REFORMING SERVICE OF PROCESS: AN ACCESS-TO-JUSTICE FRAMEWORK

ANDREW C. BUDZINSKI*

Over the past few decades, the number of pro se litigants in state civil courts has risen exponentially—between 75 percent and 90 percent of litigants in family law cases, landlord-tenant disputes, and small claims actions did not have a lawyer in 2015. Procedural rules governing those proceedings, however, often impose requirements that disproportionately burden unrepresented litigants, fail to optimally protect the due process rights of those parties, and thereby deny them access to justice. Rules governing service of process illustrate this problem by requiring litigants to find a third party to hand-deliver court papers to a defendant directly or to a co-resident at the defendant's home. For many low-income, pro se litigants, this poses a significant barrier: housing instability, homelessness, and unemployment make it extraordinarily difficult to locate low-income defendants and serve them in the manner prescribed by the rules, a task made even more challenging by the requirement that the plaintiff secure a third party to serve.

Until plaintiffs can accomplish service, they are denied access to a hearing on the merits of their claim and defendants are denied notice of the claims brought against them. In short, burdensome service of process rules bar access to justice for both parties. Using those service of process rules as a case study, this article advances an access-to-justice framework through which rulemakers can re-evaluate procedural rules in courts hearing predominately pro se cases and better protect the parties' procedural interests. First, rulemakers must identify the full scope of procedural rights at stake for

---

* Visiting Associate Professor of Clinical Law and Friedman Fellow, George Washington University Law School. I am deeply grateful to Deborah Epstein, Rachel Camp, Robin West, Jessica K. Steinberg, Anna Carpenter, Kate Kruse, Greer Donley, Seth Bowers, and my co-fellows at Georgetown University Law Center for their valuable feedback, insight, and support at every stage of this project.

both parties. Second, rulemakers should view the rules in context, considering how the rules operate in practice, the experiences of each class of litigants involved, and how the rules will affect low-income, unrepresented litigants in particular. Finally, rulemakers should adjust the rules to reflect that context, aiming to optimally protect each procedural interest at stake. Applying this framework to service of process rules in domestic violence cases shows that both parties' rights can be better protected by allowing a new form of service of process: service through electronic media, such as text message, email, and social media messaging. By updating court rules to capture the realities of low-income, pro se litigants, the legal community can increase efficiency and fairness, thereby giving litigants better access to the just resolution of legal disputes.

INTRODUCTION

Service of process commences adversarial civil litigation—it gives a defendant notice of both the plaintiff's[1] claims and

1. The terminology used to identify parties varies from jurisdiction to jurisdiction and, in some cases, depends upon the type of suit. For simplicity, this article will refer to the filing party as the "plaintiff" and the party against whom a case is filed as the "defendant." When discussing specific cases in the District of Columbia Domestic Violence Unit, this article adheres to local terminology, referring to the filing party as the "petitioner" and the party against whom the

the court's attempt to exercise jurisdiction over the parties and the case.[2] Service of process, which embodies the initial protections of the Due Process Clause, is meant to ensure that a defendant is given a fair chance to defend his interests before a court can infringe upon those interests.[3] A plaintiff may not proceed to a hearing on the merits of her claim until perfecting service of process under the local court rules of civil procedure.[4] In the past, courts read the Constitution to require service of process by hand-delivery, either on a defendant personally or at a defendant's home address.[5] Those methods were authorized because they maximized the likelihood that a defendant would receive actual notice of the claims against them.[6] Over time, the constitutional doctrine interpreting the Due Process Clause evolved to permit a wider range of service methods.[7] Rules governing service of process, however, did not adapt to this less restrictive interpretation of the Due Process Clause.[8] Almost all jurisdictions continue to require that process be served personally on the defendant or on someone residing at the defendant's domicile—even though the Due Process Clause permits other, more expedient methods.[9]

Pro se[10] plaintiffs are held to the same standards as represented parties and are expected to accomplish service of process on defendants[11] but often lack the resources and expertise to do so effectively and efficiently.[12] Because current methods of service all center around a defendant's home address or

---

case is filed as the "respondent."

2. Henderson v. United States, 517 U.S. 654, 672 (1996) ("[T]he core function of service is to supply notice of the pendency of a legal action, in a manner and at a time that affords the defendant a fair opportunity to answer the complaint and present defenses and objections.").

3. *Id.*

4. *See, e.g.*, FED. R. CIV. P. 4(c)(1).

5. Pennoyer v. Neff, 95 U.S. 714, 733–34 (1877).

6. *Id.*

7. *See, e.g.*, Mullane v. Central Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950).

8. *See infra* Section V.A.

9. *See infra* Section V.A.

10. In this article, I use the terms "pro se," "self-represented," and "unrepresented" interchangeably.

11. *See, e.g.*, D.C. SUPER. CT. R. CIV. P. 4(c)(1) ("The plaintiff is responsible for having the summons, complaint, Initial Order, any addendum to that order, and any other order directed by the court to the parties at the time of filing served within the time allowed . . . and must furnish the necessary copies to the person who makes service.").

12. *See infra* Part V.

physical location, pro se litigants in low-income communities often struggle to accomplish traditional service on defendants who do not have a stable or identifiable home or work address.[13] While court rules across the country permit plaintiffs to request judicial authorization to attempt alternative methods of service, many of those methods present the same challenges as the traditional ones.[14] Every court rule governing alternative service requires the plaintiff to file a motion or affidavit seeking pre-approval from the court, creating additional procedural hurdles over which pro se litigants must jump.[15] Many pro se plaintiffs lack the expertise to file a successful motion and, particularly in emergency civil matters, face substantial prejudice from the delays incurred by taking the efforts required to obtain alternative service and by filing and awaiting a ruling on the motion.[16] These rules erect a high wall around the court system, one that low-income plaintiffs lack the resources, expertise, and information to scale.

The barriers erected by stringent service of process rules pose an access-to-justice[17] problem for pro se plaintiffs. In this article, I explore the intersection between access to justice and procedural fairness by looking at court rules governing domestic violence cases.[18] Rules governing service of process in domestic violence cases present an important example of antiquated procedural rules. Service of process rules are the initial hurdle to a hearing on the merits—in that sense, they are a quintessential barrier to "access." Moreover, it is valuable to study the effect of procedural rules on survivors of domestic

13. *See infra* Section V.A.

14. *See infra* Section V.C.

15. *See infra* Section V.C.

16. For examples of the ways in which stringent service motions can cause prejudice, see *infra* Part I.

17. The term "access to justice" encompasses a broad movement aimed at increasing the ability of low-income litigants to navigate the legal system. *See generally* Deborah L. Rhode, *Access to Justice* 69 FORDHAM L. REV. 1785 (2001) (describing the various forces that contribute to the barriers facing low-income litigants in the court system).

18. I refer to the broad class of civil suits between intimate partners, family members, or other protected relationships involving abuse as "domestic violence cases." Depending on the jurisdiction, these orders may be referred to as "protection orders," "restraining orders," "protective orders," "domestic violence orders," or "peace bonds." For the purposes of this Article, I use the terms "protection order" and "civil protection order" interchangeably as shorthand for those terms, and "domestic violence case" to describe the civil action through which a litigant can obtain such an order.

violence specifically. Survivors of domestic violence in low-income households[19] are more likely to have civil legal needs[20] than members of low-income households not affected by domestic violence.[21] Ninety-seven percent of low-income survivors will have at least one civil legal need, as opposed to 71 percent of low-income individuals who have not faced domestic violence.[22] Low-income survivors are also more likely to have multiple civil legal needs at a time: 67 percent of low-income survivor households have six or more civil legal problems each year, as compared to 25 percent of low-income households not affected by domestic violence.[23] In short, inequitable procedural rules affect survivors of domestic violence more frequently, even among already disproportionately affected pro se litigants. Finally, the stakes of meritorious claims in domestic violence cases are high—survivors of domestic violence can only obtain lasting legal protection if they are able to present their substantive claim, which they cannot do until they accomplish service on the defendant.

To remedy the access-to-justice problem posed by inequitable procedural rules, the legal community must reexamine the rules governing civil procedure in courts hearing primarily pro se cases. When crafting procedural rules, rulemakers should employ a framework focused on providing access to justice for unrepresented litigants. To ensure access to justice, rulemakers should review each procedural rule in three phases: first, they must recognize the policies that originally led to the rule and the scope of all procedural rights at stake; second, they must put the rule in context by considering the current realities and historical barriers facing low-income litigants who

19. I use the term "low-income" to refer to households at or below 125 percent of the federal poverty guideline (FPG). *See* LEGAL SERVICE CORPORATION, THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 7 (2017) [hereinafter THE JUSTICE GAP], https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf [https://perma.cc/3477-V7VP]. Of course, the same trends may well apply to households that, despite earning an income above FPG, nonetheless experience the myriad challenges posed by poverty.

20. The phrase "civil legal needs" includes problems that can be addressed by the civil legal system, including issues of children and custody, wills and estates, veteran status, disability status, income maintenance, home ownership, consumer finance, rental housing, and healthcare. *See id.* at 31.

21. *See id.* at 7.

