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Solving Sewer Service: Fighting Fraud with Technology

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SOLVING SEWER SERVICE: FIGHTING FRAUD WITH TECHNOLOGY

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ABSTRACT

Fraudulently obtained default judgments ruin lives. Many defendants are ignorant of their cases and therefore do not appear for court. Defendants suffer dire consequences as victims of falsified service of process. They learn of their lawsuits after their wages are garnished, assets seized, or when their poor credit precludes them from obtaining housing or a new job.

For decades, fraudulent service of process has been widespread in high volume court dockets, such as landlord and tenant, debt collection, and small claims matters. Judgments granted to the debt collector plaintiff disproportionately affect low-income communities of color. Some plaintiffs obtained such judgments against defendants who live in mostly black neighborhoods at a rate 18 times higher than it did against defendants in mostly white neighborhoods. Despite this knowledge, the current rules of procedure in most jurisdictions do not require reliable verifications of service. Process servers complete the proof of service themselves, thereby "proving" their service through self-verification. When proof of service relies only on the "honor system," this is unreliable and unfair, and fails to protect defendants when more reliable technological verifications are available. The integrity of our judicial system is challenged when service-of-process rules fail to use technological verifications to protect litigants from fraud.

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The current service of process standard requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." Since the U.S. Supreme Court articulated this standard in 1950, the circumstances have simply changed. Therefore, so must our service of process requirements. Traditional methods of service, which lack reliable verifications, are not reasonably calculated to provide constitutionally adequate notice. The technological advancements that have occurred in the decades following Mullane, provide new and better circumstances under which notice must be provided.

INTRODUCTION

The first time I sat in the D.C. Superior Court's Landlord and Tenant Branch for "roll call," I wondered why so many tenants failed to appear for their eviction hearings. As the clerk of the court individually called each case scheduled for the day, the tenants, almost all of whom appeared pro se, shouted their names loudly. The same five or six landlords' attorneys answered for their clients—none of whom actually appeared. Then it happened. The longer I sat in that large courtroom, the more I heard the same request from landlords' attorneys—"default, please."

I heard those words more times than I could count. I tried to convince myself that the tenants in default had already paid their debts in full, so they thought there was no reason to appear. Maybe they even found a better place to live and moved out. But I had an uneasy feeling that many of those tenants in default lacked notice of their cases.

As the years passed, I represented many clients facing eviction for nonpayment of rent in Washington, D.C., many of whom were served by posting or mailing instead of by personal service, even though this method of service is the "least favored form of service."[1] Although D.C. law requires at least two separate attempts at personal service before a process server may resort to service by posting or mailing,[2] the vast majority of my clients

1. Parker v. Frank Emmet Real Estate, 451 A.2d 62, 64 (D.C. 1982) (holding that posting is a disfavored method service of process because it is less reliable than other appropriate methods, and may raise due process concerns).

2. Lynch v. Bernstein, 48 A.2d 467, 468 (D.C. 1946) (finding valid service after server posted notice on second visit).

were served in this manner. It was the normal practice. Although this observation was initially troubling, I did not realize the gravity of this systemic injustice until I met the F. family.

During my initial meeting with Mr. F., I went through my normal eviction defense algorithm. I asked questions about technical defenses, whether he received a thirty-day Notice to Correct, the method of service, and the existence of housing conditions. When we reviewed the affidavit of service together, I became intrigued when he confidently suggested that the process server lied about his personal service attempts.

I researched this landlord's other cases on the public online court docket. The method of service for every case was posting and mailing. I pulled every affidavit of service that I could find. The results showed that this particular process server had never personally served any defendant on behalf of this landlord. Of his more than fifty alleged attempts at personal service, this process server never succeeded and always resorted to posting and mailing. More importantly, the affidavits suggested that he attempted service in different quadrants across Washington, D.C. on the same dates, and at the same times, in separate cases—an impossible feat. Needless to say, Mr. F. prevailed in his case.

About a year later, I met Mr. N. Mr. N already had a default judgment entered against him and the writ of eviction had already been executed. While he was at work, the contents of his apartment were emptied onto the sidewalk. He lost everything. He insisted that his failure to appear for his court date was because he lacked actual notice of the case. I was not surprised to learn that he was allegedly served via posting and mailing. My research showed that although posting should be an extremely rare method of service, it was this landlord's method of service in almost every case.

Additionally, the landlord's process server had a history of suspicious, alleged attempts at personal service. Out of over forty alleged attempts at personal service, the process server had successfully effected personal service on only one occasion—a 2.3% success rate. On one particular date, this process server claimed to have attempted with "due diligence" to personally serve process at six separate apartments, on different floors of five separate buildings in the same neighborhood, in a total span of a few

minutes. Unsurprisingly, after I raised these suspicions with opposing counsel, the landlord consented to vacate the default judgment and reinstate the tenancy.

Years have passed since the first day that I observed "roll call" in the District of Columbia Landlord and Tenant Branch, and I no longer wonder why some tenants in default fail to appear. I unequivocally know that service practices are unreliable and unfair. There are systemic due process violations occurring in the form of improper and ineffective service of process. Most troubling is that many defendants do not appear for court simply because they do not know about their case.

Unreliable and unfair service practices are a national problem.[3] They are not unique to the District of Columbia. At least three jurisdictions have recently attempted to address sewer service through litigation, resulting in multimillion dollar settlements for victims.[4] Even Matthew Desmond's nationally acclaimed book, *Evicted*, found allegations of such practices.[5] Desmond followed eight indigent families in Milwaukee, chronicling their housing struggles and ultimate evictions.[6] It did not take long before the book's subjects alleged that they lacked notice of their eviction.[7] In chronicling a sheriff's execution of an eviction, Desmond wrote:

> No one was home for the next eviction, a two-story baby-blue house. Half the time, the tenants weren't home. Some moved out before the sheriffs arrived. Others didn't realize their day had come. A rarefied bunch called the Sheriff's

3. *See* JON LEIBOWITZ ET AL., FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 9-12 (2010), https:// www.ftc.gov/ sites/ default/ files/ documents/ reports/ federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf [https://perma.cc/57UH-DEJE].

4. Sean Lahman, *Debt Collector Scam Resolution: Refunds Coming*, DEMOCRAT & CHRON. (Nov. 23, 2015, 10:30 PM), http://www.democratandchron icle.com/ story/ news/ 2015/ 11/ 23/ debt- collector- class- action- lawsuit/ 76061396/ [https://perma.cc/84EJ-X9JA]; Press Release, Cal. Office of the Att'y Gen., Attorney General Kamala D. Harris Announces Settlement with JPMorgan Chase for Unlawful Debt-Collection Practices (Nov. 2, 2015) [hereinafter California Press Release], https://www.oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-settlement-jpmorgan-chase-unlawful [https://perma.cc/F7UQ-AS36]; FED. TRADE COMM'N, OPERATION COLLECTION PROTECTION: STATE AND LOCAL ACTIONS 29 (2015).

5. MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 115 (2016).

6. *Id.* at 5.

7. *Id.* at 115.

> Office, asking if their address was on that day's eviction list. But many were unprepared and bewildered when the sheriff came knocking. Some claimed never to have received notice [of the eviction] . . . . The deputies would shrug. They figured the tenants were just playing the system, staying as long as they could.[8]

When a defendant, like the tenants above, fails to appear for court, a default judgment typically results.[9] A large percentage of default judgments are entered in high-volume dockets.[10] High-volume dockets are dockets that "put a premium on expedited case processing."[11] Generally, a high-volume docket will consist of cases ranging from consumer-debt-collection and landlord/tenant disputes to other small claims cases.[12] Many defendants do not appear for these types of high-volume matters because they are simply unaware of their cases.[13] Indeed, typical methods of service, which are intended to provide constitutionally-required notice, are unreliable in apprising defendants of a pending case.[14] They are "riddled with inaccuracies and inadequacies," which often rise to the level of fraudulent "sewer service."[15]

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8. *Id.*

9. *See* Hannah E. M. Lieberman & Paula Hannaford-Agor, *Meeting the Challenges of High-Volume Civil Dockets*, *in* TRENDS IN STATE COURTS: SPECIAL FOCUS ON FAMILY LAW AND COURT COMMUNICATIONS 89, 91-93 (Carol R. Flango et al. eds., 2016), http://www.ncsc.org/ ~/media/ microsites/ files/ trends% 202016/ trends-2016-low.ashx [https://perma.cc/8545-UNU9].

10. *Id*. at 91.

11. *Id*. at 89-90.

12. *Id*. at 90.

13. *See* David D. Siegel, *"Sewer Service" In Huge Numbers of Cases – Resulting in Default Judgments on Perjured Affidavits of Service – Leads to Criminal Penalties; What About Civil Consequences?*, SIEGEL'S PRAC. REV., Apr. 2009, at 1, 1. The problem of sewer service gained the public spotlight decades ago in early 1970s in NYC. *Id.* In response, administrative law judge Edward Thompson initiated the practice of vacating fraudulently obtained default judgments en mass. *Id.* This practice, which was the first of its kind, was codified in 1973 and is referred to as "Thompson's Law." *Id*. Thompson's Law can be applied so long as the offending cases are able to be identified based on the time period in which a default judgment was entered, the named plaintiff, a specific attorney, or a particular process server. *Id.*

14. PAULA HANNAFORD-AGOR ET AL., NAT'L CTR. FOR STATE COURTS, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 2 (2015), https://www.ncsc.org/~/media/Files/PDF/Research/CivilJusticeReport-2015.ashx [https://perma.cc/8XBK-QPSH]; *see also* 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, 1124-29 (2005).

15. HANNAFORD-AGOR ET AL., *supra* note 14, at 2.

"Sewer service" occurs when a process server falsifies an affidavit of service instead of actually serving court documents.[16] The name originated from a practice by which process servers would symbolically throw legal documents into the sewer, rather than delivering them to the intended recipient.[17] Sewer service is a fraudulent practice with potentially crippling results—the entry of a default judgment against a defendant.[18] Defendants are indeed suffering dire consequences from falsified affidavits of service, including frozen bank accounts, wage garnishment, ruined credit, and even eviction.[19]

Sewer service practices occur along a spectrum. Although, as a practical matter, some are more evil than others, all are fraudulent and deny defendants their constitutional right to notice and an opportunity to be heard.[20] The most malicious practice occurs when a process server blatantly lies about ever serving an individual with documents. The affidavit incorrectly reflects either that the server personally served the defendant, or that a resident at the defendant's home was served via substitute service. In some cases, the so-called "resident" is a fictitious character that never existed.[21] Either way, this wicked practice is a flagrant disregard of an individual's rights.

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16. *See* CLAUDIA WILNER ET AL., DEBT DECEPTION: HOW DEBT BUYERS ABUSE THE LEGAL SYSTEM TO PREY ON LOWER-INCOME NEW YORKERS 2 (2010), http://mobilizationforjustice.org/ wp-content/ uploads/ reports/DEBT-DECEPTION.pdf [https://perma.cc/YN6E-MAFM].

17. *See id.* at 6 (defining "sewer service" as "the practice of failing to serve court papers (and instead throwing them in the 'sewer') and filing false affidavits of service with the courts").

18. *See Sewer Service*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "sewer service," a slang phrase, as "[t]he fraudulent service of process on a debtor by a creditor seeking to obtain a default judgment").

19. WILNER ET AL., *supra* note 16, at 10.

20. MFY LEGAL SERVS., JUSTICE DISSERVED: A PRELIMINARY ANALYSIS OF THE EXCEPTIONALLY LOW APPEARANCE RATE BY DEFENDANTS IN LAWSUITS FILED IN THE CIVIL COURT OF THE CITY OF NEW YORK 2 (2008), http://mobilizationforjustice.org/wp-content/uploads/reports/Justice_Disserved.pdf [https://perma.cc/9T84-TK9C].

21. For example, in a case study by MFY Legal Services, Victor A., a 68-year-old blind man, was the victim of a potentially fraudulent affidavit of service. *Id.* at 7.

> His first notice of a lawsuit against him by a debt buyer was when he attempted to withdraw money from an ATM to pay for medication and learned that two of his bank accounts had been frozen. He was unable to buy the medication, which he needed for a follow-up procedure to an operation for colon cancer. He also was unable to pay his rent for the month, and could not pay his bills. The affidavit of service stated that a person of suitable age and discretion, "John Doe-co-tenant," had been served at his address. Mr. A lives alone and only leaves the house with the help of a home attendant, and knows nobody

On the other end of the spectrum, there are occasions when a process server uses a service method of "last resort," such as nail and mail, as the first and only attempt at service.[22] The affidavit of service falsely indicates that, after a number of failed attempts at personal service, the process server resorted to "nailing and mailing" the documents. This method of service is strongly disfavored and problematic because it is the least likely to afford a defendant actual notice.[23] To be legally sufficient, such disfavored methods of service can be used only after a process server has exhausted other options that are more likely to provide actual notice.[24]

This article examines "sewer service" and the modern-day technological verifications that are available to solve this systemic injustice. One of the most fundamental legal rights of our American justice system is the right to be notified of a pending lawsuit.[25] Without such notice, an individual is fundamentally stripped of their opportunity to appear and defend themselves. The current service practices are unreliable and unfair because proof of service relies on an "honor system" by which a process server self-verifies an affidavit of service. There are independent and reliable technological verification tools available that are not currently required by many court rules. The integrity of our judicial system is broken when our court rules fail to require technological verifications that could easily protect litigants from sewer service.

This article contributes to the existing scholarship on access to justice barriers. Although many scholars focus on access to

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> who fit the description of the "co-tenant" supposedly served. His bank account was frozen for weeks until MFY convinced the debt collection attorney to release his account by sending them proof of his only source of income.

Id.

22. *See id.* at 6, 10.

23. "Nail and mail" service is the least reliable form of service and is less likely to protect a defendant's due process rights. Jones v. Hersh, 845 A.2d 541, 547 (D.C. 2004). Indeed, District of Columbia courts have interpreted service by "nailing and mailing" under D.C. Code § 16-1502 as the "method of "last resort." *Id.* at 547 (citing Dewey v. Clark, 180 F.2d 766, 768 (D.C. Cir. 1950)).

