitive, wanted for the theft of over \$200,000 from Seattle banks, after he befriended a former Justice Department official on Facebook and posted several vainglorious status updates which subsequently revealed his whereabouts); *Mom Arrested for Posting Facebook Picture of Baby with Bong*, THE PALM BEACH POST (Aug. 16, 2010, 8:59 AM), <http://www.palmbeachpost.com/news/mom-arrested-for-posting-facebook-picture-of-baby-861714.html> (describing how police arrested a 19-year-old mother after she posted a picture on Facebook of her infant posing with a bong); *Shannon D. Jackson*:

increasingly turn to Facebook, seeking justice where traditional means fail to deliver.¹⁰³ With the increasing utility of technological advances, Facebook expressed its willingness to assist justice institutions.¹⁰⁴ Nonetheless, only a few American jurisdictions have tried utilizing technology to serve process—leaving a majority of jurisdictions still employing traditional methods¹⁰⁵, like service via publication.¹⁰⁶

Woman Arrested for Facebook “Poke”, THE HUFFINGTON POST (May 25, 2011 3:20 PM), http://www.huffingtonpost.com/2009/10/09/shannon-d-jackson-woman-a_n_315877.html (stating that a Tennessee Court upheld the arrest of a women who ‘poked’ a Facebook user in violation a Personal Protection Order).

103. *See, e.g.*, Lindsay Key, *Retailer Uses Facebook to Investigate Shoplifting*, THE ROANOKE TIMES & WORLD NEWS, May 31, 2007, at A1 (detailing how a Virginian boutique owner, fed up with shoplifting, used Facebook to ensnare an evasive shoplifter after spotting her unique merchandise on display on the shoplifter’s Facebook page).

104. *See Princy, supra* note 88. *See also* Rod McGuirk, *Australia OKs Facebook for Serving Lien Notice*, LAW.COM (Dec. 17, 2008), <http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202426805954> (quoting a Facebook spokesperson who stated that Facebook was pleased with an Australian court’s decision to permit service of process via Facebook).

105. *See, e.g.*, *Fortunato v. Chase Bank USA, N.A.*, No. 11 CIV 6608 (JFK), 2012 WL 2086950, at *2 (S.D.N.Y. June 7, 2012) (“The Court cannot agree” that service by private Facebook message is reasonably calculated to notify the defendant of the proceedings. “Service by Facebook is unorthodox to say the least”); Debra Cassens Weiss, *Federal Judge Refuses Request to Serve Party by Facebook, Orders Newspaper Publication Instead*, ABA JOURNAL, (June 12, 2012, 6:59 AM), http://www.abajournal.com/news/article/federal_judge_refuses_request_to_serve_party_by_facebook_orders_newspaper_p/.