22. *Id.*

23. *Id.*

bring the legal claims to which the rules apply; and third, they must consider how the rule can be modified to optimally protect each right at stake. Importantly, rulemakers should employ the access-to-justice framework with an eye toward the practical realities of many pro se litigants' lives. They must consider the norms of life in low-income areas, the impact of poverty on a litigant's ability to comply with the procedural rule, and the ways in which widely accessible technology could facilitate compliance. In short, the access-to-justice framework ensures practical fairness and, thereby, expands access to justice for pro se litigants.

In Part I, I show how existing procedural rules in state courts impose substantial barriers on the self-represented. When applied to pro se litigants, procedural rules designed to safeguard the rights of litigants actually operate to undermine those rights. I illustrate the access barriers posed by procedural rules in the context of service of process, recounting the actual experiences of litigants in the District of Columbia Domestic Violence Unit. Then, I explain how the rules prevent plaintiffs from obtaining a hearing on the merits of their claim and identify the actual harms inflicted on survivors of domestic violence as a result.

Part II evaluates the implications of the meteoric rise in pro se litigation across the country, and how the access-to-justice movement has responded to that trend. I identify various perspectives on what "access to justice" means and propose a reinvigorated look at the importance of a procedural dimension to "access." Most reforms advanced by proponents of access to justice focus on increasing access to counsel for otherwise unrepresented litigants, primarily by expanding access to free legal services. Others emphasize the need for litigants to understand the law and procedure governing their claim through self-help resources or unbundled legal assistance. Still others focus on how the internal operations of courthouses could be changed to decrease the disadvantages facing pro se litigants. While each of these perspectives is critical to comprehensive access-to-justice reform, I argue that the prioritization of these issues has overshadowed procedural fairness, and that the most successful access-to-justice reforms must include a reexamination of court rules governing primarily pro se courts to ensure fairness.

Part III argues that to adequately address the access

problem posed by service rules, actors in the legal system must change the lens through which these rules are viewed and, ultimately, must change the rules themselves. Existing rules come from an outmoded understanding of due process, stemming from the procedural regime of *Pennoyer v. Neff*.[24] Today, more than 150 years after *Pennoyer*, our understanding of due process has evolved to permit a wider range of methods of service.[25] For a variety of reasons, however, court rules governing service of process have not evolved alongside the due process doctrine. Moreover, the Due Process Clause protects a plaintiff's right to a hearing on the merits of her claim at a "meaningful time and in a meaningful manner."[26] Service of process rules that make it impracticable for a plaintiff to serve a defendant deny the plaintiff that right. I argue that we must look at service rules with a modern access-to-justice perspective in order to update the rules and better protect the rights of civil litigants.

Part IV explores the connection between procedural unfairness and the history of access barriers facing survivors of domestic violence. Procedural reform cannot occur in a vacuum. To fully understand how court rules, such as those applied to service of process, affect litigants on the ground, one must look to the historical experience of the litigants they affect. This Part analyzes the roots of systemic barriers facing survivors, going back to the influence of medieval European legal norms regarding domestic abuse. I review the failure of the criminal justice system to provide a meaningful remedy to survivors and discuss how those failures led to a civil justice solution. But, as this Part explains, civil protection order statutes have not fully ameliorated the challenges facing survivors in the criminal system. For that reason, we must evaluate procedural rules in domestic violence cases with careful attention to the history of exclusion that survivors have faced in order to avoid perpetuating that unfairness.

Accordingly, in Part V, I advance a critical component of a procedural access-to-justice framework and explore the ways in which procedural rules affect low-income plaintiffs specifically. Low-income litigants face the most serious obstacles to access-

24. 95 U.S. 714 (1877).

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

26. Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982); *see also id.* at 428–30 (discussing cases that address a plaintiff's rights to a hearing).

ing justice,[27] in large part because of court rules that assume the parties have representation or financial means.[28] Looking at service of process rules across the country, I articulate three overarching access problems they pose. First, service of process rules impose strict personal- or constructive-service requirements, which are often impracticable in low-income areas. Court rules, by and large, require that the defendant receives personal service by hand-delivery or that process be served on a co-resident at the defendant's home address.[29] Those requirements, however, pose particular difficulty in populations characterized by unemployment, housing instability, and homelessness, all of which make personal and residential service challenging. Second, service rules in every jurisdiction prohibit plaintiffs from serving process themselves, therefore requiring plaintiffs to find a third party to do so. This creates an agency cost—the collective financial, social, and logistical burdens of finding a third party to accomplish service. Many low-income plaintiffs cannot afford a lawyer or private process server to effect service and must rely on law enforcement or other third parties to serve at no cost.[30] The same logistical barriers, however, prevent successful service by law enforcement or private third parties. Third, the mechanism for requesting alternative methods of service requires specialized legal knowledge, posing an additional access barrier to unsophisticated pro se litigants.

In Part VI, I identify a solution to the access-to-justice problem posed by service of process rules: service through electronic media. After analyzing the constitutionality of electronic service, I show how electronic service would not only be easier for plaintiffs, but also more likely to give defendants actual notice. By increasing access to a hearing for plaintiffs while maximizing the likelihood that defendants receive notice, allowing electronic service would ultimately balance the rights of both parties, thereby ensuring procedural access to justice. A brief conclusion ensues.

27. *See infra* Part V.
28. *See infra* notes 88–93 and accompanying text.
29. *See infra* Section V.A.
30. *See infra* notes 192–194 and accompanying text.

I. SERVICE OF PROCESS AS AN ACCESS BARRIER

Survivors of domestic violence[31] derive the right to obtain a civil protection order against their abusive partners from state statute.[32] Protection order statutes often permit courts to order a defendant to, among other things, stay away from the plaintiff, refrain from contacting her, vacate their shared residence, reimburse her for property damage or medical bills, and comply with a temporary adjudication of the custody of minor children.[33] Orders issued pursuant to these statutes prevent future violence by subjecting the abusive partner to criminal contempt if he violates the terms of the order.[34] As with all civil suits, before a plaintiff can have a hearing on the merits of her claim, she needs to serve process on the defendant.[35] "Process" includes a copy of the petition for a protection order and a notice of the hearing date.[36] Applicable court rules in nearly every jurisdiction require that someone other than the plaintiff serve process in one of two ways: by delivering the papers to the defendant personally, or by leaving them at the defendant's residence with a person of suitable age and discretion.[37]

Despite their ubiquity, these rules frequently create insurmountable obstacles for plaintiffs in protection order cases. The following story demonstrates the kind of practical barriers

---

31. Because the "vast majority of domestic violence cases involve male perpetrators and female targets," in this piece I refer to survivors as women and abusive partners as male. Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 3 n.4 (1999). That is not to ignore cases involving male survivors, or cases involving same-sex couples. The procedural inequities I aim to highlight in this article have the potential to affect all cases of domestic violence, whatever the gender, gender identity, or sexual orientation of the parties.

32. *See, e.g.*, D.C. CODE §§ 16-1001–06 (2012).

33. *See, e.g.*, *id.* § 16-1005(c).

34. *See generally* Jaime Kay Dahlstedt, *Notification and Risk Management for Victims of Domestic Violence*, 28 WIS. J.L. GENDER & SOC'Y 1, 8 (2013) (describing a generic civil protection order regime).

35. *See, e.g.*, D.C. CODE § 16-1004(d) (2012).

36. *See, e.g.*, *id.* ("[T]he respondent . . . shall be served with notice of the hearing and an order to appear, a copy of the petition, and a temporary protection order, if entered.").

37. *See, e.g.*, *id.*; D.C. SUPER. CT. DOM. VIO. R. 5(a)(3)(A)(i)–(ii). A minority of jurisdictions also allow service by other means, but each of those methods requires the petitioner to provide the defendant's home or business address. For a survey of permissible methods of service of process across jurisdictions, *see infra* Section V.A.

plaintiffs face on a regular basis.[38]

Donna, a resident of the District of Columbia, broke off her relationship with her ex-boyfriend after months of consistent physical and emotional abuse—being punched, choked, beaten with a wooden dowel, and having her hair pulled from her head. When Donna ended the relationship, her ex-boyfriend moved out of her apartment, where he had been living for ten months. As her ex-boyfriend left with his belongings, he told Donna to watch her back and that he would return to "fuck her up." The next day, Donna filed a petition for a civil protection order. Under District of Columbia law,[39] these facts established a cognizable claim for a civil protection order because Donna's ex-boyfriend, the respondent in her civil protection order case, was Donna's former romantic partner and committed one or more criminal offenses against her in the District of Columbia.[40] After Donna filed her petition, she obtained an ex parte temporary protection order;[41] her petition for a longer one-year order was set to be heard in two weeks.

Before Donna could have a hearing on the merits of her claim, she needed to serve process on her ex-boyfriend, including a copy of her petition and a notice of the hearing date. But Donna did not know the respondent's home address—the respondent had lived at Donna's apartment throughout their relationship, so she could only guess where he went after moving out. He occasionally stayed at a particular homeless shelter, but otherwise had no stable address that Donna knew of. While both federal and District of Columbia law require local law enforcement to attempt service of process at no cost to Donna,[42] the police could not realistically attempt service without a residential address, and they would not attempt service at the homeless shelter.[43] No one explained to Donna that this might

38. The events recounted here reflect the actual experiences of petitioners whom the author advised in the District of Columbia Superior Court's Domestic Violence Unit. The facts and names have been changed to protect the petitioners' anonymity.