24. Talia E. Neri, Article, *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, 219 (2009) ("Sometimes, conspicuous service of process is the first attempt at service, even though this manner of service should only be used if the process server cannot locate and serve the respondent or another suitable individual in person.") (footnotes omitted).

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

justice, few, if any, have considered the long-term consequences of failing to appear for court as a result of fraudulent service of process. A defendant who lacks knowledge of his lawsuit cannot access justice. The first step in ensuring access to justice is to examine and reform the current service-of-process laws to protect litigants who fall victim to sewer service. This article is the first to suggest that service of process reform is a prerequisite to all other attempts at improving access to justice for indigent litigants. This work fills the gap in existing scholarship on access to justice by acknowledging the silenced victim who is fraudulently deprived of an opportunity to access justice.

Although currently underutilized, readily-available technological verifications would pressure process servers to provide notice that is "reasonably calculated, under all the circumstances," and offer the victims evidence of fraud.[26] Part I of this article examines the historical evolution of service of process. Part II discusses the current practice, which leaves a defendant who wishes to challenge service with the burden of proving a negative. Part III discusses the problems created by fraudulent sewer service and its devastating effect on the lives of low-income defendants. Part IV argues that technological verifications of service should be utilized in order to meet the current *Mullane v. Central Hanover Bank & Trust Co.* standard. Outdated service-of-process laws, which do not explicitly require technological verification, fail to protect many defendants. Finally, Part V confronts the concerns of those who oppose the use of technology as a tool to verify service of process.

I. EVOLUTION OF SERVICE-OF-PROCESS LAWS

An individual's due process right to be heard has "little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."[27] The Fifth and Fourteenth Amendments limit federal and state governments from depriving individuals of life, liberty, and property without due process of law.[28] Due process requires

26. *Id*.

27. *Id.*

28. 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.").

both notice and an opportunity to respond in a legal proceeding when an individual may lose life, liberty, or property.[29] Indeed, the two core principles of procedural due process are (1) notice and (2) an opportunity to be heard.[30] However, this article focuses only on the former, as, without notice, there cannot be an opportunity to be heard.[31]

A. Historical Methods of Service

The due process requirements for adequate notice have varied and evolved over time. As our society has changed, courts have adapted and become more flexible in accepting methods of service of process. Historically, the United States Supreme Court required personal service within the forum state for in personam proceedings.[32] This requirement stemmed from the close connection between service of process and personal jurisdiction.[33] In *Pennoyer v. Neff*, the Supreme Court tackled the issue of whether a state court had personal jurisdiction over a non-resident who was not personally served within the state.[34] The Court held that, in actions concerning a defendant's personal rights and obligations, the defendant must be personally served within the state for a court to enter judgment against him.[35]

In 1917, in *McDonald v. Mabee*, the Supreme Court was again required to consider forms of service other than personal service over a nonresident.[36] Although the Court ultimately found that service by publication was insufficient, it seemingly opened

29. *See Mullane*, 339 U.S. at 313-14 (noting that the Due Process Clause requires, at a minimum, notice and an opportunity to be heard).

30. *Id.* at 314.

31. In order for a court to exercise its authority over a defendant, both personal jurisdiction and service of process are required. *Id.*; *see also* Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1115-16 (1980). This article focuses only on service of process. For a brief overview of the history and evolution of personal jurisdiction, see *id.* at 1114-20; James Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872, 872-75 (1980).

32. *See An Overview of the Law of Personal (Adjudicatory) Jurisdiction: The United States Perspective*, CHI.-KENT C.L., http://www.kentlaw.edu /cyberlaw/ docs/ rfc/ usview. html [https://perma.cc/BJ8J-SP2T].

33. *See id.*

34. Pennoyer v. Neff, 95 U.S. 714, 726-27, 732-33 (1877) (requiring personal service in an *in personam* matter when an action concerns an individual's personal rights and obligations).

35. *Id.* at 733-34.

36. McDonald v. Mabee, 243 U.S. 90, 91 (1917).

the door for alternative methods of service, rather than requiring a strict personal service approach, when a defendant cannot be located.[37] In taking a slightly more flexible approach to service, the Court noted that in order "[t]o dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done."[38] In the decades that followed, service of process became even more relaxed, and the Supreme Court focused on sufficient minimum contacts with a state in order to establish personal jurisdiction.[39]

B. The Current "Reasonably Calculated" Mullane Service Standard

In 1950, in *Mullane v. Central Hanover Bank & Trust Co.*, the United States Supreme Court set forth the current standards for assessing the constitutionality of notice.[40] *Mullane* is the seminal case in the historical succession of cases that address service of process. Although its holding applied to an accounting of trust property as opposed to real property, it has been widely applied to many areas of law.[41]

In *Mullane*, the Supreme Court granted certiorari to examine the constitutionality of notice provided to trust fund beneficiaries through newspaper publication.[42] The Court appointed Kenneth Mullane to act as the "special guardian and attorney for all persons known or unknown not otherwise appearing," who may have

37. *Id.* at 92 ("Perhaps in view of his technical position and the actual presence of his family in the State a summons left at his last and usual place of abode would have been enough.").

38. *Id.*

39. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945) (holding that a party may be subject to the jurisdiction of a state court if the party has minimum contact with that state).

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

41. Jo-Leo W. Carney-Waterton, Case 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, 80 (2007) (explaining that *Mullane* has been widely applied to cases involving eminent domain, property tax, and probate); *see also* Walker v. City of Hutchinson, 352 U.S. 112, 115 (1956) (applying the holding in *Mullane* to eminent domain); Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 795-800 (1983) (applying the holding in *Mullane* to property tax); Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 484-85 (1988) (applying the *Mullane* holding to a probate issue).

42. *See Mullane*, 339 U.S. at 307-09.

had an interest in the common trust fund.[43] A newspaper notice was published only once.[44] Notably, the publication failed to identify the beneficiaries, or any other interested, known parties, by name.[45] Furthermore, despite having the mailing addresses of known beneficiaries, and having previously corresponded with them through regular mail, the known beneficiaries were still provided notice only by general newspaper publication.[46]

The publication's failure to "name those whose attention it [was] supposed to attract" reduced the chance of actual notice.[47] Indeed, even acquaintances, who could have seen the publication and conveyed the information to the beneficiaries, could not know who the publication referred to.[48] As a result, the special guardian challenged the adequacy of notice on due process grounds.[49]

The Court, noticeably careful not to commit itself to any formula, balanced the individual interest sought to be protected by due process with the interests of the State.[50] The Court held: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice 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."[51]

The Court then divided the beneficiaries in to two distinct groups—(1) *unknown* beneficiaries whose interests and whereabouts could not be ascertained by due diligence; and (2) *known* beneficiaries with known places of residence.[52] For *unknown* beneficiaries, whose interests or whereabouts could not with due diligence be ascertained, the Court found that notice via the newspaper publication was sufficient.[53] The Court reasoned that due

43. *Id.* at 310.
44. *See id.* at 309-10.
45. *Id.* at 310 (explaining that the publication set forth only the name, address, and dates of the trust company and establishment of particular accounts).
46. *Id.* at 318.
47. *Mullane*, 339 U.S. at 315.
48. *Id.*
49. *Id.* at 311.
50. *Id.* at 314.
51. *Id.*
52. *See Mullane*, 339 U.S. at 318.
53. *Id.* at 317.

process does not require impracticable and extended searches for unknown parties.[54]

Regarding the *known* beneficiaries with known places of residence, the Court treated service by newspaper publication differently.[55] In holding that notice must be "reasonably calculated to reach interested parties," the Court required at least notice by mail, as opposed to notice only by newspaper publication, for those whose places of residence were known.[56] When the names and addresses of those affected are "at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency."[57] The Court found no tenable ground for "dispensing with a serious effort to inform [the known beneficiaries] personally of the accounting, at least by ordinary mail to the record addresses."[58]

C. Significant Cases Following Mullane

Twelve years after *Mullane*, in *Schroeder v. City of New York*, the United States Supreme Court invalidated statutory standards of service by publication and posting when a defendant's mailing address could have been easily ascertained and he could have been served by mail.[59]

In 1982, in *Greene v. Lindsey*, the issue before the Court was whether Louisville public housing tenants were afforded due process when, after one unsuccessful attempt at personal service (or substitute service), their eviction summonses were posted on their doors.[60] Although there may have been "a time when posting provided a surer means of giving notice than did mailing, [t]hat time has passed."[61] The Sixth Circuit found that although *historically* considered adequate service, posting service alone was insufficient by *modern standards*.[62] Indeed, continued reliance on an unreliable notice procedure (posting) is not notice "reasonably

54. *Id.* at 318 ("The expense of keeping informed from day to day of substitutions among even current income beneficiaries and presumptive remaindermen . . . would impose a severe burden on the plan, and would likely dissipate its advantages.").

55. *Id.*

56. *Id.* at 317-19.

57. *Mullane*, 339 U.S. at 318 (emphasis added).

58. *Id.*

59. Schroeder v. City of New York, 371 U.S. 208, 210-11 (1962).

60. Greene v. Lindsey, 456 U.S. 444, 445 (1982).

61. *Id.* at 448 (quoting Lindsey v. Greene, 649 F.2d 425, 428 (6th Cir. 1981)).

62. *Lindsey*, 649 F.2d at 428, *aff'd*, 456 U.S. 444 (1982).

calculated" when an inexpensive and efficient mechanism (mail) is available to enhance reliability.[63]

As modern communication standards shift, so has the *Mullane* "reasonably calculated" notice requirement. As society has advanced, methods of modern communication (newspaper publication, posting, mail, fax, email, television, Facebook, Twitter, etc.) evolved, and so have court's' views of constitutionally adequate notice. For example, around the same time that the parties litigated *Greene*, a separate court authorized an alternative method of service using technology—with telex.[64] Similarly, in 1988, a court permitted service of process upon an attorney through a fax machine after two separate defendants had evaded service.[65] In 2001, the Southern District of New York permitted service through another means of technology—television.[66] The plaintiff sued defendants Osama bin Laden, al Qaeda, the Taliban, and the Islamic Emirate of Afghanistan for claims stemming from the attack on the World Trade Center on September 11, 2011.[67] The court permitted service of process upon the two unknown defendants, bin Laden and al Qaeda, through newspaper publication and television broadcast, a manner of service not contemplated by *Mullane*.[68] However, in accordance with the *Mullane* reasoning, the court did not permit service via television on the defendants whose addresses were known: the Taliban and the Islamic Emirate of Afghanistan.[69]

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63. Greene, 456 U.S. at 455-56 (citing *Mullane*, 339 U.S. at 319).

64. New Eng. Merchs. Nat'l Bank v. Iran Power & Transmission Co., 495 F. Supp. 73, 81 (S.D.N.Y. 1980) (directing service with a telex message). A telex is "a system of communication in which messages are sent over long distances by using a telephone system and are printed by using a special machine (called a teletypewriter)." *Telex*, MERRIAM-WEBSTER, https:// www.merriam-webster.com/ dictionary/ telex [https://perma.cc/BRZ4-HC8Z].

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

66. *See* Smith v. Afghanistan, No. 01 CIV 10132(HB), 2001 WL 1658211, at *3-4 (S.D.N.Y. Dec. 26, 2001).

67. *Id.* at *1.

68. *Id.* at *3-4 (reasoning that neither bin Laden nor al Qaeda have a readily ascertainable address or officer to accept service). *See also* John M. Murphy III, Note, *From Snail Mail to E-Mail: The Steady Evolution of Service of Process*, 19 ST. JOHN'S J.L. COMMENT. 73, 91 (2004); Aaron R. Chacker, Note, *E-Ffectuating Notice:* Rio Properties v. Rio International Interlink, 48 VILL. L. REV. 597, 601-02 (2003) (noting that the Court's holding in *Mullane* expanded methods of service and authorized unusual methods in cases where a defendant's whereabouts are unknown).

69. Murphy, *supra* note 68, at 91.

In 2002, a court permitted a plaintiff to use another alternative service method, email, to serve a defendant residing in Saudi Arabia.[70] In 2008, a New York Civil Court similarly permitted service via email on a domestic defendant whose whereabouts were simply unknown.[71] Additionally, courts in Australia, New Zealand, and Minnesota have permitted service through Facebook in limited circumstances.[72]

In 2016, a federal judge permitted a plaintiff to use Twitter to effectuate service on a foreign defendant, when he was unable to be served by traditional means.[73] The case arose from alleged damages caused by the defendant's financing of ISIS attacks on Assyrian Christians in Iraq and Syria, but the plaintiff had been unable to serve the defendant, al-Ajmi, through traditional means.[74] Al-Ajmi was a Kuwaiti national and Kuwait was not a party to the Hague Convention, which permits service through internally agreed upon means.[75] Nevertheless, al-Ajmi had an active Twitter account and "used the social-media platform to fundraise large sums of money for terrorist organizations by providing bank-account numbers to make donations."[76] The court, citing Rule 4(f), held that, "Al-Ajmi has an active Twitter account and continues to use it to communicate with his audience. Service by Twitter is not prohibited by international agreement with Kuwait."[77] With technological advances and changes to modern

70. Hollow v. Hollow, 747 N.Y.S.2d 704, 705, 708 (Sup. Ct. 2002) (permitting wife to serve husband, a resident of Saudi Arabia, via email in a divorce proceeding). For foreign defendants, Federal Rule of Civil Procedure 4(f) allows service via email. Specifically, the rule permits service by: (1) internationally agreed upon means such as the Hague Convention; (2) if there are no international means, then "by means "reasonably calculated to give notice," or (3) by other means not prohibited by international agreement. FED. R. CIV. P. 4(f).

71. Snyder v. Alternate Energy Inc., 857 N.Y.S.2d 442, 447-49 (Civ. Ct. 2008) (holding that service by e-mail was an appropriate form of alternative service because conventional service was impracticable, and plaintiffs showed that defendant was regularly online using an e-mail address that, by all indications, was his).