106. *See Snyder v. Alt. Energy Inc.*, 857 N.Y.S.2d 442, 450 (N.Y. Civ. Ct. 2008) (“In the proper circumstances, such as those presented here, plaintiffs need not wait for the [the state’s service statute] to be amended in order to be able to resort to service by e-mail . Our state courts already have the power to grant them the relief they seek.”); *see also* *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007 (9th Cir. 2002) (service via email); *Mpafe v. Mpafe*, No. 27-FA-11-3453 (D. Minn. May 10, 2011) *available at* <http://www.scribd.com/doc/70014426/Mpafe-v-Mpafe-order> (service via Facebook). In contrast, every state permits service via publication, or posting. *See, e.g.*, ALA. R. CIV. P. 4.3; ALASKA R. CIV. PROC. 4(e); ARIZ. R. CIV. P. 4.1(n); ARK. R. CIV. P. 4(f); CAL. CIV. PROC. CODE § 415.50 (West 2012); COLO. R. CIV. P. 4(g); 1A CONN. PRAC., JUVENILE LAW § 33a-5 (2011); DEL. CODE ANN. tit. 10, § 6106 (2012); D.C. CODE § 13-340 (2012); FLA. STAT. ANN. § 49.011 (West 2012); GA. CODE ANN. § 9-11-4(f)(1) (West 2012); HAW. REV. STAT. § 634-23(3) (West 2012); IDAHO CODE ANN. § 5-508 (West 2012); 735 ILL. COMP. STAT. ANN. 5/2-206 (West 2012); IND. CODE ANN. § 4.13 (West 2012); IOWA. R. CIV. P. 1.310; KAN. STAT. ANN. § 60-307 (West 2012); LA. CODE CIV. PROC. ANN. art. 803 (West 2011); ME. R. CIV. P. 4(g); MD. CODE ANN., Civ. Proc. § 2-122(a) (West 2012); MASS. GEN. LAWS ANN. ch. 136, § 8 (West 2012); MICH. CT. R. 2.104(C); MINN. R. CIV. P. 4.04(a); MISS. R. CIV. P. 4(c)(4); MO. ANN. STAT. § 506.160 (West 2012); MONT. R. CIV. P. 4(o); NEB. REV. STAT. ANN. § 25-519 (West 2012); NEV. R. CIV. P. 4(e)(1); N.H. REV. STAT. ANN. § 510:9 (2012); N.J. STAT. ANN. § 40:65-4 (West 2012); N.M. R. CIV. P. 1-004(K); N.Y. C.P.L.R. 315 (MCKINNEY 2012); N.C. R. CIV. P. 4(j1); OHIO CIV. R. 4.4(A)(1); OKLA. STAT. ANN. tit. 12, § 2004(C)(3) (West 2012); OR. R. CIV. P. 7(D)(6); PA. R. CIV. P. 430(b)(1); R.I. GEN. LAWS ANN. § 15-5-21 (West 2012); S.C. R. CIV. P. 4(e); S.D. CODIFIED LAWS § 15-9-7 (2012); TENN. R. CIV. P. 4.0; TEX. R. CIV. P. 109; UTAH R. CIV. P. 4(D)(4)(A); VT. R. CIV. P. 4(g); VA. CODE ANN. § 8.01-296 (2)(b) (West 2012); WASH. SUPER. CT. R. 4(d)(3); W. VA. R. CIV. P. 4(e); WIS. STAT. ANN. § 801.11(1)(c) (West 2012); WYO. R. CIV. P. 4(e).

V. SERVICE OF PROCESS AND FACEBOOK

When seeking ways to serve parties who evade service in an increasingly internet-connected culture, one must certainly consider service of process via Facebook. The language of most service of process rules arguably empowers courts with the discretion to order service via Facebook wall post.¹⁰⁷ The questions are: a) whether this method of service satisfies due process and b) whether judges possess the technical knowledge necessary to employ this contemporary means of service.

As a matter of Constitutional law, we believe court-ordered service via Facebook wall post is proper when: a) it is reasonably calculated to notify the party of the legal action and b) it is not substantially less likely to provide notice than traditional posting or publishing methods (e.g., in the legal section of a local newspaper).¹⁰⁸

Because due process and equity serve as the foundation of the notice requirement,¹⁰⁹ it makes sense that notice be reasonably calculated to reach its intended recipient. *Reasonably calculated* thus properly hinges on probability that the defendant will see the notice, based on the places defendant frequents.¹¹⁰ Because alternative service serves as an indirect means of notification, communicating the notice to family and close friends increases the probability of actual notice or discovery of the action.¹¹¹

Foundationally, if a citizen's constitutional right of due process includes the timeless truth that fairness in legal matters matters, and that fairness requires notice, then we must reason from this inalienable premise when applying due process principles today. Thus, due process ought to require that contemporary means of service be in accord with that which is actually reasonably calculated to provide notice. In this regard, the notion of *reasonably calculated* logically ought to comport with contemporary society's primary means of discourse and channels of communication. Although Facebook did not exist when the drafters wrote the due process clause, the self-evident Truth embodied in its objective standard allows today's judges to employ fair process when they apply this standard to today's circumstances.¹¹² Thus, if

107. Statutory language generally requires the means most likely to provide actual notice. See statutes cited *supra* note 106.

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

109. *Id.* at 313–14.

110. *Id.* at 315–17.