39. D.C. CODE §§ 16-1001–06 (2012).

40. *Id.* §§ 16-1001(5)–(6); § 16-1005(c); § 16-1006.

41. *Id.* § 16-1004(b).

42. Violence Against Women Act, 34 U.S.C. § 10461 (2017).

43. Based on my and my students' conversations with law enforcement, this appears to be common practice in the District of Columbia Metropolitan Police Department. Law enforcement may decline to serve process at homeless shelters to ensure that the homeless do not forego finding a place to sleep to avoid an encounter with police officers. To my knowledge, this policy is not captured in any

pose a problem, neither when she filed her petition nor in the two weeks before her full hearing. And, of course, no one took any steps to determine the respondent's location, as neither court staff nor law enforcement had any obligation to assist Donna in locating the respondent. So, when Donna arrived at court for her protection order hearing, she learned for the first time that the respondent had not received the papers and that she would need to arrange for service herself. Her hearing was continued for two weeks, and her temporary protection order was extended.

Over those two weeks, Donna struggled to figure out how to serve the respondent. To serve the respondent personally, Donna would need to ascertain his home address or determine his precise location at a particular moment and have someone deliver the papers to him at that moment. She did not know any of the respondent's friends or family to ask where he was staying or where he might be found, and she did not want to contact the respondent directly out of concern for her safety. She could not afford to hire a private process server or investigator to discover the respondent's whereabouts, she could not afford to hire an attorney, and local legal services organizations were too flooded with other clients to take on Donna's case. When she arrived at court for her second hearing, the judge continued her case yet again to allow her another chance to serve the respondent. But nothing had changed—Donna did not have the information necessary to effectively serve process, and she did not know how to obtain it.

For Donna, the costs of each court appearance were significant and reached far beyond mere time investment. Donna held down a job in sales and supported three children aged one, three, and four. Having to appear in court forced Donna to take off from work and to make alternate childcare arrangements for her young children; going to and from the courthouse required her to pay for public transportation when she was already struggling to make ends meet; taking slow-running public transportation from her underserved neighborhood took additional time away from her job both before and after the court hearing; and repeatedly missing work could have meant losing her job altogether. These impositions can force a survivor's hand—to avoid the substantial financial and logistical

---

formal document.

burdens of coming to court again and again, survivors may dismiss their case and forego obtaining legal protection.

After six weeks, Donna was frustrated. She could not afford—financially or emotionally—to continue attending court, especially if the result would be yet another postponement of her case. At her third hearing, left without a way forward, Donna voluntarily dismissed her case. Her temporary protection order expired, and she walked out of court without legal protection against her abusive partner—protection to which she would have been legally entitled, had she been able to present her case at trial.

Donna fell through the cracks of the legal system. Because she had no safe and procedurally sufficient way to serve the respondent, she could not move forward with her case. In part, this is because the rules governing service did not permit an accessible, expedient, and constitutional method of service: service by electronic media.[44] Donna had the respondent's cell phone number and social media handles. She had communicated with him on those accounts recently and often. Had the rules governing service of process permitted Donna to serve process electronically, the respondent could have received notice through one of those channels—which he used regularly to communicate—and Donna could have accessed a hearing on the merits of her claim. The failure of court rules to accommodate contemporary reality not only resulted in Donna's experience of immense injustice, but unnecessarily continued her exposure to domestic violence.[45]

Donna's story is not uncommon. Week after week, I saw numerous petitioners in the District of Columbia Domestic Violence Unit return to court again and again without a hearing on the merits, solely because they were unable to serve process in the manner required by court rules. Unable or not

---

44. *See infra* Part VI.

45. "[P]rotection orders are meant to prevent future violence by the perpetrator against his victim and to provide resources and time for the victim to establish herself independently of the abuser." Jeffrey R. Baker, *Enjoining Coercion: Squaring Civil Protection Orders with the Reality of Domestic Abuse*, 11 J.L. & FAM. STUD. 35, 43 (2008). For that reason, protection orders routinely order abusive partners to, among other things, stay away from the petitioner and not contact her. *Id.* at 35. When a petitioner's case is dismissed for failure to serve process, she loses access to that relief and is left exposed to conduct that, while lawful, creates a serious risk of violence. *See id.* at 38–40 (citing studies showing the effectiveness of protection orders at preventing future violence).

knowing how to accomplish service of process, many voluntarily dismissed their own cases out of frustration or economic necessity. Worse, some cases were involuntarily dismissed when judges grew impatient with failures of service or when survivors simply stopped showing up.[46]

The consequences of stringent service rules for survivors are not mere delays or inconveniences. Rather, the rules cause serious harms that affect survivors' substantive rights and risk their physical safety. After a survivor of domestic violence files her paperwork, she can usually obtain a temporary protection order,[47] which protects her until she has a hearing on her claim and can obtain more permanent relief.[48] But when a survivor's case is dismissed after a failure of service, like Donna's was, the temporary protection order is no longer effective.[49] After numerous delays, Donna lost her temporary order and the legal protection it provided. And while the respondent in Donna's case did not commit further crimes against her during the pendency of her case, Donna left court without a way to prevent that conduct in the future.[50]

In short, current service of process rules impose substantial burdens on plaintiffs and impose the greatest harms to

46. Unfortunately, there is a dearth of statistical evidence to show the full extent of this problem due to political, conceptual, and professional failures that have long stalled extensive access-to-justice reform. *See generally* Rhode, *supra* note 17. Further study is needed to show how often various procedural rules—including service of process rules—negatively impact a litigant's ability to obtain an adjudication on the merits.

47. D.C. CODE § 16-1004(b)(1)–(2) (2012) (setting out the standard for obtaining temporary protection order and noting that the duration of temporary protection orders may not exceed fourteen days).

48. *Id.* § 16-1005(c) (enumerating the available remedies in a civil protection order).

49. *Id.* § 16-1004(b)(2) (permitting the court to extend temporary protection order "as necessary until a hearing on the petition is completed").

50. While it is difficult to ascertain exactly how effective civil protection orders are at preventing future violence, one 2002 study found that women who obtained a protection order were 80 percent less likely to experience police-reported physical violence in the twelve months following the issuance of the order. Holt et al., *Civil Protection Orders and Risk of Subsequent Police-Reported Violence*, 288 JAMA 589, 589–94 (2002), https://jamanetwork.com/journals/jama/fullarticle/195163 [https://perma.cc/J2Y9-ZVZV]; *see also* Holt et al., *Do Protection Orders Affect the Likelihood of Future Partner Violence and Injury?*, 24 AM. J. PREVENTATIVE MED. 16, 18–21 (2003), https://www.ajpmonline.org/article/S0749-3797(02)00576-7/pdf [https://perma.cc/9SSX-VUCS] (finding that survivors who report domestic violence and obtain a protection order are less likely to experience subsequent contact, threats, and physical violence than survivors who report but do not obtain a protection order).

low-income, pro se plaintiffs. The access barriers put in place by service rules are not unique to suits for protection orders—the rules governing service of process in all fifty states and the District of Columbia, and across various types of civil cases, impose similar requirements and present identical obstacles for pro se plaintiffs.[51] Those obstacles have a real impact on their ability to obtain relief. In domestic violence cases, the plaintiff is denied access to protection from those inflicting physical and emotional abuse. In other family law cases, including actions for divorce and child custody, the plaintiff is denied the legal certainty of an order adjudicating property or custody rights. Leaving those issues unresolved can also exacerbate the risk of intrapartner violence.[52] In a small claims suit, the plaintiff is denied a hearing to recover money damages. In these types of cases, which involve disproportionately high numbers of low-income, pro se litigants,[53] ensuring fair procedure is a necessary predicate to resolving their claims.

II. A PROCEDURAL ACCESS-TO-JUSTICE FRAMEWORK

The access barriers facing low-income litigants are not new—they are, however, increasingly problematic given the explosion of pro se litigation in the American civil legal system. Over the past several decades, state courts have seen an exponential and well-documented increase in the number of pro se litigants, particularly in cases involving family law, domestic violence, small claims, and landlord-tenant disputes.[54] For example, whereas in the 1970s approximately 10 percent of litigants in family law cases proceeded without counsel,[55] today between 75 and 90 percent of these litigants are unrepresented.[56] The same general trend applies across other types of

51. *See infra* Section V.A.

52. Suzanne Reynolds & Ralph Peeples, *When Petitioners Seek Custody in Domestic Violence Court and Why We Should Take Them Seriously*, 47 WAKE FOREST L. REV. 935, 938–39 (2012) (discussing the benefits to survivors of a custody adjudication).

53. *See infra* Part A Procedural Access-to-Justice Framework.

54. Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 749–51 (2015).

55. *See The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104, 160 (1976) (finding that 2.5 percent of litigants in Connecticut divorce cases were unrepresented, and that approximately 20 percent of litigants in California divorce cases were unrepresented).