72. William Wagner & Joshua R. Castillo, *Friending Due Process: Facebook as a Fair Method of Alternative Service*, 19 WIDENER L. REV. 259, 265-66 (2013); *see also* Ronald J. Hedges et al., *Electronic Service of Process at Home and Abroad: Allowing Domestic Electronic Service of Process in the Federal Courts*, 4 FED. CTS. L. REV. 55, 68-71 (2009).

73. St. Francis Assisi v. Kuwait Fin. House, No. 3:16-cv-3240-LB, 2016 WL 5725002, at *2 (N.D. Cal. Sept. 30, 2016).

74. *Id.* at *1.

75. *Id.*

76. *Id.*

77. *St. Francis*, 2016 WL 5725002, at *2.

standards of communication, courts have expanded the traditional methods of service of process.

II. THE CURRENT PRACTICE

A. Codified Methods of Service that Satisfy the "Reasonably Calculated" Standard

When a plaintiff files lawsuits, he or she must ensure that a copy of the summons and complaint are served on the defendant.[78] After service is effectuated, proof of service, usually in the form of an affidavit, must attest to the facts of service and be filed with the court.[79] Process servers complete the proof of service themselves, thereby "proving" their service through self-verification.[80] Such an "honor system" method of verification fails to protect defendants when more reliable technological verifications are available.

Under codified rules of procedure that govern service of process, a plaintiff may have several options from which to choose.[81] The rules and requirements vary for *how* service may be effectuated, and *who* may act as the process server.[82] In addition to jurisdictional differences,[83] the service requirements may vary depending on the branch or division of the court within the same jurisdiction.[84] For example, the small claims court, landlord and

78. FED. R. CIV. P. 4(c).

79. FED. R. CIV. P. 4(*l*).

80. Md. Access to Justice Comm'n, *Tip Sheet 6: Service of Process: Circuit Court*, MD. CTS., http://mdcourts.gov/ video/ docs/ tipsheet service of process circuit.pdf [https://perma.cc/K3QE-55YG].

81. FED. R. CIV. P. 4(e).

82. *See* FED. R. CIV. P. 4(c)(2)-(3).

83. *See* FED. R. CIV. P. 4; ALA. R. CIV. P. 4; ALASKA R. CIV. P. 4; ARIZ. R. CIV. P. 4; ARK. R. CIV. P. 4; CAL. CIV. PROC. CODE §§ 412.20–415.50 (West 2017); COLO. R. CIV. P., 4; FLA. R. CIV. P. 1.070; GA. CODE ANN. § 9-11-4 (2013); HAW. R. CIV. P. 4; IDAHO R. CIV. P. 4; 735 ILL. COMP. STAT. 5/2-201 to -203 (West 2017); IND. R. TRIAL P. 4; IOWA R. CIV. P. 1.302; KAN. STAT. ANN. § 60-204 (2014); KY. R. CIV. P. 4.01-.16; LA. CODE CIV. PROC. ANN. art. 1231-1237 (2017); ME. R. CIV. P. 4; MASS. R. CIV. P. 4; MICH. CT. R. 2.102; MINN. R. CIV. P. 4.01-.07; MISS. R. CIV. P. 4; MO. SUP. CT. R. 43.01; MONT. R. CIV. P. 4; NEB. REV. STAT. § 25-503.01, -505.01 (West 2017); NEV. R. CIV. P. 4; N.Y. C.P.L.R. 305-316 (McKinney 2017); N.C. GEN. STAT. § 1A-1, R. 4 (West 2017); N.D. R. CIV. P. 4; OHIO R. CIV. P. 4 to 4.6; OR. R. CIV. P. 7; S.C. R. CIV. P. 4; TENN. R. CIV. P. 4.01-.09; UTAH R. CIV. P. 4; VT. R. CIV. P. 4; W. VA. R. CIV. P. 4; WYO. R. CIV. P. 4.

84. *Compare* N.M. DIST. CT. R. CIV. P. 1-004, *with* N.M. MAGIS. CT. R. CIV. P. 2-202, N.M. METRO. CT. R. CIV. P. 3-202, *and* N.M. MUN. CT. R.P. 8-204.

tenant branch, and civil division service rules may differ within the same jurisdiction.[85]

Each jurisdiction has codified methods of service in their respective Rules of Civil Procedure that satisfy *Mullane*'s "reasonably calculated" standard.[86] Moreover, many state Rules of Civil Procedure substantially mirror Rule 4 of the Federal Rules of Civil Procedure.[87] Under these service rules, there are several accepted methods of service available.

1. Personal Service

Personal service is the most reliable method of service and is often considered the "gold standard."[88] Personal service is the preferred method of service because it provides "actual notice," which is "directly and personally" delivered to the defendant.[89] Indeed, personal service results in actual delivery of the court papers to the defendant.[90] Actual notice is considered superior to constructive notice, which is notice that the law imputes to a person who lacks actual knowledge.[91]

Because personal service is the preferred method, it must often be attempted before a process server can resort to using another method. Normally, one in possession of a residence can be found and served in person.[92] Personal service requires a process server to physically locate a defendant, which could occasionally prove to be difficult—especially when the defendant intentionally

85. *See* D.C. SUPER. CT. SMALL CL. R. 4; D.C. SUPER. CT. LAND. & TEN. R 4; D.C. SUPER. CT. R. CIV. P. 4.

86. *See* PATRICK J. BORCHERS, CONFLICTS IN A NUTSHELL §§ 122-23 (4th ed. 2016).

87. Roger Michael Michalski, *Tremors of Things to Come: The Great Split Between Federal and State Pleading Standards*, 120 YALE L.J. ONLINE 109, 109-10 (2010), http://www.michalski.ch/ publications/ Roger% 20Michalski% 20-% 20Tremors%20of%20Things%20to%20Come%20%20120%20Yale%20L.J.%20Online%20109%20(2010).pdf [https://perma.cc/GA3F-PZ3M].

88. Claire M. Specht, Note, *Text Message Service of Process—No LOL Matter: Does Text Message Service of Process Comport with Due Process?*, 53 B.C. L. REV. 1929, 1937 (2012) (citing *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950)).

89. Crown Coin Meter Co. v. Park P, LLC, 934 N.E.2d 142, 148 (Ind. Ct. App. 2010).

90. *See id.*

91. Jasek v. Tex. Dept. of Family & Protective Servs., 348 S.W.3d 523, 532 (Tex. App. 2011).

92. "[N]o doubt from the assumption by Congress that ordinarily one in possession or residence could be found and served in person, particularly in an action for possession." Jones v. Hersh, 845 A.2d 541, 547 (D.C. 2004) (quoting Dewey v. Clark, 180 F.2d 766, 768 (D.C. Cir. 1950)).

evades service.[93] Another drawback of personal service is that it can be an expensive method to employ.[94]

2. Substitute Service on a Resident

If personal service is not possible, a process server may resort to a form of substitute service. Substitute service can sometimes be easier because the defendant's physical presence at the time of service is not required.[95] Rather, service is completed "at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there."[96] This method of service, when challenged, can require "an intensive fact-based inquiry."[97] Further complications may arise in defining what constitutes a "dwelling or usual place of abode,"[98] and "someone of suitable age and discretion."[99]

3. Substitute Service on a Dwelling: Nail and Mail

Another form of substitute service is service on the dwelling itself. Under this method, court documents are posted, or nailed, at the defendant's dwelling.[100] In addition to the posting, the documents must also be mailed.[101] Although permitted in some forums and jurisdictions, this method of service is disfavored, and is often considered an option of last resort.[102] Often, the process

93. *See* Yvonne A. Tamayo, *Are You Being Served?*: *E-Mail and (Due) Service of Process*, 51 S.C. L. REV. 227, 234 (2000).

94. Specht, *supra* note 88, at 1937.

95. *See* FED. R. CIV. P. 4(e)(2)(B).

96. *Id.*

97. Specht, *supra* note 88, at 1938.

98. *Id.* (citing Nat'l Dev. Co. v. Triad Holding Corp., 930 F.2d 253, 256-57 (2d Cir. 1991) (discussing whether the dwelling where service of process was left was sufficient for service of process)).

99. *Id.*

100. Baidoo v. Blood-Dzraku, 5 N.Y.S.3d 709, 712 (Sup. Ct. 2015) ("Another method, known as 'nail and mail' service, requires affixing the summons to the door of a defendant's 'actual place of business, dwelling or usual place of abode' . . . .").

101. *Id.*; *see also* Greene v. Lindsey, 456 U.S. 444, 455-56 (1982).

102. *See* Parker v. Frank Emmet Real Estate, 451 A.2d 62, 64 (D.C. 1982) (explaining that posting is a disfavored method of providing notice because it is less reliable than other more appropriate methods and may, therefore, raise due process concerns).

server must first unsuccessfully attempt service using another method before it can resort to the "nail and mail" method.[103]

4. Service via Mail

Some jurisdictions have authorized service via mail.[104] Mail service must generally be done by certified or registered mail because such methods are considered "'reasonably calculated' to provide actual notice."[105] Service by first-class mail is sometimes authorized, especially when used in conjunction with another method of service such as nail and mail.[106] In order to be proper, the service must include the correct address and postage.[107] Although the rules may permit service by mail, it is not always a prudent option for the plaintiff. An accusation by a defendant that the service was ineffective because it was never received may frustrate the service.[108]

5. Constructive Notice

Many jurisdictions permit constructive notice "when it is impracticable or impossible to serve the defendant in any other manner."[109] Normally, publication in a regularly-circulating newspaper is the standard form of constructive notice.[110] However, this method of notice is highly disfavored.[111] It is not only unlikely to reach the defendant, it is also costly for the plaintiff.[112] This

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103. "Nail and mail" is only permitted after a "diligent and conscientious effort" to achieve personal service has failed. *Id.* Under D.C. law, "diligence" requires at least two attempts on two different occasions. *See id.* at 65.

104. 58 AM. JUR. 2D *Notice* § 29 (2012).

105. Carmel Credit Union v. Bondeson, 772 N.E.2d 1089, 1092 (Mass. App. Ct. 2002) (citation omitted).

106. *Greene*, 456 U.S. at 453-55.

107. 58 AM. JUR. 2D *Notice* § 29.

108. Montalbano Builders, Inc. v. Rauschenberger, 794 N.E.2d 401, 404 (Ill. App. Ct. 2003).

109. Angela Upchurch, *"Hacking" Service of Process: Using Social Media to Provide Constitutionally Sufficient Notice of Process*, 38 U. ARK. LITTLE ROCK L. REV. 559, 566 (2016).

110. *Id.*

111. *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 315 (1950) ("It would be idle to pretend that publication alone . . . is a reliable means of acquainting interested parties of the fact that their rights are before the courts.").

112. Baidoo v. Blood-Dzraku, 5 N.Y.S.3d 709, 716 (Sup. Ct. 2015) (discussing the substantial price of publication in a "more widely circulated newspaper, like the New York

method generally requires that a plaintiff move the court for an order permitting this method of service.[113]

6. A Movement Toward Electronic Service?

Many scholars have argued for the adoption of new methods of electronic service through social media and email.[114] For example, in *Friending Due Process: Facebook as a Fair Method of Alternative Service*, the author analyzes whether service via Facebook complies with constitutional due process.[115] As discussed, due process requires that notice 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."[116] The author argues that service via a Facebook wall post is proper when "it is reasonably calculated to notify the party of the legal action and . . . it is not substantially less likely to provide notice than traditional posting or publishing methods."[117]

Electronic service through social media platforms may seem like the next logical step to some, especially considering that most federal district courts moved to electronic filing nearly fifteen

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Post or the Daily News . . . which approaches $1,000 for running the notice for a week . . . .").

113. Upchurch, *supra* note 109, at 566.

114. *See id.* at 560 (focusing on a principled approach to service through social media); Pedram Tabibi, *Facebook Notification—You've Been Served: Why Social Media Service of Process May Soon Be a Virtual Reality*, 7 PHOENIX L. REV. 37, 39 (2013) (focusing on Facebook); Wagner & Castillo, *supra* note 72, at 260 (focusing on Facebook); Jeremy A. Colby, *You've Got Mail: The Modern Trend Towards Universal Electronic Service of Process*, 51 BUFF. L. REV. 337, 345-46 (2003); Keely Knapp, Comment, *#serviceofprocess @socialmedia: Accepting Social Media for Service of Process in the 21st Century*, 74 LA. L. REV. 547, 564 (2014) (focusing primarily on Facebook); Alyssa L. Eisenberg, Comment, *Keep Your Facebook Friends Close and Your Process Server Closer: The Expansion of Social Media Service of Process to Cases Involving Domestic Defendants*, 51 SAN DIEGO L. REV. 779, 813-14 (2014) (focusing on Facebook); Kevin W. Lewis, Comment, *E-Service: Ensuring the Integrity of International E-Mail Service of Process*, 13 ROGER WILLIAMS U. L. REV. 285, 285 (2008) (focusing on email); Svetlana Gitman, Comment, *(Dis)service of Process: The Need to Amend Rule 4 to Comply with Modern Usage of Technology*, 45 J. MARSHALL L. REV. 459, 460 (2012) (focusing on email); Specht, *supra* note 88, at 1931 (focusing on text messaging); Murphy, *supra* note 68, at 76 (focusing on email).

115. Wagner & Castillo, *supra* note 72, at 270-72.

116. *See Mullane*, 339 U.S. at 314.

117. Wagner & Castillo, *supra* note 72, at 271-72; *see also Mullane*, 339 U.S. at 315.

years ago.[118] The changes to the filing rules have had a positive impact on the court's ability to "maintain[] storage space," access documents, and minimize the cost of organizing.[119]

Nevertheless, despite their willingness to adopt electronic filing methods, courts have hesitated to approve new methods of service using social media and email.[120] One scholar suggests that judicial committees and legislatures have been deprived of guidance on how to revise the service rules to include electronic methods of service.[121] In the cases that do consider electronic service methods, given the unusual circumstances of most of these cases, the analysis is done on a case-by case basis.[122] Although this continues to be a robust scholarly discussion, and perhaps the trend of the future, this article focuses on using technology to *verify* the allegations of service, and does not advocate for new *methods* of service, such as service via Facebook.