111. *Id.* at 315 (explaining that the chance of actual notice decreases when notice doesn't inform acquaintances who might bring it to the intended recipient's attention); see also *Dehaan v. Tsarnas*, No. 289967, 2010 WL 2384921, at *4, n.8 (Mich. Ct. App. June 15, 2010) (*per curiam*) (affixing notice to front door of the defendant's mother's home increased probability of actual notice because the defendant's mother would presumably bring the notice to defendant's attention).

112. *Mullane*, 339 U.S. at 315:

service via Facebook wall post provides the best means of providing notice to the defendant, then courts should abandon other ineffective alternatives.¹¹³ The question to which we now turn is whether today's defendant is more likely to receive actual notice via Facebook or via traditional alternative methods.¹¹⁴

A. *Is Facebook Superior to Traditional Means of Alternative Service?*

1. Facebook Wall Post versus Publication or Posting

Today, most defendants never receive notice from posting or publication.¹¹⁵ When the Court decided *Mullane*, a large majority of adults read a newspaper on a weekly basis.¹¹⁶ By 2007, weekly adult readership declined to 55.4%.¹¹⁷ A recent survey estimated that only 26% of Americans read newspapers on a daily basis.¹¹⁸ Thus, the futile formality of publishing notice in a newspaper provides little chance of providing any actual notice to a defendant.

In contrast to the declining readership of newspapers, Facebook "readership" has skyrocketed, becoming the world's most trafficked website

The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

113. *Krueger v. Williams*, 300 N.W.2d 910, 918 (Mich. 1981). "It is significant that in every instance where alternate means of giving notice were available which were better calculated to give actual notice, the Court held service of process by publication constitutionally deficient." *Id.* "[T]he Court has stressed that notice will not be considered reasonable if better means of actually informing a party are available." *Id.* at 918 n.4. *See also* *Schroeder v. City of New York*, 371 U.S. 208, 213 (1962) (quoting *Mullane*, 339 U.S. at 318) ("Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.>").

114. *See Mullane*, 339 U.S. at 315–18. Via Facebook, a defendant receives actual notice either by: 1) logging onto Facebook and seeing plaintiff's wall post, 2) receiving an email notification that the plaintiff posted on his wall, 3) receiving an email notification that someone commented on plaintiff's posted notification, or 4) receiving notification from family or friends concerning the plaintiff's notice of a lawsuit posted on his Facebook wall. To receive actual notice via the more traditional alternative means of service, a defendant must actually be looking for the notice.

115. This is especially true if defendant resides outside the newspaper circulation area. *See Dow v. State*, 240 N.W.2d 450, 458 (Mich. 1976) ("Newspaper publication is a formality. . . . [N]ewspaper publication for most property owners provides no notice at all."); *see also* *Ward*, *supra* note 54 (As one judge stated, "service by publication is antiquated and is prohibitively expensive.").

116. *See generally Readership Archives – Sunday Readership Trends*, NEWSPAPER ASS'N OF AMERICA, <http://www.naa.org/Trends-and-Numbers/Readership/Readership-Archives.aspx> (last visited Apr. 20, 2013) (providing the average weekday newspaper readership of adults in 1964).

117. *Id.* (providing the average weekday newspaper readership of adults in 2007).

118. *Americans Spending More Time Following the News*, THE PEW RESEARCH CTR. 5 (Sept. 12, 2010), <http://www.people-press.org/files/legacy-pdf/652.pdf>.

six years after its launch.¹¹⁹ This comes as no surprise as 92% of U.S. adults use email and online search engines and 65% of U.S. adults use social media such as Facebook.¹²⁰ Moreover, with social media use consistent across racial, socioeconomic, and age groups, Facebook is no longer just for Harvard students.¹²¹ Amazingly, half of Facebook's users access their account at least once each day, on average.¹²² Thus, the presence of a Facebook profile for a defendant creates great potential for actual notice via Facebook. The same cannot be said about service via newspaper publication.