56. Steinberg, *supra* note 54, at 750–51, 751 nn.29–32 (citing statistics from

civil cases[57] in both urban and rural settings,[58] and (unsurprisingly) disproportionately impacts low-income litigants who cannot afford to hire an attorney.[59] Indeed, the correlation between poverty and self-representation has been widely discussed among access-to-justice scholars.[60]

Legal services organizations offering representation at no cost consistently lack the resources necessary to meet the overwhelming needs of low-income litigants. For example, the 2017 Legal Service Corporation (LSC) intake census revealed a vast gap between the civil legal needs of low-income Americans and the services that LSC-funded organizations were able to provide.[61] Of the roughly 1.7 million civil legal problems presented to these organizations,[62] 41 percent (roughly 647,000 cases) received no assistance at all.[63] The overwhelming majority of the time, the client was not served because the organization lacked adequate resources.[64] Of the clients that received no assistance, 54 percent exceeded the income guidelines used to channel

---

Maryland, the District of Columbia, and other jurisdictions).

57. *See* Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37, 41 (2010).

58. *See, e.g.*, COMMITTEE ON RESOURCES FOR SELF-REPRESENTED PARTIES STRATEGIC PLANNING INITIATIVE, REPORT TO THE UTAH JUDICIAL COUNCIL 5 (2006), https://www.utcourts.gov/resources/reports/docs/ProSe_Strategic_Plan-2006.pdf [https://perma.cc/LSE5-JN29] (showing that at least one litigant is unrepresented in 95.4 percent of divorce, protection order, stalking, eviction, small claims, debt collection, and guardianship cases); NEW HAMPSHIRE SUPREME COURT TASK FORCE ON SELF-REPRESENTATION, CHALLENGE TO JUSTICE: A REPORT ON SELF-REPRESENTED LITIGANTS IN NEW HAMPSHIRE COURTS (2004), https://www.courts.state.nh.us/supreme/docs/prosereport.pdf [https://perma.cc/L55W-7LU3] (showing that in New Hampshire, at least one party is unrepresented in 85 percent of all civil cases in District Court, 48 percent of all civil cases in Superior Court, 70 percent of domestic relations cases, and 97 percent of domestic violence cases); JUDICIAL COUNCIL OF CALIFORNIA, ACTION PLAN FOR SERVING SELF-REPRESENTED LITIGANTS 2 (2004), http://www.courts.ca.gov/documents/selfreplitsrept.pdf [https://perma.cc/CE9J-V7LP] (showing that sixty-seven percent of family law litigants in California state courts are unrepresented at the time of filing).

59. *See generally* THE JUSTICE GAP, *supra* note 19 (documenting the civil legal needs of low-income Americans and the current dearth of legal services available to address those needs).

60. *See, e.g.*, Steinberg, *supra* note 54, at 752–54; Rashida Abuwala & Donald J. Farole, *The Perceptions of Self-Represented Tenants in a Community-Based Housing Court*, 44 CT. REV. 56, 57 (2008); Rhode, *supra* note 17, at 1788–90.

61. THE JUSTICE GAP, *supra* note 19 at 9.

62. *Id.* at 39.

63. *Id.* at 43.

64. *Id.*

these organizations' limited resources to particularly impoverished clients.[65] But the needs of low-income clients were so great that LSC-funded organizations turned away 24 percent of clients eligible for legal assistance—that is, roughly 408,000 clients received no legal assistance despite meeting the income guidelines.[66] Even clients who obtained some assistance were not fully represented—LSC organizations reported that between 21 and 31 percent of cases received only partial assistance.[67] In sum, legal service providers have been unable to meet the rise of low-income civil legal needs, causing many low-income litigants to represent themselves or to forego legal action altogether.[68]

Lack of representation can diminish, or altogether block, access to justice in a variety of ways. Without legal training, many litigants struggle to understand the legal requirements imposed on them, both under procedural court rules and the substantive law governing their claims.[69] Pro se litigants are unlikely to obtain clarity on the law from judges, who often hold back advice in an effort to maintain the neutral judicial role in adversarial proceedings—a passivity that is self-imposed.[70] As one might expect, lack of representation has a direct impact on case outcomes. Numerous randomized studies conducted over the last decade show that unrepresented litigants are substantially less likely to obtain a favorable ruling than litigants represented by counsel.[71]

---

65. *Id.*

66. *Id.*

67. *Id.* at 42–43.

68. *Id.* at 33 ("Many people do not seek legal help because they think they can handle their problems on their own or because they do not know where to turn for help.").

69. *See, e.g.*, Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating their Cases in New York City's Housing Court*, 3 CARDOZO PUB. L., POL'Y & ETHICS J. 659, 661–62 (2006).

70. Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36, 42 (2002) (discussing how judges' "loyalty to and socialization by the legal professions" has led to a "deeply ingrained" belief that neutrality requires passivity); *see also* Ellen E. Sward, *Values, Ideology and the Evolution of the Adversary System*, 64 IND. L.J. 301, 355 n.96 (1989) ("A judge can be impartial but very active in developing the case, as judges are in continental inquisitorial systems. Impartiality is a requirement for fair adjudication, but judicial passivity is not.").

71. *See, e.g.*, Engler, *supra* note 57, at 46–66 (surveying numerous studies of the relationship between representation and case outcomes across civil and administrative courts); D. James Greiner, Cassandra Wolos Pattanayak &

In response to the overwhelming civil legal needs of low-income litigants, the legal community has pushed for reform to remedy the justice gap. Thirty-six states and the District of Columbia have established commissions charged with expanding access to justice.[72] Proponents of access to justice have suggested a variety of proposals, each designed to help litigants navigate the legal system more easily. Some have advocated for the right to counsel in at least some civil cases,[73] and others for the right to counsel in all civil cases (a concept known as "civil *Gideon*," named after the Supreme Court case guaranteeing counsel in criminal proceedings).[74] Others have advocated for measures short of a right to counsel, including expanded access to unbundled legal services[75] and increased involvement of judicial officers and court staff.[76] These proposals respond to the Supreme Court's decision in *Turner v. Rogers*,[77] which held that there is no right to counsel in civil contempt proceedings so long as the court provides sufficient alternative safeguards for the defendant's rights. Each of these access-to-justice solu-

---

Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for The Future*, 126 HARV. L. REV. 901, 927 (2013) (unrepresented tenants in Massachusetts District Court are half as likely to retain possession as represented tenants); Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U.J. GENDER SOC. POL'Y & L. 499, 511–12 (2003) (thirty-two percent of unrepresented survivors obtain a protection order, compared to 83 percent of represented survivors). Even when both parties are unrepresented, studies show less favorable results for litigants. *See, e.g.*, ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 108–09, 111, app. A tbl.5.A2 (1992).

72. ABA RESOURCE CENTER FOR ACCESS TO JUSTICE INITIATIVES, STATE ACCESS TO JUSTICE COMMISSIONS: CREATION, COMPOSITION, AND FURTHER DETAILS (2017), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ATJReports/atjcommissions_structure2017.authcheckdam.pdf [https://perma.cc/KK6X-7DNS].

73. *See, e.g.*, Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 TOURO L. REV. 187 (2009); Stephen Loffredo & Don Friedman, Gideon *Meets* Goldberg*: The Case for a Qualified Right to Counsel in Welfare Hearings*, 25 TOURO L. REV. 273 (2009); *cf.* Russell Engler, *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697 (2006).

74. Gideon v. Wainwright, 372 U.S. 335 (1963); *e.g.*, Steinberg, *supra* note 54, at 745.

75. *See, e.g.*, Russell Engler, Turner v. Rogers *and the Essential Role of the Courts in Delivering Access to Justice*, 7 HARV. L. & POL'Y REV. 31 (2013).

76. *See, e.g.*, Steinberg, *supra* note 54, at 787–806; Baldacci, *supra* note 69, at 661–62.

77. 564 U.S. 431, 448 (2011).

tions would likely help struggling self-represented litigants find their way through the courts, to varying degrees.

There is some disagreement, however, over what "access to justice" entails.[78] The term has taken on several dimensions of "access," including access to representation or advice of counsel,[79] access to information necessary to comprehend the law and legal proceedings,[80] access to fair treatment by judges and court staff,[81] and even access to a subjective sense of justice in the outcome of a proceeding.[82] These interpretations each imply that justice can be meaningfully accessed when a litigant (1) obtains representation, or (2) becomes otherwise equipped to understand legal rules and standards and, therefore, to adequately represent herself.[83] I contend that when court rules are substantively unfair, even the savviest pro se litigant will not obtain meaningful access to justice.

Existing procedural regimes are unfair to many pro se parties in a fundamental sense because they impose standards that disadvantaged, low-income litigants are unable to meet as a product of their circumstances. Service of process exemplifies the problem.[84] Even when a plaintiff understands the rules governing service of process, she does not have access to justice if her circumstances make it impossible to serve the defendant under those rules and thereby preclude her from presenting the merits of her claim. Viewed in that light, increasing access to justice must include an effort to reform both substantive law

---

78. *See, e.g.*, Gary Blasi, *Framing Access to Justice: Beyond Perceived Justice for Individuals*, 42 LOY. L.A. L. REV. 913, 914 (2009) ("[A]ccess to justice has come to be framed rather narrowly into four components: (1) access of (2) an individual (3) to a lawyer, or some form of assistance purported to be at least a partial substitute, (4) to help deal with a problem or dispute already framed in legal terms.").