B. Causes of Sewer Service

Over the last several decades, a number of factors have contributed to, or directly caused, systemic sewer service. First, this area is largely unregulated.[123] Often, jurisdictions require only that a process server be eighteen years old and not be a party to the suit.[124] This means that virtually any person over the age of eighteen, despite their moral character, history, veracity, background, or criminal record, can serve process.

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118. Murphy, *supra* note 68, at 93; *see also* Maria Perez Crist, *The E-Brief: Legal Writing for an Online World*, 33 N.M. L. REV. 49, 54-55 (2003) (discussing amendment to federal rules in order to increase efficiency).

119. Murphy, *supra* note 68, at 93 (citing Crist, *supra* note 118, at 52-55 (explaining that overflowing paperwork and desired ease of access for judges and other employees led to adoption of electronic case management systems)).

120. Upchurch, *supra* note 109, at 579 (citing Fortunato v. Chase Bank USA, No. 11 Civ. 6608(JFK), 2012 WL 2086950, at *2 (S.D.N.Y. June 7, 2012) (discussing the "unorthodox" request to allow Facebook service of process); FTC v. PCCare247 Inc., No. 12 Civ. 7189(PAE), 2013 WL 841037, at *4 (S.D.N.Y. Mar. 7, 2013) (denying a request for service of process through social media due to its novelty)).

121. *Id.* ("[B]y failing to take a principle-driven approach, judicial committees and legislatures are deprived of guidance on how to revise the service rules . . . .").

122. *See id.* (explaining how "catchall provisions" enable the court to fashion any form of constitutional service "in . . . unusual situation[s]", even though they are not specifically directed at social media).

123. *See* Frank M. Tuerkheimer, *Service of Process in New York City: A Proposed End to Unregulated Criminality*, 72 COLUM. L. REV. 847, 868 (1972).

124. *Id.*

Second, attorneys for the debt collectors do not feel pressure to acknowledge and address the practice.[125] Indeed, they do not reasonably fear that they will be held responsible.[126] Moreover, attorneys actually benefit from and rely on the high number of default judgments to maintain a profitable firm.[127] The high number of defaults result in judgments without trials—the most efficient and profitable outcome for the firm.

Third, once victims discover the case, they almost inevitably do not have access to legal counsel to remedy the injustice.[128] Indeed, after falling victim to sewer service, many individuals are too poor to afford counsel and, thus, are ultimately unable to resolve their nightmare.[129] In 2013, the Conference of Chief Justices (CCJ) organized a Civil Justice Improvements Committee to assess service effectiveness and make recommendations for best practices in state courts.[130] A study, *The Landscape of Civil Litigation in State Courts*, was undertaken to record the characteristics and outcomes of civil cases in state courts.[131] The *Landscape* data found that "[t]he idealized picture of an adversarial system in which both parties are represented . . . is an illusion."[132] For

125. *See id.*

126. *See id.*

127. *Id.* at 867.

128. Paul Kiel & Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, PROPUBLICA (Oct. 8, 2015), https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods [https://perma.cc/C4GD-BH63] (finding that court records from 2008 to 2012 showed that less than eight percent of defendants in St. Louis had legal counsel, and in lower-income black neighborhoods, the percentage was even lower at four percent).

129. Tuerkheimer, *supra* note 123, at 868; *see also* Capital Development Grp. v. Marcus Jackson et al., 142 Daily Wash. L. Rptr. 2645, 2647-48 (D.C. Super. Ct. Oct. 2014) (Kravitz, J., entering summary judgment in favor of tenant in an eviction case in which landlord's lawyer falsely swore that mandatory 30-day notice was served on tenant, and awarding attorney's fees to tenant's counsel as a sanction. The court stated: "Perhaps most concerning about the bad faith litigation tactics exhibited here is the reality that the fatal legal and factual deficiencies . . . likely never would have come to light had the defendants . . . failed to appear . . . without counsel. . . . [Without counsel] there is a high probability they would have lacked the knowledge and wherewithal to challenge the legal sufficiency of [the documents]. . . . The outcome of this case thus could have been dramatically different had the defendants not been among the small minority of tenants . . . who are fortunate enough to obtain free legal representation . . . .").

130. CIVIL JUSTICE IMPROVEMENTS COMM., NAT'L CTR. FOR STATE COURTS, CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL 5 (2016), http://www.ncsc.org/~/media/microsites/files/civil-justice/ncsc-cji-report-web.ashx [https://perma.cc/F9LP-U326].

131. HANNAFORD-AGOR ET AL., *supra* note 14, at iii.

132. *Id.* at iii-vi ("In 2013, the Conference of Chief Justices (CCJ) convened a Civil Justice Improvements Committee to assess the effectiveness of these efforts and to make

example, in small claims dockets, seventy-six percent of plaintiffs were represented by legal counsel.[133] These types of small claims courts were originally developed "as a forum for self-represented litigants to obtain access to courts through simplified procedures."[134] Instead, plaintiffs in low-value debt collection matters, although represented by counsel, deliberately decide to litigate in these forums.[135]

Finally, sewer service has not been heavily monitored by law enforcement, and goes largely unchecked.[136]

C. Misplaced Burden?

Another contributing factor to the injustice of sewer service is the defendant's inability to reverse the harm once the victimization is realized. Once victims of sewer service discover the default judgment, they can move to vacate the judgment on the ground that they were not served with process.[137] If defendants are lucky enough to obtain counsel, or able to navigate the complex civil court system unrepresented, they still have an "unnecessarily difficult burden of proof."[138] Although, in theory, the opportunity to be heard on a motion to vacate a default judgment is the fair remedy, in practice it does not deter process servers from fraudulently filing false affidavits of service.[139]

At the hearing, the victim of sewer service has the burden of proof.[140] Indeed, the defendant "must prove a negative—that he was not served"—despite the process server's assertions to the contrary.[141] This results in a "he said, she said" type of hearing. An additional hurdle is that the alleged service will have occurred

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recommendations concerning best practices for state courts. To inform the Committee's deliberations, the National Center for State Courts (NCSC) undertook a study entitled *The Landscape of Civil Litigation in State Courts* to document case characteristics and outcomes in civil cases disposed in state courts.").

133. *Id.* at iv-v.

134. *Id.* at v.

135. *Id.*

136. Tuerkheimer, *supra* note 123, at 868.

137. *See* FED. R. CIV. P. 60(b)(4); *see also* Erin Louise Palmer, *Service by Certified Mail Insufficient to Preserve Default Judgment*, LITIG. NEWS, Summer 2015, at 18.

138. Tuerkheimer, *supra* note 123, at 854.

139. *Id.*; *see also* N.Y.C. BAR ASS'N ET AL., OUT OF SERVICE: A CALL TO FIX THE BROKEN PROCESS SERVICE INDUSTRY 8-10 (2010), http://www.nycbar.org/pdf/report/uploads/ProcessServiceReport4-10.pdf [https://perma.cc/8893-L2UF].

140. Tuerkheimer, *supra* note 123, at 854.

141. *Id.*

sometime in the past, possibly months earlier, and the server will not recall each instance of service, as many serve hundreds or thousands of documents.[142] Therefore, the process server is unable to testify about the details of the service. Instead, he will testify only to the "general practice."[143]

Of course, there is the rare occasion when a defendant can successfully prove failure of service through "alibi" evidence. For example, on the alleged date of service, the defendant can prove that she was in the hospital, traveling out of state, in jail, or at another location that would make the alleged service physically impossible.[144] Without such "alibi" evidence, the outcome of the hearing may depend on who the judge believes—the process server or the defendant. Therefore, the judge may have no choice but to resolve this question on the basis of demeanor and the parties' interests in the litigation.[145] Whereas the defendant likely has no experience testifying at such hearings, the professional process server will often be called to court on a more regular basis.[146] Additionally, the defendant has a greater economic interest in the action, which puts him or her at an "unnecessary disadvantage."[147]

D. A Process Server's Incentives to Falsify Service

We may never know the exact reason(s) behind each and every decision to falsify service. Depending on the individual circumstances, the decision could be driven by a combination of apathy, malice, discrimination, safety concerns, or financial incentives. However, one known contributing factor is the payment practice in the debt collection industry.[148] For debt collection cases, lawyers typically execute bulk contracts with process serving agencies, who then hire independent process servers that act

142. *Id.*

143. *Id.*

144. *Id.*; *see also, e.g.*, Deborah L. Cohen, *Attorneys Push for Change in Debt Collection,* ABA J., May 2013, at 19 (recounting consumer attorney's anecdote of a client whose bank records proved she was away from home purchasing farm supplies on the day a debt process server swore she was personally served).

145. Tuerkheimer, *supra* note 123, at 855.

146. *Id.*

147. *Id.*

148. WILNER ET AL., *supra* note 16, at 6.

as independent contractors.[149] Under this model, some have suggested that it is "impossible . . . to serve all papers properly and still make the minimum wage."[150] Interestingly, process servers who serve documents for cases other than debt collection matters earn significantly more money.[151]

The substandard pay that process servers receive for collection cases undermines the incentive to properly serve the documents. More recent data shows that process servers in debt collection actions are not salaried employees, but instead are paid "per completed service."[152] Process serving companies often charge their customers between $13.00 and $15.00 for serving a pleading in a consumer collection case.[153] Other studies have found that the pay is even lower—between $3.00 and $6.00 per completed job.[154] However, in other types of litigation, the prevailing rate for service is between $35.00 and $45.00 per item served.[155] These wages are so low that it would be extremely difficult, if not impossible, for a process server to earn a minimum wage and serve all papers properly.[156] Additionally, some debt collection firms will not pay anything for "unsuccessful attempts at service, a practice that further encourages process servers to lie about having completed service."[157]

The financial incentive to engage in sewer service was not ignored when the parties in *Sykes v. Mel S. Harris & Associates* reached a $59 million settlement.[158] In *Sykes*, which was filed in 2009 and settled in 2015, the plaintiffs alleged that the group of debt collectors engaged in sewer service by falsifying affidavits of service.[159] Of course, consumers failed to appear and default

149. *Id.*

150. *Id.* (citing ROBERT ABRAMS ET AL., A JOINT INVESTIGATIVE REPORT INTO THE PRACTICE OF SEWER SERVICE IN NEW YORK CITY 2 (1986)).

151. *Id.*

152. *Id.*

153. N.Y.C. BAR ASS'N ET AL., *supra* note 139, at 17.

154. WILNER ET AL., *supra* note 16, at 6.

155. N.Y.C. BAR ASS'N ET AL., *supra* note 139, at 17.

156. WILNER ET AL., *supra* note 16, at 6.

157. *Id.*

158. *See* Lahman, *supra* note 4.

159. Third Amended Class Action Complaint & Jury Demand at 2, 23, Sykes v. Mel S. Harris & Assocs., 285 F.R.D. 279 (S.D.N.Y. 2012) (No. 09 Civ. 8486(DC)), 2011 WL 10773338 [hereinafter Sykes Complaint]. In addition to sewer service, the Complaint also alleged that the Defendants falsely told the court that evidence existed to prove the alleged debt, when, in fact, it did not. *Id.* at 26-27.

judgments were entered.[160] Many learned of the judgment after their bank accounts were frozen and their wages were garnished.[161] In addition to monetary damages, which will provide $59 million to about 75,000 victims and will vacate over 115,000 judgments,[162] the process serving company agreed to change its payment practices.[163] Specifically, the company promised to pay its process servers the same amount of money for unsuccessful attempts as it pays for completed jobs.[164] Such a change in pay structure will counter the incentives to falsify service.

E. Audits

Some research indicates that one of the primary forces behind the prevalence of sewer service is the willful ignorance of judges and attorneys general.[165] This "hear no evil, see no evil" approach is exacerbating the problem and impeding a final resolution to these fraudulent service practices.[166] Even the Federal Trade Commission concedes that there is a dearth of reliable, nationwide empirical data available on service-of-process problems.[167] The national data is unavailable simply because no one has taken responsibility to undertake such an effort.

Judges play a role in sewer service. However, we cannot rely on them to solve the sewer service epidemic. Judges, in their role as neutral arbiters, must proceed efficiently through their heavy dockets. Judges are very busy, and some have overwhelming caseloads. For example, lawsuits to collect credit card debts "fly across the desks of . . . judges, sometimes hundreds in a single day."[168]

Nevertheless, some judges place a low priority on an individual's due process right to be properly served.[169] Consumer-

160. *Id*. at 30, 34, 39, 44.

161. *See id.* at 3.

162. Lahman, *supra* note 4.

163. *See* Benjamin Mueller, *Victims of Debt Collection Scheme in New York Win $59 Million in Settlement*, N.Y. TIMES (Nov. 13, 2015), https://www.nytimes.com/ 2015/ 11/ 14/ nyregion/victims-of-debt-collection-scheme-in-new-york-win-59-million-in-settlement. html [https://perma.cc/846R-M6RQ].

164. *Id.*

165. *See* N.Y.C. BAR ASS'N ET AL., *supra* note 139, at 12.

166. *See id.*

167. LEIBOWITZ ET AL., *supra* note 3, at 9-10.

168. Kiel & Waldman, *supra* note 128.

169. N.Y.C. BAR ASS'N ET AL., *supra* note 139, at 12.

law attorneys have reported that some judges "dissuade defendants from asserting their right to challenge service and instead, pressure defendants to settle their cases."[170] Many judges even require defendants to waive the defense of improper service and lack of personal jurisdiction as a prerequisite to vacating a default judgment.[171] When judges decline to address sewer service, it threatens the integrity of the judicial system[172]—the lawsuit is broken from the very beginning.

In this author's experience, judges have twice declined to tackle systemic sewer service when presented with such evidence. It seems that judges are reluctant to take on the responsibility of "opening Pandora's box" when more efficient individual solutions are available. Unfortunately, such individualized solutions do not tackle the larger systemic injustice. In the first case, smoking gun evidence was available. The process server filed two conflicting affidavits of service—under oath—with the court. These affidavits placed him in two separate quadrants in Washington, D.C. at the exact same minute, serving process in two separate cases on two separate defendants. At a hearing on defendant's motion for dismissal, or, in the alternative, summary judgment, the court had two grounds upon which it could grant the requested relief: fraudulent and ineffective service of process, or an unrelated technical violation for failure to comply with a condition precedent to filing the lawsuit. The judge granted the relief sought on the latter ground, which did not require him to ultimately rule on the allegations of fraud and sewer service.