Similarly, service via posting is less likely to provide defendant with notice of a lawsuit than service via Facebook. Posting is problematic because it requires a plaintiff to demonstrate an inability to find and serve the defendant personally or via certified mail, while at the same time requiring the plaintiff to post notice in a place where the defendant frequents.¹²³ Such a conundrum allows for arguments that either the plaintiff did not make a diligent effort to serve the defendant, or the plaintiff does not really know where the defendant frequents, resulting in neither party realizing the fairness desired. In reality, if a plaintiff cannot find and serve the defendant, plaintiff likely knows not where the defendant frequents; to prove otherwise undermines the diligence of plaintiff's efforts to effect personal service. Thus, assuming a Facebook profile exists for a defendant, posting is inherently less reasonably calculated than serving notice via a Facebook wall post. Unlike service via posting, service via Facebook provides an alternative method that likely provides a defendant with actual notice.

Moreover, Facebook's use of email enhances the potential for providing actual notice. Any activity on a user's Facebook wall, such as a wall post or comment, triggers a notification message to the user's email address.¹²⁴ Additionally, 61% of U.S. adults check their e-mail every day; nearly triple the amount that read the local newspaper.¹²⁵ Only a handful of state courts

119. Crouse & Flom, *supra* note 3; Pepitone, *supra* note 3. Facebook was launched in 2004. Tabak, *supra* note 3.

120. KRISTEN PURCELL, PEW RESEARCH CTR., SEARCH AND EMAIL STILL TOP THE LIST OF MOST POPULAR ONLINE ACTIVITIES 2 (2011), available at http://www.pewinternet.org/~media/Files/Reports/2011/PIP_Search-and-Email.pdf.

121. *Id.* Eighty-seven percent of the United States' senior citizens are using the internet. *Id.* at 3. See also Tabak, *supra* note 3 (noting that Facebook began as a website for only Harvard students).

122. See *Digital Universe Expands*, *supra* note 98.

123. See, e.g., *Grove v. Guilfoyle*, 222 F.R.D. 255, 256–57 (E.D. Pa. 2004). See generally FED. R. CIV. P. 4(e)(1) (allowing for service according to state laws in which the district court is located or where service is effectuated); Talia E. Neri, *Privacy in the Age of Tracking Technology: Why G.P.S. Technology Should Not Be Used to Track Process Servers*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 209, 214–16 (2009).

124. See *Notifications*, *supra* note 75.

125. Purcell, *supra* note 120, at 2.

recognize email as a valid means of alternative service.¹²⁶ The Supreme Court, however, holds that as long as a defendant received *actual* notice in a timely manner, a court must not dismiss a case for improper service.¹²⁷ Because 92% of people use email and Internet, even defendants rarely accessing their Facebook account nonetheless receive actual notice because Facebook automatically sends an email notification, alerting the user of the wall post and its content.¹²⁸ If the defendant is a part of the roughly 40% of cell phone owners who use email or Internet on their phone, then the probability of notification increases again.¹²⁹ One third of the general public uses email or Internet on their cell phone.¹³⁰ This group is twice as likely to check their Facebook account as non-mobile users.¹³¹ Although the reasonableness of the service is determined on a case-by-case basis, the statistical data alone indicates that an individual with a Facebook profile is not substantially less likely to receive actual notice via Facebook wall post than via posting or publication, especially if they use a smartphone. Moreover, Facebook only activates new accounts after the user responds to Facebook's confirmation email, ensuring a connection between the profile and the owner's email.¹³²

Publication is constitutionally barred in the presence of a more reasonably calculated alternative method of service;¹³³ thus, anytime service via posting or publication is appropriate for a defendant with Facebook, service via Facebook wall post is appropriate. Indeed, service of process via Facebook generates a high probability that the defendant will receive actual notice when the defendant's Facebook friends see the complaint and summons on their Facebook News Feed.¹³⁴ Because the News Feed is in the center of every Facebook user's homepage, the defendant's Facebook friends are likely to

126. Svetlana Gitman, *(Dis)service of Process: The Need to Amend Rule 4 to Comply with Modern Usage of Technology*, 45 J. MARSHALL L. REV. 459, 465, 467, 473–75 (2012).

127. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). See, e.g., MICH. CT. R. 2.105(J)(3) (“An action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time provided in these rules for service.”); *In re Estate of Gordon*, 564 N.W.2d 497, 502 (Mich. Ct. App. 1997) (upholding service unless it fails to notify the defendant or it is not executed in a timely manner).