79. Engler, *supra* note 75, at 36; Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 422–23 (1994).

80. NATIONAL CENTER FOR STATE COURTS, ACCESS BRIEF: SELF-HELP SERVICES (2012), http://cdm16501.contentdm.oclc.org/utils/getfile/collection/accessfair/id/263/ filename/264.pdf [https://perma.cc/W724-W9F3] ("The core idea of self-help services is simple: Give litigants information and tools to help them understand how to start a case, move it forward, present the facts to the decision maker, and obtain the benefit of, or comply with, the court's order.").

81. Baldacci, *supra* note 69, at 661–62.

82. Gary Blasi, *How Much Access? How Much Justice?*, 73 FORDHAM L. REV. 865, 870–83 (2004).

83. *Id.* at 865 ("In most common usage, 'access to justice' means access to a lawyer, or what are generally regarded as next-best alternatives, such as assistance for self-represented litigants or demystifying court procedures.").

84. *See infra* Part V.

and procedure to protect each litigant's rights. The best way to tear down those barriers is to take a new look at procedural rules with access to justice as the touchstone.

Some scholars have resisted focusing on procedural fairness in the access-to-justice movement, fearing that it might stifle attempts to increase the availability of legal assistance.[85] But it would be as damaging to lobby for an expanded right to counsel or access to self-help while ignoring the procedural inequities inherent in existing legal rule-sets. To be sure, a holistic approach to access-to-justice reform is necessary to meaningfully empower disadvantaged pro se litigants, and we must not lose sight of the value of counsel in legal proceedings.[86] It is equally important to consider how "demand-side" reforms—those that allow pro se litigants to navigate the legal process without an attorney—can help litigants understand and comply with court procedure.[87]

But meaningful access-to-justice reform requires a reinvigorated look at procedural rules that assume litigants will appear with an attorney and thereby disadvantage litigants who appear without one.[88] Legal rules are premised on the lawyer's ability to zealously represent his client while maintaining the professional norms that have come to dominate the legal community's perception of the adversarial system, such as judicial impartiality, economic use of time on a crowded civil docket, and adherence to courtroom etiquette.[89] Self-

85. *See, e.g.*, Rhode, *supra* note 17, at 1786–87 (noting that a "purely procedural understanding [of access to justice] by no means captures [the] aspirations" of the access-to-justice movement, in part because the "role of money and special interests in the legislative process often skews the law to insure that the haves come out ahead" (internal quotation marks omitted)).

86. *See* Honorable Dina E. Fein, *Access to Justice: A Call for Progress*, 39 W. NEW ENG. L. REV. 211, 214 (2017).

87. *See* Steinberg, *supra* note 54, at 787–89.

88. Nourit Zimerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L.J. 473, 476–77 (2010).

89. *See id.* ("[L]awyers serve both litigants and the system. They serve the litigants by bringing legal expertise and case management experience to bear on a particular case. They therefore provide a professional service that is believed to significantly increase the chances of winning in a system that treats dispute resolution in an adversarial setting in which the best litigator wins. At the same time, the work of lawyers serves the basic structure of the adversary system, allowing judges to preserve a passive role and sparing them the potential complexities of dealing with unprofessional litigants who are not invested in long-term relations with other legal actors that motivate people to adhere to rules of appropriate conduct when dealing with legal authorities.").

represented litigants defy the assumption of representation, disrupting the legal norms that procedural rules have come to codify.[90] Pro se litigants unfamiliar with procedural rules, or unable to apply the facts of their cases to the standards the rules impose, are left unable to properly communicate their legal causes and are, therefore, less likely to obtain relief.[91] For example, the layperson's method of communication typically centers around conveying a narrative, whereas lawyers and judges expect precise, element-driven application of facts to the law.[92] Importantly, these struggles are not due to any defect in the merits of a litigant's claim—they are borne solely of procedures that do not account for the litigant's lack of representation or legal training.[93]

To remedy this imbalance, I propose a framework for reviewing procedural rules that puts access to justice at its core. Under this access-to-justice framework, procedural rules should be reviewed in three phases. First, rulemakers should identify the procedural rights potentially affected by the rule and the scope of those rights. Second, rulemakers should put the rule in context by considering the lived realities of unrepresented low-income litigants, the operational norms of the court in which the rule applies, and the historical barriers faced by marginalized populations appearing in that court. Third, rulemakers should adjust the rules with that context in mind, with the aim of maximizing protection for each right affected. In short, the access-to-justice framework seeks to balance and enhance the rights of litigants, ensuring that both parties have their day in court. Service of process rules—and, indeed, all procedural rules—should reflect that balance.

---

90. *See id.* at 480–81 ("Under the current design of the system, the represented litigant loses any structured role in the process; the Federal Rules of Civil Procedure do not assign the litigant himself any structured opportunities to speak before the court other than if he chooses to testify. Likewise, the Rules do not require the litigant's own signature on most documents submitted to the court, and do not even require the litigant's presence in pretrial conferences, which are meant to enhance the management of the dispute and possibly facilitate its settlement.").

91. Ayelet Sela, *Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation*, 26 CORNELL J.L. & PUB. POL'Y 331, 337 (2016) ("[Self-represented litigants] typically have difficulty in applying legal concepts, determining the relevance of facts, and meeting the requisite burden of proof.").

92. *Id.* at 337–39.

93. *Id.*

III. SERVICE OF PROCESS AND THE RIGHTS AT STAKE

Service of process rules in domestic violence cases present an apt example of how the legal community can work to expand access through procedural reform. Before deciding how to address the problems posed by service of process rules on the ground, it is important to revisit the legal principles animating those rules to ensure that the rights of the parties receive adequate protection, and to ensure that reform does not undermine the interests that the rules are designed to protect. At the same time, revisiting the rights of the parties can reveal ways in which the rules fail to protect those interests.

A. The Defendant's Right to Notice

Service of process has long been viewed as a means of safeguarding the defendant's right to notice.[94] Court rules governing service, in turn, are structured to protect that right—to shield defendants from the constraints of judgments they had no way of knowing would be entered and, accordingly, no way of contesting.[95] In the American legal system, service of process originated as the exclusive method through which courts obtained *in personam* jurisdiction over defendants in civil actions.[96] That method derived from the English system: English courts obtained *in personam* jurisdiction through the writ of *capias ad respondendum*, which authorized sheriffs to arrest private citizens in the king's name and bring them before the court.[97] American law supplanted physical arrest with service of process and replaced the sheriff's duty to transport the litigant to court with the litigant's obligation to appear of his own

94. Murphy Bros. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 350 (1999) ("Service of process, under longstanding tradition in our system of justice, is fundamental to any procedural imposition on a named defendant."); *see also* Harris v. Hardeman, 55 U.S. 334, 339 (1852) ("[I]t would seem to be a legal truism, too palpable to be elucidated by argument, that no person can be bound by a judgment, or any proceeding conducive thereto, to which he never was party or privy; that no person can be in default with respect to that which it never was incumbent upon him to fulfil [sic].").

95. *See* 16B AM. JUR. 2D *Constitutional Law* § 997 (2018).

96. 17A JAMES WILLIAM MOORE ET AL., MOORE'S FEDERAL PRACTICE – CIVIL § 120 App. 2 (3d ed. 2016).

97. *Id.* ("The King's Bench, being concerned with the king's claims, had the power to order the sheriff to arrest in the king's name by issuing the writ of *capias ad respondendum*.").

volition.[98] Nonetheless, American service of process rules retained the requirement that the defendant be physically located and personally served with the paperwork.[99]

In the mid-nineteenth century, the Supreme Court evaluated the extent to which the Constitution requires particular methods of service of process.[100] In *Pennoyer v. Neff*, drawing on the tradition of physical presence, the Court ratified particular methods of service that were likely to achieve actual notice for in-state defendants, upholding personal service as the most preferable means.[101] Thereafter, personal service became the touchstone, a method "always adequate in any type of proceeding."[102] *Pennoyer* also permitted constructive service in some limited settings, such as serving process by publication in a newspaper for unreachable in-state defendants.[103] All other methods of serving process, however, were viewed with great skepticism and were treated as presumptively unconstitutional.[104]

Pennoyer perpetuated an interpretation of due process that required actual notice, as opposed to reasonable attempts at providing notice.[105] Indeed, it would take another fifty years for the Court to explicitly authorize other constructive methods of service, such as serving a defendant's co-resident at the defendant's home.[106] But the ratification of constructive methods of service implicitly broke down *Pennoyer*'s assumption that due process requires actual notice. Serving a defendant's co-resident satisfies due process because the court can be reasonably

98. *Id.*

99. *Id.*

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

101. *Id.* at 733–34 ("[F]or any other purpose than to subject the property of a non-resident to valid claims against him in the State, 'due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered.'").

102. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950).