In a second case, this author presented a different judge with evidence of alleged sewer service in a motion to vacate a default judgment. At the hearing on the motion, the judge instructed counsel for both parties to approach the bench. With the husher on, the judge warned the plaintiff's attorney that he may wish to consent to the defendant's requested relief in order to avoid opening the floodgates. The judge even confided that the court had been monitoring this particular process server due to its concerns about her alleged service attempts. Plaintiff's counsel eventually consented to defendant's requested relief, which at least partially remedied the individual defendant's harm. Nevertheless, the

170. *Id.*
171. *Id.*
172. CIVIL JUSTICE IMPROVEMENTS COMM., *supra* note 130, app. I at 2.

judge seemingly ignored the injustices suffered by the unknown victims whose voices may never be heard.

F. Service at the Incorrect Address

Process servers in New York City have claimed to serve defendants at former addresses and addresses at which the defendants never lived.[173] Collection plaintiffs often sue defendants using old addresses.[174] Often, plaintiffs neglect to research the defendants' current address, or such conduct is the result of intentional wrongdoing.[175]

When determining whether service of process is sufficient, complications arise when debtors frequently change residences.[176] Many individuals seldom remain in the same residence they lived in at the time they were first issued the credit.[177] Other residents are involuntarily forced to move due to no fault of their own, for reasons such as crime, domestic violence, or uninhabitable living conditions.[178] Despite technological advances that make checking current addresses quite easy, plaintiffs do not investigate current addresses when they are not required to conduct such investigations.

The defendants have a due process right to notice, so that they may subsequently have an opportunity to be heard.[179] For notice to be sufficient, it must be directed to the *correct* defendant and the *correct* address.[180] This means service is insufficient if it

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173. *See, e.g.*, *id.* ("[M]any notices have been returned to the clerk's office as undeliverable by the postal system, despite the fact that process servers claim under oath to have served the defendants at the listed addresses."); WILNER ET AL., *supra* note 16, at 9-10 ("The debt buyer's process server claimed to have served [the victim] at an address at which she had not lived for four years, and which had been converted to a commercial property prior to the date of service.").

174. N.Y.C. BAR ASS'N ET AL., *supra* note 139, at 13.

175. *Id.*

176. Aimee Constantineau, Comment, *Fair for Whom? Why Debt-Collection Lawsuits in St. Louis Violate the Procedural Due Process Rights of Low-Income Communities*, 66 AM. U. L. REV. 479, 520 (2016).

177. *See* Kiel & Waldman, *supra* note 128 (discussing various St. Louis residents who had moved since their initial confrontations with debt collectors).

178. *See id.* (summarizing interviews of women who were forced to move their families on numerous occasions over a couple of years due to gun violence, robberies, and a landlord's refusal to fix plumbing that allowed raw sewage into the home).

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

180. Upchurch, *supra* note 109, at 580 (noting that service is insufficient when it incorrectly misnames the defendant or incorrectly directs service to the wrong address).

misnames the defendant, serves the wrong defendant, or directs service at an incorrect address—including a former address.[181] Moreover, service is not always simple and cheap; sometimes it becomes difficult and costly. However, this does not eliminate the requirement to investigate and verify the *correct* defendant and the *correct* address.[182] Without such verification, service may be insufficient.[183]

The *Mullane* Court reasoned that the right to notice is significant enough to warrant enough time to assure proper notice of a lawsuit.[184] In *Mullane*, the Court required the plaintiff to provide more notice than simply notice through publication for the known defendants who could be identified.[185] The Court cautioned against a nominal effort at service that was actually just a "mere gesture."[186] Rather, the Court required a good faith effort that "one desirous of actually informing the absentee might reasonably adopt to accomplish [service]."[187]

G. A Lawyer's Liability for Failing to Monitor Service

Since at least 1972, debt collection lawyers have been aware of sewer service and willingly turned a blind eye. "Several facts lead to the inescapable conclusion that sewer service could not be as pervasive as it is without plaintiffs' attorneys being aware of it . . . . a relatively small number of law firms account for a very high percentage of default judgments."[188] Even former New York Attorney General Andrew Cuomo has publicly taken the position that debt collection lawyers are at least partially to blame for sewer service.[189] Cuomo warned that, "[l]aw firms cannot turn a blind eye to abuses perpetrated on their behalf."[190] Cuomo eventually named thirty-five law firms as defendants in a lawsuit to

181. *Id.*
182. *Id.* at 580-81.
183. *Id.*
184. *See Mullane*, 339 U.S. at 314-15.
185. *Id.* at 317-18.
186. *Id.* at 315.
187. *Id.*
188. N.Y.C. BAR ASS'N ET AL., *supra* note 139, at 14 (quoting Tuerkheimer, *supra* note 123, at 865).
189. *Id.*
190. *Id.* (citing Press Release, N.Y. State Office of the Att'y Gen., The New York State Attorney General Andrew M. Cuomo Announces Arrest of Long Island Business Owner for Denying Thousands of New Yorkers Their Day in Court (April 14, 2009),

vacate more than 100,000 default judgments based on sewer service.[191] Although the law firms had no direct control over the process server's actions, Cuomo requested that all default judgments be vacated in cases where American Legal Process was the process server.[192]

Plaintiffs' lawyers must be cautious and concerned about their exposure and liability when their process servers commit sewer service. In *Kleeman v. Rheingold*, the court found that a plaintiff's attorney could be liable to her client for the actions of a process server that ultimately resulted in the dismissal of the client's case.[193] Specifically, the New York Court of Appeals held that

> an attorney has a nondelegable duty to his or her clients to exercise due care in the service of process and that, accordingly, an attorney may be held liable to the client for negligent service of process, even though the task may have been 'farmed out' to an independent contractor.[194]

Although an attorney may have no direct involvement with a process server's failure to serve documents, he or she may be liable for the process server's actions.

III. THE PROBLEMS CREATED BY SEWER SERVICE

A. Alarmingly High Prevalence of Default Judgments in High Volume Dockets

When a defendant fails to answer a complaint and appear for court, a default judgment is entered. A large percentage of default judgments are entered in "high-volume dockets"[195] typically found in courts of limited jurisdiction.[196] Such high-volume trial calendars "put a premium on expedited case processing."[197] The

https://ag.ny.gov/press-release/new-york-state-attorney-general-andrew-m-cuomo-announces-arrest-long-island-business [https://perma.cc/397Z-DUF2]).

191. *Id.*
192. *Id.*
193. Kleeman v. Rheingold, 614 N.E.2d 712, 716-17 (N.Y. 1993).
194. *Id.* at 717.
195. Lieberman & Hannaford-Agor, *supra* note 9, at 93.
196. *Id.* at 89.
197. *Id.* at 89-90.

types of cases on these high-volume dockets include consumer debt collection, landlord and tenant, and small claims cases.[198]

In the majority of collection cases, a default judgment is entered against the defendant for failure to appear. In a New York City study of 336 debt buyer cases, the court entered default judgments in over four out of five cases (81.4%).[199] Another study found that default judgments were entered in seventy to ninety percent of consumer cases.[200] A Cook County, Illinois study found that forty-five percent of debt collection cases resulted in default judgments.[201] Finally, another study found that eighty percent of debt collection cases in NYC result in default judgments.[202]

This high tendency of defendants' failure to appear raises the question, "Why do defendants fail to appear for court?" Put simply, many do not know about their cases.[203] The *Landscape* study found that "[t]ypical methods of serving process are riddled with inaccuracies and inadequacies."[204] A 2008 study of the low appearance rates by defendants in lawsuits in New York City found that of the "more than 350 clients who were being sued in debt collection cases . . . none had been served properly."[205]

B. Racial Disparities in High-Volume Debt Collection Lawsuits

Judgments in favor of debt-collection plaintiffs disproportionately affect low-income communities of color.[206] ProPublica

198. *Id.* at 90.

199. WILNER ET AL., *supra* note 16, at 8.

200. Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79, 119 (1997).

201. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-748, CREDIT CARDS: FAIR DEBT COLLECTION PRACTICES ACT COULD BETTER REFLECT THE EVOLVING DEBT COLLECTION MARKETPLACE AND USE OF TECHNOLOGY 41 (2009).

202. URBAN JUSTICE CTR., DEBT WEIGHT: THE CONSUMER CREDIT CRISIS IN NEW YORK CITY AND ITS IMPACT ON THE WORKING POOR 1 (2007), https:// cdp.urbanjustice.org/ sites/ default/ files/ CDP. WEB.doc_ Report_ Debt% 20Weight_ 200710.pdf [http://perma.cc/EEL8-CGHQ].

203. *See generally*, Siegel, *supra* note 13, at 1.

204. *See* HANNAFORD-AGOR ET AL., *supra* note 14, at 2.

205. MFY LEGAL SERVS., *supra* note 20, at 2 ("It appears that nine out [of] ten New Yorkers who are sued in the Civil Court of the City of New York are being denied their right to be heard because of possibly illegal process serving practices.").

206. *See* Constantineau, *supra* note 176, at 487.

analyzed five years of debt-collection judgments in three metropolitan areas—St. Louis, Chicago and Newark.[207] The study, the first of its kind to analyze racial disparities of this nature, found that the rate of judgments in consumer collection matters "was twice as high in mostly black neighborhoods as it was in mostly white ones."[208] One collection plaintiff, Metropolitan St. Louis Sewer District, obtained judgments in mostly black neighborhoods about four times more often than in the mostly white neighborhoods, despite most of its customers being white.[209] The study discovered the worst racial disparity in the Chicago area occurred at the hands of the national subprime auto lender Credit Acceptance.[210] This lender obtained judgments against defendants who lived in mostly black neighborhoods at a rate eighteen times higher than it did against defendants in mostly white neighborhoods.[211]

ProPublica's study resulted in two significant conclusions. First, there is an overwhelmingly disproportionate number of judgments in predominantly black communities.[212] Moreover, "[t]his risk of judgment . . . was twice as high in majority black census tracts as majority white census tracts, [while keeping] income constant."[213] Second, there is also racial disparity in whether plaintiffs who win judgments seek to execute a garnishment to collect wages or other assets.[214] Indeed, the study found that St. Louis plaintiffs were twenty percent more likely to execute garnishment against a defendant in a majority black area versus a defendant in a majority white area.[215]

Although there is no national data on the prevalence of sewer service or its disparity in certain neighborhoods,[216] one can infer that sewer service has a disparate impact on communities of color.

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207. Kiel & Waldman, *supra* note 128.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. Annie Waldman & Paul Kiel, Racial Disparity in Debt Collection Lawsuits: A Study of Three Metro Areas 20 (Oct. 8, 2015) (unpublished White Paper), https://static.propublica.org/projects/race-and-debt/assets/pdf/ProPublica-garnishments-whitepaper.pdf [https://perma.cc/K66Q-X8B8].

213. *Id.*

214. *Id.*

215. *Id.*

216. LEIBOWITZ ET AL., *supra* note 3, at 9-10 (conceding that there is no reliable, nationwide empirical data available on service-of-process problems).

Indeed, studies that focus on evictions and debt collection begin to reveal stories of victims of sewer service. It is often as simple as "seek and ye shall find."

C. Sewer Service: Seek and Ye Shall Find

Recall Matthew Desmond's book, *Evicted*, when he followed several families in Milwaukee and chronicled their housing struggles and ultimate evictions.[217] The families recounted stories of evictions where they allegedly never received any notice.[218] One may wonder if finding sewer service is a simple as looking for it. Rather than investigating possible sewer service, it may be easy to assume, like the sheriff in Desmond's book, that "the tenants [are] just playing the system, staying as long as they could."[219]

However, assumptions that defendants are simply "playing the system" are dangerous. To the contrary, investigations have revealed that sewer service is a widespread epidemic.[220] Instead of being ignorant of the truth, what would be discovered if such allegations were properly investigated? Luckily, several Attorneys General and private attorneys have conducted investigations that revealed widespread fraudulent service and led to victories for the victims.[221]

D. Jurisdictions Leading the Fight

1. New York's War Against Sewer Service

New York is the leader in the battle against sewer service simply because it has not turned a blind eye—unlike most other

217. *See generally* Desmond, *supra* note 5.

218. *Id.* at 115.

219. *Id.*

220. In *In re Pfau v. Forster & Garbus*, the New York Attorney General filed suit against 35 debt collection law firms and two debt collection companies that obtained more than 100,000 default judgments allegedly entered because their process server engaged in "sewer service." Press Release, N.Y. State Office of the Att'y Gen., Attorney General Cuomo Sues to Throw Out Over 100,000 Faulty Judgments Entered Against New York Consumers in Next Stage of Debt Collection Investigation (July 23, 2009), https:// ag.ny.gov/ press-release/ attorney- general- cuomo- sues- throw- out- over- 100000- faulty- judgments- entered- against-n-0 [https://perma.cc/CY4E-FDRT]; *see also* N.Y.C. BAR ASS'N ET AL., *supra* note 139, at 2.