128. See Purcell, *supra* note 120, at 3.

129. See AARON SMITH, PEW RESEARCH CTR., AMERICANS AND THEIR CELL PHONES 5, (2011), available at <http://www.pewinternet.org/~media/Files/Reports/2011/Cell%20Phones%202011.pdf> (detailing the percentages of adults owning cell phones and how they utilize their phones throughout various daily activities, primarily focusing on internet and e-mail use).

130. *Id.*

131. See *Key Facts*, *supra* note 58.

132. *Confirm Your Email Address*, *supra* note 65.

133. See *City of New York v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 293, 296 (1953).

134. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950) (indicating that potential sources of collateral notice increase the probability of actual notice); see also, *Dehaan v. Tsarnas*, No. 289967, 2010 WL 2384921, at *4, n.8 (Mich. Ct. App. June 15, 2010) (*per curiam*).

catch sight of the notice and potentially notify the defendant of the posting.¹³⁵ Here the wall post is analogous to affixing notice on the front door of everyone on the defendant's friend list.¹³⁶ Additionally, anyone with Internet access can ascertain the virtual whereabouts of a defendant who uses Facebook by simply typing the defendant's name into Facebook's "quick search" application.¹³⁷

The authors of the service rules never foresaw the era of Facebook, and therefore could not foresee its utility as a reliable method of alternative service. Nonetheless, embedded in the deeply rooted legal traditions and history of our nation, the underpinnings of the unalienable right of due process remain unchanged. The timeless truth that fairness in legal matters matters, and that fairness requires notice, articulates an inviolable, enduring, objective standard, empowering courts to reject procedural habitude and respond to contemporary situations by ordering service in any manner consistent with these inalienable jurisprudential principles.¹³⁸ Because notice should involve one using efforts that "one desirous of actually informing" someone might reasonably employ,¹³⁹ service via Facebook properly exists as an available means of service when alternative service is otherwise appropriate.

B. Account Authenticity: How does a court know plaintiff served the right person?

Account authenticity is the most common concern of opponents to service via Facebook.¹⁴⁰ Facebook's Statement of Rights and Responsibilities requires users to provide real names and accurate, up-to-date information on their

135. See *Mullane*, 339 U.S. at 315–17; see also Justin Smith, *The Facebook Marketing Bible: 24 Ways to Market Your Brand, Company, Product, or Service Inside Facebook*, INSIDE FACEBOOK (Dec. 9, 2007), <http://www.insidefacebook.com/2007/12/09/inside-facebook-marketing-bible-24-ways-to-market-your-brand-company-product-or-service-in-facebook/>. The author refers to the Facebook News Feed as "the wind that blows your marketing seeds" because one user's action can be displayed on hundreds of other users news feeds. *Id.*

136. Facebook users must pass their News Feed before they can navigate their Facebook page. *How News Feed Works*, *supra* note 70. Likewise, an individual passes the front door of a home before entering the home. *Debaan*, 2010 WL 2384921, at *4.

137. *Finding Friends*, FACEBOOK, <http://www.facebook.com/help/findingfriends> (last visited Apr. 20, 2013). In *Debaan*, the defendant's mother did not know the defendant's whereabouts; however, the court found that the likelihood that the mother would communicate with the defendant was persuasive enough to meet the reasonably calculated standard. *Deeban*, 2010 WL 2384921, at *4.

138. 1 HONIGMAN & HAWKINS, MICH. CT. R. ANN. 111–12 (2d ed.) ("It is thus believed desirable to confer discretion upon the courts to permit utilization of new methods of service of process which may be developed, and to permit courts themselves to propose and effectuate other methods of service of process.")

139. *Mullane*, 339 U.S. at 314–15.

140. See *Browning*, *supra* note 46 at 181.

profile.¹⁴¹ Not much else exists, however, to stop an individual from creating a false profile.