103. *See Pennoyer*, 95 U.S. at 727, 729; *see also, e.g.*, Earle v. McVeigh, 91 U.S. 503, 507–09 (1875).

104. *Cf.* McDonald v. Mabee, 243 U.S. 90, 92 (1917) ("To 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. We repeat, also, that the ground for giving subsequent effect to a judgment is that the court rendering it had acquired power to carry it out; and that it is going to the extreme to hold such power gained even by service at the last and usual place of abode.").

105. *Pennoyer*, 95 U.S. at 733–34; *see also* Windsor v. McVeigh, 93 U.S. 274, 277 (1876).

106. *See McDonald*, 243 U.S. at 92.

assured that a co-resident will turn over the paperwork to the defendant.[107] But unlike serving a defendant personally, that result is not guaranteed.

Over time, the Court's interpretation of due process evolved to focus on the likelihood that a method of service would give notice, rather than on whether it gave notice-in-fact. As a result, today the Constitution permits a much wider array of service methods than those authorized by *Pennoyer*.[108] In the mid-twentieth century, the Supreme Court announced a more holistic standard for reviewing the adequacy of notice in *Mullane v. Central Hanover Bank and Trust Co.*—the attempt must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[109] Our understanding of due process no longer requires that the defendant receive in-hand service—it only requires a method of service that is the "equivalen[t] of actual notice."[110] In other words, it is now settled that the Constitution requires methods of service that are likely to achieve actual notice, whether or not they achieve notice-in-fact.[111] This standard strikes a balance between each of the constitutional values at stake—giving notice to a defendant on the one hand, while on the other, protecting a plaintiff's interest in resolving the suit on the merits.

State rules governing service of process in suits for protection orders, however, do not take full advantage of the flexibility inherent in the *Mullane* standard. Instead, they still appear to flow from the rigid analysis of *Pennoyer*, authorizing only the particular methods of service deemed sufficient in the nineteenth century. State rules primarily require plaintiffs to serve a defendant personally, or to serve a defendant's co-resident at the defendant's home.[112] When plaintiffs cannot accomplish service under the rules, defendants are deprived of actual no-

107. *Cf. id.*; *see also* Angela Upchurch, *"Hacking" Service of Process: Using Social Media to Provide Constitutionally Sufficient Notice of Process*, 38 U. ARK. LITTLE ROCK L. REV. 559, 587 (2016).

108. William Wagner & Joshua R. Castillo, *Friending Due Process: Facebook as a Fair Method of Alternative Service*, 19 WIDENER L. REV. 259, 263 (2013).

109. 339 U.S. 306, 314 (1950).

110. *Id.* at 315.

111. *See* Dusenbery v. United States, 534 U.S. 161, 168 (2002) (affirming the "well-settled practice" of applying the *Mullane* standard when reviewing the sufficiency of notice).

112. *See infra* Section V.A.

tice, and their constitutional right is not upheld.[113]

Importantly, a defendant is not entitled to avoid having a claim brought against him—the Due Process Clause protects a defendant's right to notice of the claims against him, and not some other interest in evading or delaying them.[114] As a result, rules governing service of process best protect a defendant's constitutional rights where they maximize the chance a defendant will be served, and not where they simply make it difficult for a plaintiff to give a defendant notice. Of course, a defendant's property rights are not harmed when the plaintiff cannot serve him, since the plaintiff cannot obtain a judgment affecting the defendant's property without service of process. But rules that do not permit the most effective and constitutional methods of service are inherently inefficient because they impose additional burdens on plaintiffs without actual benefit to the relevant interests of defendants. Put simply, when a plaintiff cannot accomplish service, the defendant does not receive notice of the suit, the defendant's constitutional right to notice is not vindicated, and the defendant, too, is deprived of access to justice.

B. The Plaintiff's Right to a Hearing on the Merits

While rules governing service of process are primarily aimed at protecting the defendant's due process rights, desirable rules must reflect all rights at stake, including the plaintiff's. To achieve that balance, one must understand how service of process rules affect a plaintiff's procedural rights.

When a plaintiff files a civil action, she has a constitutionally protected interest in a hearing on the merits of that claim. The Due Process Clause applies to all litigants in civil cases, "either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances."[115] The plaintiff's interest in a hearing is protected as a property interest,[116] which comes into being when the plaintiff avails herself of the

113. *Mullane*, 339 U.S. at 314–15.

114. This is consistent with rules governing alternative service, which permit less reliable methods of service when a defendant actively evades notice. *See, e.g.*, MD. R. 3-121 (permitting service by mail when a litigant shows that the defendant "has acted to evade service").

115. Logan v. Zimmerman Brush Co., 455 U.S. 422, 429 (1982).

116. *Id.* at 428–29; *see also* Martinez v. California, 444 U.S. 277, 281–82 (1980); *Mullane* 339 U.S. at 313–15.

state-sanctioned process to redress her injury.[117] Once a state confers upon a plaintiff the right to a claim, it cannot deprive the plaintiff of a hearing on that claim without due process of law.[118] Accordingly, procedural rules must strike a reasonable balance between the plaintiff's right to a hearing and the goals animating the procedural rules.[119] The rules must not create an "unjustifiably high risk that meritorious claims will be terminated."[120]

The Supreme Court has shed some light on what procedures do not provide a reasonable balance between rights. The Due Process Clause prevents rules from terminating a plaintiff's claim when her inability to comply with those rules is "due to inability, and not to willfulness, bad faith, or any fault of" her own.[121] For example, in *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, the court reversed the dismissal of a plaintiff's suit after the plaintiff failed to comply with an order to produce bank records, the mere production of which would have exposed her to criminal prosecution in a foreign country.[122] In *Logan v. Zimmerman Brush Co.*, the court overturned an Illinois procedural rule that precluded a hearing on a wrongful termination claim after a certain number of days, where the administrative body with jurisdiction failed to hear the case within the set timeframe due only to its own heavy case load.[123] And in *Boddie v. Connecticut*, the court prohibited states from imposing filing fees on impoverished civil litigants who could not afford them.[124] Indeed, *Boddie* rested upon the notion that "the right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals."[125] In other words, when a law (or, here, a court rule) effectively

117. *Logan*, 455 U.S. at 430–33.

118. *Mullane*, 339 U.S. at 314–15.

119. *Logan*, 455 U.S. at 429; *see also* Boddie v. Connecticut, 401 U.S. 371, 380 (1971) (holding that the Due Process Clause prevents states from limiting the rights to adjudicatory procedures when doing so is "the equivalent of denying them an opportunity to be heard upon their claimed right").

120. *Logan*, 455 U.S. at 435.

121. Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers, 357 U.S. 197, 212 (1958).

122. *Id.*

123. *Logan*, 455 U.S. at 429.

124. *Boddie*, 401 U.S. at 379–80.

125. *Id.*

blocks a particular plaintiff's access to a judicial remedy, it violates that plaintiff's constitutional right to due process of law.[126]

The practical access barriers experienced by so many plaintiffs unable to accomplish service of process in domestic violence cases have significant constitutional implications. When service of process is not practicable under existing rules, plaintiffs are denied a hearing on the merits of their claim through no fault of their own. Of course, the Constitution does not guarantee a hearing on the merits in every case, and the state may impose procedural requirements designed to protect the individual rights of the parties and the court's interest in procedural efficiency.[127] However, a plaintiff's right to a hearing is not adequately protected unless the state confers an opportunity to be heard at a "meaningful time and in a meaningful manner."[128] A plaintiff does not have a "meaningful" opportunity to be heard if procedural rules impose requirements that litigants simply cannot meet.[129] Rules governing service of process may well fall below that constitutional threshold in cases where the plaintiff cannot accomplish service by any of the methods listed in those rules.

Yet, there is need for reform even if existing service of process rules rise above the constitutional baseline. Procedural rules should accomplish their goals with as little infringement on the rights of the parties as possible, precisely because we recognize those rights as valuable. Beyond the federal Constitution, the right to be heard is guaranteed by state constitutions in most jurisdictions[130] and by state statutes in

126. *See id.*

127. *Logan*, 455 U.S. at 437; *see also* Chase Sec. Corp. v. Donaldson, 325 U.S. 304 (1945); United States v. Kras, 409 U.S. 434 (1973).

128. *Logan*, 455 U.S. at 437.

129. *See, e.g.*, Gonzalez-Julio v. INS, 34 F.3d 820, 823 (9th Cir. 1994) (concluding that a ten-day deadline to file an appeal was "fundamentally unfair" because an alien detainee would be "forced to mail his notice of appeal from Hawaii and he has no control over the mail nor over when the Office of the Immigration Judge files the appeal after receipt"); Holman v. Hilton, 712 F.2d 854, 858–63 (3d Cir. 1983) (holding that statute forbidding prison inmates to file tort claims against state officials until released from confinement did not provide a hearing at "a meaningful time and in a meaningful manner").