221. LEIBOWITZ ET AL., *supra* note 3, at ii, 9-11.

jurisdictions. In the 1960's, there was a call for action to address process-serving abuses in New York by groups including Congress for Racial Equality, the Legal Aid Society, and Mobilization for Youth.[222] These advocacy efforts prompted the United States Attorney's Office for the Southern District of New York to investigate—and later indict—several process servers for the systemic practice of filing false affidavits of service.[223] Four years later, in *United States v. Wiseman*, the Second Circuit affirmed the convictions of two process servers for due process violations.[224] By 1969, due in large part to the attention that had been drawn to fraudulent practices of process servers, New York City enacted a licensing requirement for its process servers.[225]

Unfortunately, a licensing requirement alone was not enough. In 1986, the New York Attorney General's Office announced the indictment of five process servers for fraudulently filing false affidavits with the court.[226] Additionally, the Attorney General's Office and the Department of Consumer Affairs issued a "joint report on sewer service."[227] In light of the report's findings of "pervasive, wanton disregard for the law by the private process server industry," New York further strengthened the recordkeeping requirements for process servers.[228] One year after the joint report was issued, the New York Court of Appeals upheld the revocation of a process server's license after he kept inaccurate and incomplete records in violation of the law.[229]

Over the next twenty years, sewer service continued to some degree in New York. The occasional anecdotal story reminded the public of these horrible abuses. For example, in 1996, a process server's license was revoked after he claimed to have personally served court papers on a Brooklyn resident at the same time the individual was in Puerto Rico.[230]

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222. N.Y.C. BAR ASS'N ET AL., *supra* note 139, at 8-9.
223. *Id.* at 8.
224. United States v. Wiseman, 445 F.2d 792, 798 (2d Cir. 1971).
225. N.Y.C. BAR ASS'N ET AL., *supra* note 139, at 9.
226. *Id.*
227. *Id.*
228. *Id.*
229. Barr v. Dept. of Consumer Affairs., 517 N.E.2d 1321, 1322-23 (N.Y. 1987).
230. Matthew Goldstein, *Process Server's License Revoked by Consumer Agency for Fraud*, N.Y. Law. Journal, Feb. 7, 1996, at 1.

In 2008, the situation remained dire. Default judgments were entered in 79% of consumer credit cases in NYC.[231] That same year, MFY Legal Services, Inc. issued a detailed report of debt collection cases in Bronx, Kings, Queens, and Richmond Counties in New York.[232] It concluded that less than ten percent of debtors appear in lawsuits filed by the top seven debt collection law firms in New York.[233] It also highlighted extremely troubling and questionable patterns of service.[234]

One year later, an investigation by the Office of the Attorney General estimated that over 100,000 default judgments had been entered in a twenty-two month period due to fraudulent service by one process serving company.[235] Given the recent technological advances, such a vast amount of default judgments can no longer be tolerated.[236] Also in 2009, former New York Attorney General, Andrew Cuomo, on behalf of Chief Administrative Law Judge Ann Pfau, sued two collection agencies and a group of lawyers and firms for obtaining court orders through fraud.[237] This resulted in a New York City stipulation that required all process servers to use a GPS tracking device to report their activities.[238]

That same year, New York plaintiffs filed a class action lawsuit, *Sykes v. Mel S. Harris & Associates*, attacking the entire debt collection infrastructure.[239] The plaintiffs named the debt collectors, the debt collection law firms, and the process servers—who allegedly engaged in a fraudulent scheme to obtain default judgments against hundreds of thousands of New Yorkers—as defendants.[240] The lawsuit accused the defendants of engaging in "sewer service" by collectively failing to serve notice of debt collection lawsuits on consumers and filing false affidavits claiming

231. N.Y.C. BAR ASS'N ET AL., *supra* note 139, at 11.

232. *See generally* MFY LEGAL SERVS., *supra* note 20.

233. *Id.* at 2 (finding that "[o]f the 180,177 cases filed [by the same seven law firms,] only 15,443 (8.57%) defendants appeared in court").

234. *See id.*

235. N.Y.C. BAR ASS'N ET AL., *supra* note 139, at 4-5.

236. Murphy III, *supra* note 68, at 81; *see also* Colby, *supra* note 114, at 345 (rationalizing the use of email service of process under the *Mullane* standard).

237. Attorney Affirmation of James M. Morrissey, *In re* Pfau v. Forster & Garbus, Index No. 2009-8236 (N.Y. Sup. Ct. July 17, 2009), http://nylawyer.nylj.com/adgifs/decisions/072309cuomo.pdf [https://perma.cc/C2NL-3SB6].

238. Cohen, *supra* note 144, at 20.

239. *See* Sykes v. Mel S. Harris & Assocs., 780 F.3d 70, 78 (2d Cir. 2015).

240. Sykes Complaint, *supra* note 159, at 2.

that the court papers had been properly served.[241] Of course, the consumers had no idea that collection lawsuits had been filed and, therefore, failed to appear.[242]

Notably, one process server claimed to have made sixty-nine delivery attempts in one day, covering a span of 10,000 miles.[243] He falsely swore in an affidavit that he attempted to serve the defendant in Brooklyn at 8:19 AM.[244] One minute later, he swore that he attempted to serve another defendant in Cattaraugus County, New York, nearly 400 miles away from Brookland, New York.[245] The class action alleged that such falsified service led to default judgments against hundreds of thousands of consumers in New York.[246] One plaintiff, a middle-aged nanny whose legal papers were allegedly left with an unknown "Mr. Victor," learned of her judgment when her bank account was frozen and her finances seized.[247] As she told the New York Times, "Maybe one day I will be able to forget, but this was the worst time of my life."[248] In November 2015, the case finally settled for $59 million.[249]

2. California's Fight Against Sewer Service: California v. JPMorgan Chase & Co.

On May 9, 2013, California Attorney General Kamala Harris sued JPMorgan Chase & Co., alleging fraudulent and unlawful debt-collection practices.[250] The complaint alleged that, between 2008 and 2011, the defendants filed "well over 100 lawsuits each [business] day."[251] On one day, the defendants filed 469 lawsuits and the next day they filed another 226.[252] To maintain such a

241. *Id.*

242. *See Sykes*, 780 F.3d at 75-76.

243. Sykes Complaint, *supra* note 159, at 19.

244. *Id.* at 19; Lahman, *supra* note 4.

245. Sykes Complaint, *supra* note 159, at 19; Lahman, *supra* note 4.

246. Memorandum of Law in Support of Final Approval of Class Action Settlement, at 1, Sykes v. Mel Harris & Assocs., No. 09 Civ. 8486 (DC) (S.D.N.Y. May 24, 2016) [hereinafter "Sykes Memo"].

247. Sykes Complaint, *supra* note 159, at 31-32, 35.

248. Mueller, *supra* note 163.

249. *Id.*

250. Complaint for Permanent Injunction, Civil Penalties, Restitution, and Other Equitable Relief at 1, 5, People v. JPMorgan Chase & Co., No. BC508466 (Cal. Super. Ct. May 9, 2013), 2013 WL 1915821 [hereinafter California Complaint].

251. *Id.*

252. *Id.*

pace of filing, the defendants "employed unlawful practices as shortcuts to obtain [unlawful] judgments."[253] Among other allegations of "unlawful, unfair, and/or fraudulent acts or practices," the Attorney General claimed widespread sewer service:

> Defendants do not properly serve consumers with the summons and complaint, despite filing proofs of service that declare under penalty of perjury that service was complete. For example, Defendants, through their agents for service of process, falsely state in proofs of service that the consumer was personally served, when, in fact, he or she was not served at all—a practice known as 'sewer service.' Other times, Defendants falsely state in proofs of service that substitute service was properly effected, even though Defendants made no reasonable attempts to personally serve the consumer.[254]

By engaging in such "unlawful, unfair, and/or fraudulent acts or practices," the defendants obtained default judgements in their favor.[255] Then, they garnished wages and bank accounts and submitted negative credit information to credit reporting agencies.[256] Ultimately, the parties settled the case and a consent judgement was entered on November 3, 2015.[257] In addition to regulating future conduct, the judgment cost the defendants approximately $100 million in damages, restitution, and a dismissal or termination of collection efforts.[258] Specifically, Chase agreed to "the withdrawal, dismissal, or termination of all pre-judgment Collections Litigation matters that were pending at any time between January 1, 2009 and June 30, 2014."[259] It further agreed "to cease its current post-judgment enforcement activities," including wage garnishment and back levies.[260] Chase also agreed to pay at least $5,000 to all service members, plus interest, pay at least $10 million in cash refunds to California consumers, and pay the people of the state of California a total aggregate amount of $50 million.[261]

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253. *Id.*
254. *Id.* at 4.
255. California Complaint, *supra* note 250, at 5.
256. *Id.* at 6.
257. Judgment at 4, People v. JPMorgan Chase & Co., No. BC508466 (Cal. Super. Ct. Nov. 3, 2015), 2015 WL 7069396.
258. California Press Release, *supra* note 4.
259. Judgment, *supra* note 257, at 22.
260. *Id.*
261. *Id.* at 24, 27.

3. Minnesota Joins the Fight: Minnesota v. Umland

On November 6, 2014, Minnesota Attorney General Lori Swanson filed a lawsuit alleging sewer service.[262] Her office sued both TJ Process Servers and one of its former employees for falsely claiming that it had served process on individuals in debt collection lawsuits.[263] The process server, who later faced felony perjury charges, swore under oath that he had personally served individuals at their home addresses, when, in reality, they were either not home or did not reside at that address.[264] For example, he claimed that he personally served a 73-year-old man at an address that had been lost to foreclosure three years earlier.[265] He further insisted that he served a woman at an address that she had vacated eleven years before the alleged service.[266] Not only did he lie about personal service, but he also falsely suggested that he engaged in substitute service. Specifically, he claimed to have served a nonexistent roommate and a nonexistent nephew.[267]

The employer and co-defendant, TJ Process Service, acknowledged and openly admitted that its employee engaged in sewer service.[268] The owner, Joe Jasicki, said that he terminated the employee after only six months on the job after suspicions were raised regarding his truthfulness.[269] During those six months, he handled 950 service jobs.[270] Many of his victims

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262. Complaint at 1, State v. Umland, No. 36-CV-14-787 (Minn. Dist. Ct. Nov. 6, 2014) [hereinafter "Umland Complaint"].

263. *Id.* at 10-14.

264. *Patrick Lunsford*, State AG Sues Process Server Over "*Sewer Service" in Debt Collection Lawsuits*, INSIDEARM *(Nov. 7, 2014, 6:09 AM)*, https:// www.inside arm.com/ news/00038441-state-ag-sues-process-server-over-sewer-s/ [https://perma.cc/X35M-23TK] (providing coverage of Minnesota victims of sewer service in debt collection lawsuits)*; see also Umland Complaint*, *supra* note 262, at 10-13.

265. Lunsford, *supra* note 264; *see also* Umland Complaint, *supra* note 262, at 10-11.

266. Lunsford, *supra* note 264.

267. DAVID CHANEN, *Server of Court Papers Faces Felony Charges in Northern Minnesota*, Star Trib. (DEC. 2, 2014, 11:08 PM), http:// www.startribune.com/ server- of- court-papers- faces- felony- charges- in- northern- minnesota/ 284557131/ [https://perma.cc/5GNM-Q7H6] (discussing criminal felony charges brought against the alleged perpetrator in Minnesota).

268. Lunsford, *supra* note 264 ("Q: [Y]ou believe 100 percent he [Umland] engaged in sewer service? A: Yes. What percentage and how many times that was, I don't know.").

269. CHANEN, *supra* note 267. *See also* ASSOCIATED PRESS, *State Alleges Process Server Filed False Claims*, WASH. TIMES (NOV. 6, 2014), http:// www. washington-times.com/ news/ 2014/ nov/ 6/ state- alleges- process- server- filed- false- claims/ [https:// perma.cc/RMT7-ZL6V].

270. Chanen, *supra* note 267.

learned of their court cases after judgments, sometimes for thousands of dollars, had already been entered against them.[271] Mr. Jasicki's hope is that his former employee "goes to jail."[272]

Almost a year after filing the case, the parties settled. As part of the settlement, the parties agreed to a stipulated order that vacated 450 default judgements—totaling over $1 million—for cases where the former employee filed affidavits of service.[273] Additionally, the defendants were banned from doing further business in Minnesota that dealt with service of process.[274]

E. How Fraudulently Obtained Default Judgments Wreak Havoc on the Poor

The tragic reality is that such fraudulent practices by process servers have the greatest impact on the poor.[275] "Despite widespread perceptions that civil litigation involves high-value commercial and tort cases," 75% of all judgments in the *Landscape* study were for less than $5,200.[276] These results are significant given the vast number of cases that were analyzed by the *Landscape* study.[277] Contract issues, rather than high-dollar tort claims, were the most common of the *Landscape* data, and the majority of those cases were for debt collection, landlord/tenant,

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271. *Id.*

272. ASSOCIATED PRESS, *supra* note 269.

273. *See* FED. TRADE COMM'N, OPERATION COLLECTION PROTECTION: STATE & LOCAL ACTIONS (2015), https:// www.ftc.gov/ system /files /attachments /press- releases /ftc- federal- state- local- law- enforcement- partners- announce- nationwide- crackdown-against-abusive-debt/151104ocp-stateactionlist1.pdf [https://perma.cc/3978-5V5F]; *see also* Consent Judgment and Order as to Defendant Terrill Joseph Jasicki dba TJ Process Service at 2, State v. Umland, No. 36-CV-14-787 (Minn. Dist. Ct. April 22, 2016) [hereinafter "Jasicki Consent Judgment"]; Consent Judgment and Order as to Defendant Jeremy M. Umland at 2, State v. Umland, No. 36-CV-14-787, (Minn. Dist. Ct. April 22, 2016) [hereinafter "Umland Consent Judgment"].

274. Jasicki Consent Judgment, *supra* note 273, at 2; *see also* Umland Consent Judgment, *supra* note 273, at 2.

275. "Often associated with consumer debt collection and landlord-tenant litigation, questionable service practices have their greatest impact on those who are poor and least capable of obtaining relief from the consequences of an improperly imposed default judgment." Barr v. Dept. of Consumer Affairs of N.Y., 517 N.E.2d 1321, 1322 (N.Y. 1987) (upholding the revocation of a process server's license when he failed to keep appropriate records, as required by law).