Prior to approving service of process via Facebook, the Australian Capital Territory Supreme Court questioned the authenticity of the defendant's Facebook profile.¹⁴² The Plaintiff insurance company demonstrated that the information on the defendant's Facebook profile matched birth dates, lists of friends, and email addresses provided by defendant to the insurance company.¹⁴³ The Australian court found this corroborative information sufficient to establish that the Facebook profiles belonged to the defendants.¹⁴⁴

If the defendant has default privacy settings, anyone on the Internet can access the defendant's profile information in seconds.¹⁴⁵ Given the personal nature of the information a Facebook user can put on his or her profile, a plaintiff can potentially corroborate anything from schooling, relationships, relatives, and even beginning and ending employment dates. The presence of verified relatives, relationships, or friendships suggests that the profile is authentic because verified relationships, friendships, and relatives require an invitation and acceptance before being displayed on a user's profile.¹⁴⁶ Thus, if a plaintiff corroborates information from the defendant's profile or verified relatives or relationships, then the profile is probably authentic. Therefore Facebook exists as a potential tool for actually notifying the defendant of the suit.

Additionally, Facebook recently released a new password feature that requires users to identify a "tagged" photo of a friend in order to gain access to their account.¹⁴⁷ This feature reduces the probability of strangers logging onto an account because they are highly unlikely to be able to identify a random photo of a stranger's friend.¹⁴⁸

141. *Statement of Rights and Responsibilities*, *supra* note 61 (explaining that Facebook reserves the right to terminate a user's account, if the user violates any part of the Statement).

142. Anne Barrowclough, *You've Been Poked—Now You're Homeless. Lawyer Serves Repossession Papers on Facebook*, SOCIAL NETWORK TIMES (Dec. 16, 2008), <http://socialnetworktimes.wordpress.com/2008/12/16/youve-been-poked-now-youre-homeless-lawyer-serves-repossession-papers-on-facebook/>.

143. *Id.*

144. *Id.*

145. *See id.* The attorney who served notice via Facebook in Australia stated that it only took him about 30 seconds to find the defendants on Facebook. *Id.* *See also* McKee, *supra* note 90 (discussing the default privacy settings).

146. *Update Your Basic Info*, *supra* note 79.

147. Josh Constine, *Facebook Has Users Identify Friends in Photos To Verify Accounts, Prevent Unauthorized Access*, INSIDE FACEBOOK (Jul. 26, 2010), <http://www.insidefacebook.com/2010/07/26/facebook-photos-verify/>.

148. *Id.*

C. Proof of Service

If service via Facebook wall post is ordered, how can the party establish that the defendant received the notification? Plaintiff establishes proof of service when defendant deletes the wall post or when defendant's wall indicates account activity after posting of the notice.¹⁴⁹ In the first instance, the defendant must have seen the notice in order to delete the notice. Facebook users, who access Facebook via computer, cannot remove a wall post until they slide the mouse over the wall post and wait until the "remove wall post" button appears.¹⁵⁰ After clicking the button, the user is prompted with a new window that requires the user to select, "remove post" or "cancel."¹⁵¹ In the second instance, because users are prompted with red account activity notices upon logging into their account, it is unlikely that the defendant overlooked the notices and proceeded to initiate other activity on his account.¹⁵² Additionally, the defendant receives an email notifying him that another user posted on the defendant's wall.¹⁵³ The email indicates the comment and the content of the wall post on which it was made.¹⁵⁴ As a whole, Facebook's complex features integrate elements of notice via email, collateral source, and a blend of publication and affixing. Because courts must order the alternative notice most reasonably calculated to provide notice, the wall post is a superior alternative to traditional means of alternative service because it employs multiple sources which, depending on the factual circumstances, present an increasingly high probability of providing notice in today's tech-driven society.

D. Ethical Concerns of Executing Service of Process via Facebook

If an attorney is unable to access a defendant's Facebook wall due to the defendant's privacy settings, is it ethical for an attorney to befriend the defendant to gain access to the defendant's Facebook profile? An Attorney should not befriend parties, witnesses, or potential parties to litigation for the unstated purpose of obtaining information to be used for litigation.¹⁵⁵

149. *How News Feed Works*, *supra* note 70 (explaining that a user's action is published on the user's Wall as well as the user's friends' News Feed).