130. *E.g.*, ALA. CONST. art. I, § 10; GA. CONST. art. I, § 1, para. XII; MICH. CONST. art. I, § 13; MISS. CONST. art. 3, § 25; UTAH CONST. art. I, § 11; WIS. CONST. art. I, § 21(2); *cf.* ARK. CONST. art. II, § 13; CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9; FLA. CONST. art. I, § 21; IDAHO CONST. art. I, § 18; ILL. CONST. art. I, § 12; IND. CONST. art. I, § 12; KAN. CONST. § 18; KY. CONST. § 14; LA.

others.[131] And, of course, a legislature's decision to create a cause of action by statute is further evidence that the legal system should ensure access to a hearing on that claim. Court rules should protect all interests at play, even where the Constitution may not compel that effort—and the legal community should aspire to that end.[132] Service of process rules should be designed to protect a plaintiff's access to a procedurally fair adjudication on the merits just as vigilantly as they protect a defendant's right to notice.

At present, the rules fail to strike that balance. This problem is not merely theoretical—it has a real impact on real people. By failing to adequately protect the rights of the parties, service of process rules cause actual harms. The rules cause delays for plaintiffs and, eventually, dismissals that risk their physical safety.[133] The rules also inflict logistical, emotional, and financial hardship on plaintiffs who try to comply. And the same rules negatively impact the rights of defendants by foreclosing the methods of service most likely to provide them actual notice.[134] In short, these rules present a problem that demands reform.

IV. THE CONTEXT OF DOMESTIC VIOLENCE CASES

A comprehensive access-to-justice framework for procedural reform requires putting the rules in context. Rulemakers balancing the rights and obligations of the parties cannot engage in that task without understanding the circumstances of the class of litigants most frequently involved, lest they risk perpetuating the access barriers they should aim to break down. Specifically, this requires looking at the history of the state's response to each class of litigants—here, survivors of

---

CONST. art. I, § 22; ME. CONST. art. I, § 19; MD. CONST. § 19; MASS. CONST. art. XI; MINN. CONST. art. I, § 8; MO. CONST. art. I, § 14; MONT. CONST. art. II, § 16; N.H. CONST. art. 14; N.C. CONST. art. I, § 18; OHIO CONST. art. I, § 16; OKLA. CONST. art. II, § 6; OR. CONST. art. I, § 10; R.I. CONST. art. I, § 5; S.C. CONST. art. I, § 9; S.D. CONST. art. VI, § 20; TENN. CONST. art. I, § 17; TEX. CONST. art. I, § 13; VT. CONST. ch. I, art. 4; W. VA. CONST. art. III, § 17; WYO. CONST. art. I, § 8.

131. *E.g.* FLA. STAT. § 454.18 (2017); 42 PA. CONS. STAT. § 2501(a) (2018); WASH. REV. CODE § 2.48.190 (2002).

132. *See* Rhode, *supra* note 17, at 1816 ("While equal access to justice may be an implausible ideal, adequate access should remain a societal aspiration.").

133. *See supra* Part I.

134. *See infra* Part VI.

domestic abuse.

Put in the context of the broader history of the state's response to domestic violence, service of process rules fit a pattern of blocking survivors from accessing the legal system. That context informs how the rules can be altered to better ensure access for plaintiffs, while continuing to protect defendants' rights. A short survey of the evolution of state responses to domestic violence demonstrates the need to prevent procedural inequity in these cases.

Survivors of domestic violence have long faced tremendous resistance to accessing justice through state systems. Up until the mid-twentieth century, survivors of domestic abuse had no meaningful recourse in legal systems.[135] American common law reflected medieval European legal norms surrounding domestic abuse, which treated women as the chattel of their husbands and permitted men to physically punish women "in every case of [their wives'] misbehaviour."[136] Put simply, domestic abuse was legal in America.[137] It was not until the late-nineteenth century that American courts moved away from explicitly sanctioning physical abuse of women by their husbands.[138] Even then, except in the most serious instances of violence, courts applied a "family privacy theory,"[139] "draw[ing] the curtain" around family relationships rather than involving the courts.[140]

American society's attitudes toward domestic abuse reflected the "family privacy theory" by discouraging the public airing of purportedly private family matters.[141] This left women's stories untold until the late 1960s, when the domestic violence movement gained traction and survivors started to ob-

135. LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE 29 (2008).

136. Bradley v. State, 1 Miss. 156, 157 (1824); *see also* R. EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY 60 (1979) ("Provided he neither kill[ed] nor maim[ed] her, it [wa]s legal for a man to beat his wife when she wrong[ed] him.").

137. *Bradley*, 1 Miss. at 157.

138. Epstein, *supra* note 31, at 10 & n.37 (citing cases).

139. GOODMAN & EPSTEIN, *supra* note 135, at 29–30.

140. State v. Oliver, 70 N.C. 60, 61–62 (N.C. 1874).

141. GOODMAN & EPSTEIN, *supra* note 135, at 31–32 ("As the pervasive scope of the problem became clearer, a broad social consensus grew around the idea that domestic violence could no longer be dismissed as a private matter even though it typically takes place at home behind closed doors.").

tain legal recourse.[142] As women began sharing their stories of abuse—a conversation that uncovered the breadth and severity of the problem across the country[143]—state actors turned to the criminal system and expanded the ability of prosecutors to charge abusive partners.[144]

Nonetheless, survivors continued to face an uphill struggle to obtain access to justice. Initial criminal justice remedies were rendered ineffective by resistance from law enforcement and prosecutors.[145] Law enforcement failed to arrest perpetrators of abuse when called to domestic disturbances—instead, it was common for officers to delay responding to reports of domestic violence, attempt to mediate domestic disputes rather than arrest perpetrators, or ignore reports altogether.[146] It was only after the publication of the Minneapolis Domestic Violence Experiment, showing that arrest dramatically reduced the recurrence of intimate partner assault,[147] that states enacted mandatory arrest laws requiring officers to make an arrest in domestic abuse cases.[148] Mandatory arrest policies proved helpful but highly imperfect, raising arrest rates from roughly 5 percent when arrest was discretionary to roughly 41 percent when arrest was mandatory.[149]

The response of prosecutors was no more helpful. State prosecutors undercharged intimate-partner assaults compared to stranger assaults, discouraged survivors from pursuing criminal charges, and rarely tried cases that were pursued.[150] "Automatic drop" policies became widespread, requiring prosecutors to drop criminal charges when a survivor requested that the case be dismissed (even when she did so under threat or

142. *Id.* at 29.
143. *Id.* at 31–32.
144. *Id.* at 31–32, 73.
145. *Id.* at 71–72.
146. *Id.*; *see also* MURRAY A. STRAUS ET AL., BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY 232–33 (1980).
147. Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984). More recent data, however, shows that arrest is not nearly as effective a deterrent as the Minneapolis Domestic Violence Experiment suggested. *See* Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1868–69 (2002).
148. GOODMAN & EPSTEIN, *supra* note 135, at 72–73.
149. *Id.* at 72.
150. *Id.* at 73.

manipulation from her abusive partner).[151] In response, jurisdictions began instituting "no-drop" policies, which flipped the norm and prohibited prosecutors from dropping domestic abuse charges, even when the survivor requested it.[152]

These inflexible responses disempowered survivors and perpetuated the risk of domestic violence by failing to tailor prosecutions to the safety and needs of individual survivors,[153] particularly in light of the substantial risk that an abusive partner who is prosecuted will reassault or kill the victim while the criminal case is pending.[154] To meet that risk, some prosecutors adapted their litigation strategy to avoid calling the victim as a witness, treating her as unavailable.[155] In some circumstances, however, the mere fact of a prosecution puts survivors at risk, particularly where the abusive partner is released while the case is pending or is not sentenced to jail time after disposition.[156] In short, institutions in the criminal justice system have routinely failed to give survivors access to an effective remedy.

In response to the failures of the criminal justice system, the domestic violence movement propelled a civil justice solution.[157] States began passing statutes that allowed survivors to seek a civil protection order punishable by criminal contempt.[158] While the civil system provides a far more flexible process, able to meet the dynamic needs of individual survivors,[159] it has not fully alleviated the justice gap. Violations of protection orders are spottily enforced—studies show that somewhere between 66 and 80 percent of reported civil protection order violations do not result in arrest.[160] Those

151. *Id.* at 73–74.
152. *Id.* at 74–75.
153. *Id.* at 75.
154. *Id.*; *see generally* LAURA DUGAN, DANIEL NAGIN & RICHARD ROSENFELD, EXPOSURE REDUCTION OR BACKLASH? THE EFFECT OF DOMESTIC VIOLENCE RESOURCES ON INTIMATE PARTNER HOMICIDE (2001), https://www.ncjrs.gov/pdffiles1/nij/grants/186194.pdf [http://perma.cc/WN7P-LHMR] (exploring the risk of "backlash effect" from resources that increase conflict or stress in intimate partner relationships characterized by domestic violence).
155. *See, e.g.*, Casey G. Gwinn & Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. U. L. REV. 297, 300–03 (1993).
156. GOODMAN & EPSTEIN, *supra* note 135, at 75.
157. *Id.* at 78–79.
158. *Id.*
159. *Id.* at 79–80.
160. T.K. Logan et al., *Protective Orders: Questions and Conundrums*, 7 TRAUMA, VIOLENCE, & ABUSE 175 (2006).

cases that do result in arrest are funneled to the same criminal system that has historically failed to serve survivors of domestic violence. Moreover, the structure of the civil system requires survivors to confront their abusive partners in the context of an adversarial process. An adversarial hearing can be particularly challenging for survivors who have been disempowered or controlled by their abusive partners.[161] It may also present concrete safety risks: making the abuse public through a court proceeding may lead to further abuse.[162]

Survivors of domestic abuse have faced significant historical barriers to obtaining justice at law and have struggled to navigate legal systems that historically resist adapting to enforce what rights survivors have obtained. Survivors continue to face those same obstacles, as evidenced by the higher percentage of unmet civil legal needs in survivor-run households than in households not run by a survivor.[163] Equitable procedural rules are necessary to prevent the perpetuation of historical injustices against survivors as a class of litigants.