276. HANNAFORD-AGOR ET AL., *supra* note 14, at iii.

277. *Id.* ("The resulting *Landscape* dataset consisted of all non-domestic civil cases disposed between July 1, 2012 and June 30, 2013 in 152 courts with civil jurisdiction in 10 urban counties. The 925,344 cases comprise approximately five percent (5%) of state civil caseloads nationally.").

foreclosure and small claims issues.[278] On the other hand, legally-sophisticated parties with resources have already abandoned the civil court system. "Most of the litigants who have the resources and legal sophistication to do so have already abandoned the civil justice system either preemptively through contract provisions (e.g., for consumer products and services, employment, and health care) or after filing a case in court through private ADR services."[279]

The civil cases that remain in state court are often on "high-volume dockets," such as small claims courts, which are "designed to obtain default judgments without trial."[280] In many states, small claims courts are not bound by the same rules of evidence and procedure that are found in other courts.[281] This creates a system that not only allows debt-collecting plaintiffs to pursue frivolous and fraudulent claims, but it also enables them to obtain default judgments that stem from sewer service.[282]

There are countless stories of ruined lives that are left in the wake of sewer service and fraudulently obtained default judgments. Often, defendants may not know they have been sued until after their wages have been garnished or their assets seized.[283] Others first learn of their default judgments when their credit precludes them from obtaining housing or a new job.[284]

One might assume that a defendant who has been the victim of sewer service would simply move to vacate a fraudulently-obtained default judgment. However, such a task is not as easy as it

278. *Id.* at iii-iv, 7. Almost two-thirds of the 925,344 cases disposed of during the year of the study were contract cases, and of those 37% were debt collection cases, 29% were landlord/tenant cases, and 16% were small claims matters. *Id.* at iii. Additionally, one party, generally the defendant, was self-represented in 76% of these cases. *Id.* at iv.

279. *Id*. at v.

280. Ian Liberty, Note, *From Debt Collection to Debt Slavery How the Modern Practice of Debt Collection is a Violation of the 13th Amendment's Prohibition on Involuntary Servitude*, 15 RUTGERS RACE & L. REV. 281, 293 (2014); *see also* Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. BUS. & TECH. L. 259, 263 (2011); WILNER ET AL., *supra* note 16, at 6, 8.

281. Holland, *supra* note 280, at 263.

282. Liberty, *supra* note 280, at 293.

283. WILNER ET AL., *supra* note 16, at 6-7.

284. MFY LEGAL SERVS., *supra* note 20, at 7-9.

sounds.[285] Indeed, a victim must not only realize that a legal remedy exists, but must also bear the expense of obtaining counsel. Furthermore, although some victims may be lucky enough to obtain free legal services, there is no right to such services in almost all civil cases.[286]

In *Justice Disserved*, MFY Legal Services, Inc. describes a few of the nightmares suffered by defendants who were lucky enough to obtain free legal counsel from its organization.[287] The publication tells one story of Victor A., a 68-year-old blind, disabled man, "whose only source of income [was] Social Security . . . ."[288] Like many victims, Mr. A learned of his default judgment after attempting to withdraw money from his frozen bank account in order to pay for his medication.[289] A second male victim, George M., was homebound when his bank account was frozen due to collection efforts on a default judgment.[290] Although Mr. M rarely left his home, due to his homebound state, the process server allegedly served him by substitute service on an unknown woman at his home.[291] Because his accounts were frozen, he was unable to pay his rent or purchase food without the help of his son.[292] Finally, a third victim, Ira K., lost his eligibility for public housing after a default judgment had been entered against him as a result of fraudulent service of process.[293] Although he eventually obtained legal counsel and had the judgement vacated, he never regained his eligibility for public housing.[294]

IV. TECHNOLOGY OFFERS VERIFICATION SOLUTIONS

285. REBECCA BUCKWALTER-POZA, CTR. FOR AM. PROGRESS, MAKING JUSTICE EQUAL 1-2 (2016), https:// cdn.americanprogress.org/ content/ uploads/ 2016/ 12/ 071 05805/ Making Justice Equal- brief.pdf [https://perma.cc/M3VD-87HA].

286. *Id.* at 1.

287. *See* MFY LEGAL SERVS., *supra* note 20, at 7-9.

288. *Id.* at 7.

289. *Id.* at 7.

290. *Id.* at 8-9.

291. *Id.* at 8.

292. MFY LEGAL SERVS., *supra* note 20, at 8-9.

293. *Id.* at 9.

294. *Id.* ("Mr. K. lost his eligibility for public subsidized housing because the process of vacating the judgment and dismissing the case took longer than the time frame allowed by the housing agency to correct his credit report.").

With these real-life examples in mind, it is difficult to overlook the reality that a solution is readily attainable. Refusing to acknowledge that technology can be a mechanism to track process servers "would be akin to hiding one's head in the sand to ignore such realities and the positives of such advancements."[295]

Indeed, it defies common sense to allow process servers to use the "honor system" to self-verify their affidavits of service. There are an exceptionally high number of default judgments entered in high-volume dockets.[296] Despite the crippling consequences that result, this system ensures that defendants will fail to appear for court. For decades, sewer service has run rampant in high-volume dockets.[297] Despite this knowledge, the current court rules of procedure in many jurisdictions do not require verification of service beyond a verification drafted by the process server himself. This broken model fails to protect litigants from fraudulent service and could easily be improved using modern technology.

Obviously, the most important component is that the court must have a way to verify that service was completed. Currently, most courts rely on an instrument, often referred to as the "affidavit of service," "return of service," or "proof of service," which the process server must file with the court following service.[298] The court relies on the return of service "to determine whether jurisdiction over an individual has been established."[299] The instrument provides the method, date, time, and description of service.[300] Process servers complete the proof of service themselves, thereby "proving" their actions of service through their own sworn statements.

A proof of service mechanism that relies only on the "honor system" is unreliable and unfair. There are independent and reliable technological verifications available that are not currently required by most court rules.[301] The integrity of our judicial system

295. In re Int'l Telemedia Assocs., Inc., 245 B.R. 713, 719 (Bankr. N.D. Ga. 2000).

296. WILNER ET AL., *supra* note 16, at 6, 8.

297. *Id.* at 6.

298. *See* FED. R. CIV. P. 4(*l*).

299. Koster v. Sullivan, 160 So. 3d 385, 388 (Fla. 2015).

300. *Id.* at 387.

301. Lexis Hub Staff, *Using Technology to Effectuate Service of Process and Assure Against "Sewer Service,"* LEXISNEXIS (Mar. 25, 2010, 9:08 PM), https://www. lexisnexis.com/ legalnewsroom/ lexis-hub/ b/ legal- technology- and- social- media/ archi ve/

is jeopardized when our court rules fail to use technological verification to protect litigants from sewer service.[302]

Indeed, the current service of process standard requires "notice reasonably calculated, *under all the circumstances*, to apprise interested parties of the pendency of the action."[303] Since the U.S. Supreme Court articulated this standard in 1950, *the circumstances* have changed.[304] Therefore, so must our service of process practices. Traditional methods of service, proof of which relies exclusively on the veracity of the process server, is not always reasonably calculated to provide notice. There are ways to verify and authenticate service rather than relying exclusively on the existing self-verification "honor system" model. The technological advancements that have occurred in the decades following *Mullane* provide new and better *circumstances* under which notice can be provided. Technology can enable all interested parties and the court to verify the sworn statements of a process server.

A. GPS Tracking of Process Servers

After the Vietnam War, the military developed the Global Positioning System ("GPS") technology.[305] At the time, the purpose of the technology was to track the "increasingly mobile" contingent of ground troops in remote locations.[306] Today, GPS is largely used to track and locate "civilian masses."[307] Indeed, GPS is so prevalent in our society that it is a required feature on all cell phones for the purpose of tracking the user's location for emergency 911 calls.[308]

To pinpoint an individual's location, GPS uses a system of satellites that orbit the Earth.[309] The satellites "transmit signals to

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2010/ 03/ 25/ using- technology- to- effectuate- service- of- process- and- assure- against- quot- sewer- service- quot.aspx?Redirected=true [https://perma.cc/7S2L-JDRZ].

302. CIVIL JUSTICE IMPROVEMENTS COMM., *supra* note 130, app. I at 2.

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

304. Upchurch, *supra* note 109, at 559-60.

305. Jill Yung, *Big Brother Is Watching: How Employee Monitoring in 2004 Brought Orwell's* 1984 *to Life and What the Law Should Do About It*, 36 SETON HALL L. REV. 163, 170 (2005) (summarizing the military's development of the technology after the Vietnam War in order to track the location of ground troops).

306. *Id.*

307. *Id.*

308. Neri, *supra* note 24, at 229.

309. *Id.* at 228.

equipment on the ground."[310] These signals can determine an individual's geographic location within a few meters of the exact location.[311] Today, process servers can easily track their GPS coordinates with one simple click.[312] There are cell phone apps, programs, and process-serving software that records the location, date, and time of service whenever the process server either takes a photograph or "logs in a service attempt."[313] This technology provides the verification of service that courts lack by relying exclusively on the veracity of the process server.

An allegation of personal service, without a GPS stamp, is not "reasonably calculated" to reach a defendant. Indeed, we know of "instances of massive fraud [where] hundreds or thousands of persons [are] not served with complaints against them."[314]

There are several benefits to logging GPS coordinates. Such a requirement protects potential victims of sewer service and provides additional proof to the court beyond the process server's own sworn statements in affidavits. The GPS tracking requirement also provides benefits for the process server. For example, GPS technology can offer protection against a wrongful claim of sewer service.[315] If a process server must testify at a hearing on a motion to quash service, even if the service occurred years earlier, GPS data can serve as a reliable form of evidence.[316]

Even where GPS is not required by law, many clients of process servers are now requesting, and even requiring, that GPS be used for all service attempts. In 2010, the New York City Bar Association supported reforms to laws governing service of process in NYC.[317] One year later, NYC enacted a law that made logging GPS coordinates and storing the information in a third-

310. *Id.*

311. *Id.*

312. STEPHANIE IRVINE, *Many Process Servers Now Voluntarily Use GPS to Log Service Attempts*, Serve-Now (FEB. 3, 2015), https://www.serve-now.com/articles/2017/many-process-servers-now-voluntarily-use-gps-to-log-service-attempts [https://perma.cc/NC9G-MHGV].

313. *Id.*

314. Hannah Lieberman, *Uncivil Procedure: How State Court Proceedings Perpetuate Inequality*, 35 YALE L. & POL'Y REV. 257, 262-63 (2016).

315. Irvine, *supra* note 312.

316. *Id.*

317. Chris Bragg, *It's Getting Harder to Process*, Crain's N.Y. Bus. (Dec. 1, 2013, 12:01 AM), http://www.crainsnewyork.com/article/20131201/POLITICS/312019968/its-getting-harder-to-process [https://perma.cc/WR7Q-T66S].

party system a requirement.[318] The NYC service laws do not extend statewide, yet many clients demand the implementation of this practice of tracking service.[319] Moreover, even when it is not required by law or client demands, some process servers voluntarily use GPS.[320] One process server explains that this choice is made because "a lot of servers [do not] do due diligence and just post. This . . . comes in handy if you have to testify."[321]

Even GPS has not been a perfect solution. "Consumer Affairs [of New York] has been probing potential violations of the new law."[322] Of forty detailed investigations into the GPS devices of individual servers, about a quarter have shown signs of sewer service.[323] For that reason, GPS tracking should be used in conjunction with other technological methods of verification, such as the practice of attaching a photograph to the affidavit of service.

B. Proactively Conduct Audits Using Technology

Data analysis tools are readily available. Software such as Microsoft Excel and basic mapping software can analyze data in the aggregate when pulled from a collection of one process server's affidavits. Simple investigations and audits at the state or local level are the first steps to address whether these due process violations occur.

One Chicago judge openly admitted that he was skeptical of defendants who appeared in the face of garnishment and claimed that they were never served.[324] It was not until after another judge in his court found sewer service by analyzing a "stack" of service documents from one process server that his opinion changed.[325] The informal audit showed that this particular process server

318. Irvine, *supra* note 312.
319. *Id.*
320. *See id.*
321. *Id.*
322. Bragg, *supra* note 317.
323. *Id.*
324. *See* Thomas More Donnelly, Remarks at the Federal Trade Commission Roundtable: Debt Collection: Protecting Consumers 35 (Aug. 5, 2009), https://www.ftc.gov/sites/default/files/documents/public_events/debt-collection-protecting-customers/transcript-90805.pdf [https://perma.cc/4CRZ-PWN6] (statement of Donnelley, J.) (admitting that before a judicial colleague conducted an informal audit of process servers, he thought that "these people are just making it up").
325. *Id.*

claimed to be in different areas—thirty miles apart—within minutes of each other.[326] The court ordered both the process server and the law firm to appear and begged the question, "Is he Superman? How can he be doing this?"[327] Following this experience, which stemmed from a very simple informal audit, this judge changed his views toward debtors who claim to have never been served.[328] He no longer dismisses such allegations. Rather, he now views service with "a lot more skepticism," and recommends that courts audit service of process.[329] These audits would provide judges with a more realistic understanding of service of process practices.[330] Indeed, audits would have widespread benefits, beginning with a shift in the judicial perspective toward sewer service.

C. Verify Defendant's Current Address Through Technology

1. Technological Searches for Proper Address

Whether due to malice or neglect, collection plaintiffs often sue defendants using old addresses.[331] Despite technological advances that can easily verify a current address, most plaintiffs are simply not required to use such verification tools.

As discussed, process servers have claimed to serve defendants at both former addresses and addresses where a defendant never lived.[332] It is unclear as to why, but ultimately plaintiffs neglect to research a current, or an updated, address.[333] There is

326. *Id.*
327. *Id.*
328. *Id.*
329. Donnelly, *supra* note 324, at 35.
330. *Id*. (explaining that "in Illinois we '[do not] have anybody that does this [conducts audits], but I think it would be very good, because otherwise [there is]' no check on it.")
331. N.Y.C. BAR ASS'N ET AL., *supra* note 139, at 13.
332. *Id.* at 6; WILNER ET AL., *supra* note 16, at 9.
333. N.Y.C. BAR ASS'N ET AL., *supra* note 139, at 13.

no excuse for such a practice, considering that technology makes address verification as simple as "the click of a few computer keys."[334] When a consumer opened a line of credit many years ago using a specific address, one should not simply assume that the address is still valid. Indeed, a failure to verify a defendant's address may not meet the current *Mullane* standard of constitutional notice.[335] *Mullane* requires "notice 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."[336] "Service" at the incorrect address is not reasonably calculated to give notice.[337] Without verification safeguards, the address at which a defendant is served is unreliable and, therefore, may not satisfy due process requirements.