150. *See id.*

151. *See id.*

152. *See id.*

153. *See id.*

154. *See id.*

155. N.Y. STATE BAR ASS'N: COMM. ON PROF'L ETHICS, Ethics Opinion 843 (Sept. 10, 2010) available at <http://www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=43208>. See also MICH. R. PROF'L CONDUCT R. 8.4(b) (2012) ("It is professional misconduct for a lawyer to . . . (b) engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer[.]").

Moreover, an attorney should not ask a non-lawyer assistant to do so.¹⁵⁶ The Philadelphia and New York Bar Associations analyzed this aspect of the ethical limitations on the use of Facebook for litigation.¹⁵⁷ The Associations' opinions are not binding on any tribunal. They do, however, provide valuable insight into the practicality of service of process via Facebook wall post.¹⁵⁸

In Philadelphia, the committee stated that neither an attorney, nor his agent, can befriend an unrepresented witness to obtain evidence for pending litigation without disclosing his or her intention of obtaining information for the litigation.¹⁵⁹ Shortly after the Philadelphia opinion, the New York Bar Association released an opinion stating that an attorney cannot dishonestly befriend a party to litigation.¹⁶⁰ However, an attorney can use a third party's Facebook account, such as a client's account, to browse an opposing party's Facebook profile, as long as the third party is a Facebook "friend" of the opposing party prior to the pending litigation.¹⁶¹ In essence, these opinions do not forbid attorneys from using Facebook for litigation, they simply warn against deceitful, dishonest use of Facebook.¹⁶²

The inability to access the defendant's wall may make it more difficult to show the court that the wall post is reasonably calculated to notify the defendant. However, in civil court, it is not uncommon for opposing parties to have a relationship prior to litigation, perhaps even a Facebook friendship. In any event, the very presence of a Facebook account seems more likely to notify a party because the account must be connected to a valid email.¹⁶³ Moreover, since the vast majority of adults use email, it's difficult to advocate for traditional means of alternative service, which the Court has designated as "futile," and more for formality.¹⁶⁴ Thus, service via wall post appears to meet due process and ethical concerns so long as litigants, and their attorneys, do not engage in any dishonest, deceptive practice.

156. Ethics Opinion 843, *supra* note 155; PHILA. BAR ASS'N PROF'L GUIDANCE COMM., Ethics Opinion 2009-02, (2009), *available at* http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf; MICH. R. PROF'L CONDUCT 8.4(a) (2012) ("It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another [.]").

157. Ethics Opinion 843, *supra* note 155; Ethics Opinion 2009-02, *supra* note 156.

158. Ethics Opinion 2009-02, *supra* note 156 (stating that the authority applying the opinion designates its persuasiveness).

159. *Id.*; PA. R. PROF'L CONDUCT 8.4 (2012) (prohibiting attorneys from engaging in dishonest conduct).

160. Ethics Opinion 843, *supra* note 155.

161. *Id.*

162. Ethics Opinion 2009-02, *supra* note 156.

163. *Confirm Your Email Address*, *supra* note 65.

164. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950).

VII. CONCLUSION

While service via Facebook is a novel concept, it will likely become common practice. As America moves from a newspaper and snail-mail dependent society to a wireless culture, electronic service of process stands constitutionally ready to replace antiquated means of service. Embedded in the deeply rooted legal traditions and history of the United States, the underpinnings of the unalienable right of due process remains unchanged. The timeless truth that fairness in legal matters matters, and that fairness requires notice, articulates an inviolable, enduring, objective standard. This standard empowers courts to respond to modern circumstances by ordering alternative methods of service consistent with such inalienable values. Because fairness requires notice, and notice ought to actually inform, it is logical to employ alternative methods of service more reasonably calculated to notify a defendant whose liberty or property is at stake. Presuming the plaintiff has already made diligent efforts to find and serve the defendant, Facebook is reasonably calculated to put the defendant on notice of the suit and give him an opportunity to respond. Moreover, service via Facebook is *more* reasonably calculated to notify the defendant than a general posting or publication. Because Facebook is likely to provide actual notice, it is therefore appropriate at least whenever traditional alternative methods would be ordered.