Additionally, under *Mullane*, the Court permitted service via newspaper publication on the *unknown* parties.[338] The Court reasoned that, due to the unknown status and whereabouts of these individuals, newspaper publication satisfied due process.[339] Much has changed due to technological advances in locating the whereabouts of an individual. Such records providing information on addresses and telephone numbers are easily accessible through the internet for a small fee.[340] Additionally, skip tracing is similarly available for a fee.[341] One can no longer argue that the *Mullane* balancing test[342] would permit exclusive service via publication due to the ability to obtain such information in today's society.

When the names and addresses of those affected are "at hand, the reasons disappear for resort to means less likely . . . to apprise them of its pendency."[343] With technological advances, such as using skip tracing, the names, addresses, phone numbers,

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334. *Id.*

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

336. *Id.* (emphasis added).

337. *See id.* at 315 (asserting that "[t]he means employed must be such as one desirous of actually informing the absentee").

338. *Id.* at 317.

339. *Id.* at 317-18.

340. *See, e.g.*, INTELIUS, http://intelius.com [https://perma.cc/K9UD-F3UE].

341. *See e.g.*, *CLEAR Skip Tracing Tools for Collections*, THOMSON REUTERS [hereinafter Skip Tracing], http:// legalsolutions.thomsonreuters.com/ law-products/ solutions/ clear-investigation-software/ skip-tracing-collections [https://perma.cc/6D9G-GA49].

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

343. *Id.* at 318.

etc. are almost always "at hand" in today's society. Search methods, such as a search of Department of Motor Vehicle records, a skip trace, or a LEXIS people search, should be utilized, especially because such searches are often used to locate a consumer for collection attempts, but not service attempts.[344]

A few states now require verification of a consumer's address at the time of filing the lawsuit.[345] Without such verification, a default judgment will not be entered.[346] In Massachusetts, plaintiffs "in trade or commerce**,** or pursuing a claim for assigned debt" must file a "Verification of Defendant's Address form" at the time of initiating a lawsuit.[347] The plaintiff, or the plaintiff's attorney, must certify the defendant's address within the past 12 months through one of the following methods: (1) a municipal record (e.g. tax record); (2) the Department of Motor Vehicles; (3) receipt of correspondence from defendant with the same return address; or (4) other verification from the defendant.[348] If the plaintiff cannot make that certification, it may certify two of the following verifications: (1) a recent letter mailed to the defendant by first class mail and not returned; (2) an online database that is not an unpaid general telephone directory; or (3) an additional source.[349]

Connecticut Superior Court's Small Claims Session has a similar verification requirement. A plaintiff must verify that, within the last six months, he confirmed the defendant's address.[350] Sufficient means of verification include: government records (e.g. tax records), contacting the Department of Motor Vehicles, receipt of correspondence from defendant with that return address, other proof, and/or mailing a recent letter first class to defendant's address that is not returned.[351]

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344. 18 U.S.C. § 2721(b)(4) (2012) (permitting service processers to obtain personal information through DMV registries); Skip Tracing, *supra* note 341 (providing skip tracing services); *Products & Services for Locating a Person*, LEXISNEXIS, http:// www.lexisnexis. com/ locatepersontask/ [https://perma.cc/ER9A-PRMC] (providing public record services).

345. MASS. SMALL CL. R. 2(b).

346. *Id.*

347. *Id.*

348. *Small Claims Verification of Defendant's Address*, MASS. LAW. WKLY., http:// mass rules. lawyers weekly. com/ wp-files/ trial- court- forms/ trial2. pdf [https://perma.cc/L7WZ-FZ68].

349. *Id.*

350. *See* Small Claims Writ and Notice of Suit, CONN. JUD. BRANCH, *www. jud. ct. gov/ webforms/ forms/ cv040 .pdf* [https://perma.cc/6ZJM-U24H].

351. *Id.*

2. As a Safeguard, the Court Mails a Supplemental Notice. If Returned to Sender, a Default Will Not be Entered.

In NYC Civil Court, in addition to serving the court documents, a plaintiff in a debt collection lawsuit must provide the clerk of the court with a one-page notice addressed to the defendant.[352] Then, the clerk mails the stamped notice to the defendant, which serves as notice to the defendant of the lawsuit.[353] If the notice is returned to the court, the request entry of default judgment is denied, and the plaintiff's attorney is advised to "move by motion or file a notice of inquest . . . [to determine] whether the defendant's address was sufficient."[354] Since the rule was enacted, the number of answers filed by defendants has increased in consumer-collection cases.[355]

V. CONFRONTING CONCERNS

A. Privacy Concerns with GPS Tracking

In her article, *Privacy in the Age of Tracking Technology: Why G.P.S. Technology Should Not Be Used to Track Process Servers*, author Talia Neri argues against the use of GPS to track process servers.[356] Neri argues that because GPS technology tracks an employee's every move, its use will enable an employer "to cross the line into an employee's personal life."[357] Although Neri acknowledges that an employee's personal and work life overlap slightly, she suggests that GPS technology will further distort that separation.[358] For example, the employer will know an employee's whereabouts before and after work, and also where

352. N.Y.C. BAR ASS'N, *supra* note 139, at 11.

353. *Id.*

354. N.Y.C. CIVIL COURT, CCM 184, NYSDMV USED TO VALIDATE ADDRESS FOR RETURNED 208.6(H) NOTICE (2009), https:// www.nycourts.gov/ cou rts/ nyc/ SSI/ directives/ CCM/ CCM184.pdf [https://perma.cc/7PUA-DGME].

355. N.Y.C. BAR ASS'N, *supra* note 139, at 11-12.

356. *See* Neri, *supra* note 24, at 253 ("[A] legal basis for blocking, or at least limiting, the use of GPS technology to monitor the movements of process servers should be recognized.").

357. *Id.* at 230.

358. *See id.*

he went during his lunch break.[359] However, the Fourth Amendment only applies when citizens have an expectation of privacy that "society is prepared to recognize as 'reasonable.'"[360] Indeed, she concedes that, in *O'Connor v. Ortega*, the Court held that employees in employment settings enjoy little to no reasonable expectation of privacy.[361] Nevertheless, she argues that the use of GPS is dangerous in a government regulated setting.[362]

Here, there is a practical way to balance the need for GPS surveillance with society's desire to have privacy in the workplace. First, process servers should "stamp" or "log" their locations only when they are serving process. For example, they can use their cell phone apps to "log" their whereabouts at "123 Main Street" for the purpose of attempting service on a specific defendant. They should not be required to log their whereabouts at any time before or after the service attempt. They should not be under constant surveillance, but instead the software can enable them to record, or log, their exact whereabouts at the exact time of service.

Not only do employees in employment settings enjoy little to no reasonable expectation of privacy, a process server's "employment setting" is often a public sidewalk.[363] There is no reasonable expectation of privacy when a server is on a public sidewalk, especially when one's presence on that sidewalk is subsequently sworn in a public court filing.[364] There is not a reasonable expectation of privacy when one works in a *public* setting, serving *public* court documents, and then swears, under oath, in a *public* affidavit of service regarding one's whereabouts during service.[365] Because of the public nature of service of process, we should discontinue "honor system" methods of self-verification when technological GPS logging is readily available.

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359. *Id.* at 230-31.

360. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

361. Neri, *supra* note 24, at 241 (citing O'Connor v. Ortega, 480 U.S. 709, 717 (1987)).

362. *See id.* at 242-45.

363. *See O'Connor*, 480 U.S. at 717 (noting that operation realities of a workplace may eliminate an employee's reasonable expectation of privacy).

364. *See* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978) (finding that courts recognize a general right to inspect public judicial records and documents); Anderson v. Home Ins. Co., 924 P.2d 1123, 1127 (Colo. App. 1996) (finding it unreasonable for parties in litigation to expect or assume that court files will remain private).

365. *See Katz*, 389 U.S. at 351; Williams v. Baker, 464 F. Supp. 2d 46, 49 (D. Me. 2006).

B. Process Servers Fear Loss of Livelihood After Changes to the Law

In 2010, the City Council in New York passed new rules that increased costs for process servers.[366] From 2011 to 2013, the number of servers licensed in NYC dropped forty percent—from 1,850 to 1,100.[367] The new rules require process servers to take biennial licensing exams, use GPS monitoring to track their whereabouts, and keep copious records.[368] Additionally, individual process servers must post a $10,000 bond every two years with the city to cover costs associated with potential fines.[369] Large agencies that operate with multiple servers must post a $100,000 bond.[370]

Many process servers believe that these regulations have been overkill. Not only have they led to delays in the legal system, but they have crippled the "good actors" who have also fallen victim to the wrongdoings of others.[371] Some have had to find new lines of work, and others have migrated to different jurisdictions with fewer regulations.[372] One process server explained that, after working a fifteen-hour day, he spent hours at home filling out paperwork to document his whereabouts even though such information has already been digitally entered in his GPS device.[373] He recalls, "[m]y wife has spent a lot of our nights standing next to me, helping me log in."[374] Additionally, he suggests that it is extremely difficult to remain current on the rules, regulations, and required logging systems.[375]

Some process servers believe the regulations are simply a way to generate revenue for the government. For example, of 180 individual investigations, ninety-eight percent resulted in settlement agreements with consumer affairs.[376] Notably, the settlements resulted in $218,000 in fines.[377]

366. *See* Bragg, *supra* note 317.
367. *Id.*
368. *Id.*
369. *Id.*
370. *Id.*
371. *See* Bragg, *supra* note 317.
372. *Id.*
373. *Id.*
374. *Id.*
375. *Id.*
376. *See* Bragg, *supra* note 317.
377. *Id.*

C. Solving Sewer Service Is Only One Step Towards Fixing the Broken Debt Collection Model

On matters related to debt collection, the Federal Trade Commission has concluded that the current system is broken.[378] "Rather than a true adversary system, the debt buyer litigation model is characterized by a sophisticated business represented by a skilled lawyer suing an unsophisticated, unrepresented consumer in which no formal rules of evidence are applied, and rank hearsay is rampant."[379]

Often, debt buyers rely on small-value cases which can be tried in a small claims court.[380] In such courts, evidentiary standards and rules of evidence often do not apply.[381] Therefore, a debt purchaser may prove its case with affidavits of employees instead of authenticating documents and proving chain of title.[382] Through this informal system, a defendant may have a judgment entered when he does not even owe the debt.[383]

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378. LEIBOWITZ ET AL., *supra* note 3, at 71.

379. Holland, *supra* note 280, at 262.

380. *Id.* at 261 ("Debt buyers shy away from large-value cases, which would require formal proof that complies with the forum state's rules of evidence.").

381. *Id.*

382. *Id.* at 282-83. Holland demonstrated the "sloppiness" in how affidavits are created:

> Lawyer: What's your job there (at Palisades)?
> Witness: I execute affidavits. . .
> Lawyer: . . . is there any quota or performance goal for the number of affidavits you have to execute?
> Witness: No, there's no quota.
> Lawyer: How many are you expected to execute?
> Witness: At least 2,000.
> Lawyer: 2,000 over what period of time?
> Witness: Per day.
> Lawyer: So you personally execute roughly 2,000 affidavits a day?
> Witness: Well, not every day, but most of the time that's what our quota is. . . .
> Lawyer: Okay. Do you actually prepare the affidavit?
> Witness: No.
> Lawyer: Who prepares the affidavits?
> Witness: I don't know. . . .
> Lawyer: Do you have any knowledge as to where that information actually came from that got into the computer system?—Omit objection—
> Witness: No.

Id. (citation omitted).

383. Kiel & Waldman, *supra* note 128 (telling the story of Rosalyn Turner, who failed to appear for a hearing and received a default judgment on a debt beyond the permissible statute of limitations period).

Many debt collection agencies, and their attorneys, rely on a business model that takes advantage of a high number of default judgments that are likely the result of falsified service.[384] Moreover, state courts are the preferred forum for debt collection, landlord/tenant, foreclosure, and small claims proceedings because of the available procedures to enforce judgments.[385] "Securing a judgment from a court of competent jurisdiction is the mandatory first step to being able to initiate garnishment or asset seizure proceedings."[386] Indeed, as discussed, some victims of sewer service do not owe a debt at all. Debt collectors sometimes sue to collect debts that have already been discharged in bankruptcy, debts that were settled with the release of liability, or debt that originated in identity theft.[387]

CONCLUSION

Many defendants fail to appear for court simply because they lack notice of their cases. Defendants are suffering dire consequences from falsified affidavits of service, including frozen bank accounts, wage garnishment, ruined credit, and even eviction. Once discovered, the victims of sewer service face two hurdles: lack of counsel and the burden of proof. Indeed, the defendants must prove a negative—that they were not served—despite the process server's assertions to the contrary.

The current service of process standard requires "notice reasonably calculated, *under all the circumstances*, to apprise interested parties of the pendency of the action."[388] Since the U.S. Supreme Court articulated this standard in 1950, *the circumstances* have simply changed and, therefore, so must our service of process requirements. Traditional methods of service, proof of which typically depends exclusively on the veracity of the process server, are not reasonably calculated to provide constitutionally adequate notice.[389] In most jurisdictions, process servers complete the proof of service themselves, thereby "proving" their service through self-verification. Such an "honor system" method

384. N.Y.C. BAR ASS'N, *supra* note 139, at 14.

385. HANNAFORD-AGOR ET AL., *supra* note 14, at v.

386. *Id.*

387. Holland, *supra* note 280, at 260.

388. *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950) (emphasis added).

389. *See* HANNAFORD-AGOR ET AL., *supra* note 14, at 2.

of verification fails to protect defendants when more reliable technological verifications are available.

The technological advancements that have occurred in the decades following *Mullane* provide new and better *circumstances* under which notice must be verified. There are independent and reliable technological verifications available that are not currently required in many jurisdictions. The integrity of our judicial system is jeopardized when service-of-process rules fail to use technological verification to protect litigants from fraudulent service process.[390]

390. CIVIL JUSTICE IMPROVEMENTS COMM., *supra* note 130, app. I at 2.