Service of process rules are one manifestation of that injustice. For example, some jurisdictions impose more stringent service of process requirements on plaintiffs in domestic violence cases than on plaintiffs in other types of civil proceedings. The District of Columbia permits service by mail in civil suits, but not in cases of domestic violence.[164] Hawaii permits service by mail in civil suits stemming from the operation of automobiles and boats, but not in cases of domestic violence.[165] It may

161. *See generally* Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1115–24 (2009) (describing typologies of domestic violence characterized by coercion and control).

162. *See* Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 162 (2003).

163. *See generally* THE JUSTICE GAP, *supra* note 19 (evaluating, in part, the civil legal needs of survivors of domestic violence).

164. *Compare* D.C. SUPER. CT. DOM. VIO. R. 5(a)(3)(A) (requiring personal service or service on a co-resident of suitable age and discretion, but excluding service by mail), *with* D.C. SUPER. CT. R. CIV. P. 4(c)(4)–(5) (permitting service by registered or certified mail, or by first class mail with a form through which the defendant acknowledges service, in other civil cases).

165. *Compare* HAW. R. FAM. CT. 4(d)(1) (requiring personal service or service on a co-resident of suitable age and discretion, but excluding service by mail), *with* HAW. REV. STAT. § 634-36 (2017) (permitting service by mail when the suit arises from the operation of an automobile under HAW. REV. STAT. § 634-33 (2017) or from the operation of a boat under HAW. REV. STAT. § 634-34 (2017)).

be that rulemakers in these jurisdictions opted to allow only the most reliable methods of service in domestic violence cases, perhaps because violation of protection orders can result in jail time. Whatever the rationale for these inequities, they evidence the continued influence of historical forces that prioritized a defendant's liberty interest over a survivor's interest in physical safety. Of course, this does not suggest that rules governing protection order cases should favor plaintiffs or survivors at the expense of defendants' rights.[166] Rather, this context highlights the importance of identifying structural inequities in order to minimize the chance that survivors are denied their day in court.

V. WHY LOW-INCOME PRO SE PLAINTIFFS ARE MOST AFFECTED

While service of process rules present potential obstacles for all plaintiffs, they are particularly likely to block access to justice for low-income, pro se plaintiffs. A combination of factors augments the impact of service rules in low-income communities. First, conventional methods of service all rely on assumptions that a defendant has a stable routine or home address. As a result, these methods are disproportionately less likely to map onto the lives of people living in low-income areas characterized by housing instability, unemployment, and homelessness. Second, court rules prevent plaintiffs from serving process themselves, imposing what I call agency costs—the monetary and non-monetary costs to the plaintiff of hiring a reliable agent to serve process on her behalf—and thereby decreasing the likelihood of accomplishing service. Third, before a plaintiff can pursue other more expedient methods, she must file a motion showing she has met the fairly stringent legal standard for alternative service. Together, these challenges create the greatest access barriers for low-income pro se plaintiffs.

166. Indeed, actual or perceived procedural unfairness may undermine the effectiveness of civil protection order regimes by decreasing compliance among defendants. *See* Epstein, *supra* note 147, at 1874–84.

A. Logistical Burdens

Service of process rules present a number of practical obstacles in low-income communities. Without a lawyer, a pro se plaintiff must engage in the difficult task of orchestrating service on the defendant.[167] A survey of the current rules landscape in domestic violence cases across the country shows the daunting requirements imposed on a plaintiff filing against a defendant who lacks a stable address.

Personal service presents the greatest challenge for low-income litigants. It is the most demanding method, and also the most widely accepted. All fifty states and the District of Columbia permit service personally upon the defendant.[168] This makes logical sense because personal service ensures that a defendant obtains a physical copy of the pleadings. Because the success or failure of this method depends upon knowing the defendant's physical location, personal service presents a fairly obvious challenge for litigants: it can be difficult to locate a defendant at any given moment, particularly if he does not have a predictable daily routine, a job, or a stable home address. The challenges of in-hand personal service are further compounded when a defendant is actively avoiding service, or when co-residents deny that the defendant lives at their address, both of which make it even more difficult to locate him.

Methods of constructive service, which permit a plaintiff to

---

167. *See, e.g.*, D.C. SUPER. CT. DOM. VIO. R. 5(a)(1).

168. ALA. R. CIV. P. 4(c)(1); ALASKA R. CIV. P. 4(d)(1); ARIZ. R. CIV. P. 4.1(d)(1); ARK. R. CIV. P. 4(d)(1); CAL. CIV. PROC. CODE § 415.10 (West 2018); COLO. R. CIV. P. 4(e)(1); CONN. GEN. STAT. § 52-57a (2017); DEL. FAM. CT. R. CIV. P. 4(d)(1); D.C. SUPER. CT. DOM. VIO. R. 5(a)(3)(A)(i); FLA. STAT. § 48.031(1)(a) (2017); GA. CODE ANN. § 9-11-4(e)(7) (2017); HAW. R. FAM. CT. 4(d)(1)(A); IDAHO R. CIV. P. (4)(d)(1)(A); 735 ILL. COMP. STAT. 5/2-203 (2016); IND. R. CIV. P. 4.1(A)(2); IOWA R. CIV. P. 1.305(1); KAN. STAT. ANN. § 60-303(d)(1)(A) (2017); KY. R. CIV. P. 4.04(2); LA. CODE CIV. P.1232–34; ME. R. CIV. P. 4(d)(1); MD. R. 3-121(a); MASS. R. CIV. P. 4(d); MICH. CT. R. 2.105(A); MINN. R. CIV. P. 4.03(a); MISS. R. CIV. P. 4(d)(1)(A); MO. STAT. § 506.150 (2017); MONT. R. CIV. P. 4(e); NEB. REV. STAT.§ 25-508.01 (2017); NEV. R. CIV. P. 4(d)(6); N.H. REV. STAT. ANN. § 510:2 (2017); N.J. R. CIV. P. 4:4-4(a)(1); N.M. R. CIV. P. 1-004(F)(1)(a); N.Y. C.P.L.R. § 308; N.C. R. CIV. P. 4(j)(1)(a); N.D. R. CIV. P. 4(d)(2)(A)(i); OHIO R. CIV. P. 4.1(B); OKLA. STAT. tit. 12 § 2004(C)(1) (2011); OR. R. CIV. P. 7(D)(2)(a) & (D)(3)(a)(i); PA. R. CIV. P. NO. 402(A)(1); R.I. R. CIV. P. 4(d)(1); S.C. R. CIV. P. 4(d)(1); S.D. CODIFIED LAWS § 15-6-4(d)(8) (2018); TENN. R. CIV. P. 4.04(1); TEX. R. CIV. P. 106(a)(1); UTAH R. CIV. P. (4)(d)(1)(A); VT. R. CIV. P. 4(d)(1); VA. CODE ANN. § 8.01-296(1) (2017); WASH. R. CIV. P. 4(d)(2); W. VA. R. CIV. P. 4(d)(1)(A); WIS. STAT. § 8.01.11(1)(a) (2018); WYO. R. CIV. P. 4(e)(1).

proceed with her claim even though she has not served the defendant in person, also present obstacles for low-income litigants. The permissible methods of substitute service vary by jurisdiction. In forty-three jurisdictions, court rules permit service upon a co-resident of suitable age and discretion.[169] Only twenty-four jurisdictions permit service by certified, registered, or first-class mail, or by another commercial carrier,[170] and most of those jurisdictions require additional guarantees of delivery to the defendant.[171] Thirteen jurisdictions permit service to be mailed with a court-created form with which the defend-

169. ALA. R. CIV. P. 4(c)(1); ALASKA R. CIV. P. 4(d)(1); ARIZ. R. CIV. P. 4.1(d)(2); ARK. R. CIV. P. 4(d)(1); CAL. CIV. PROC. CODE § 415.20 (West 2018); COLO. R. CIV. P. 4(e)(1); DEL. FAM. CT. R. CIV. P. 4(d)(1); D.C. SUPER. CT. DOM. VIO. R. 5(a)(3)(A)(ii); FLA. STAT. § 48.031(1)(a) (2017); GA. CODE ANN. § 9-11-4(e)(7) (2017); HAW. R. FAM. CT. 4(d)(1)(A); IDAHO R. CIV. P. (4)(d)(1)(B); 735 ILL. COMP. STAT. 5/2-203 (2016); IOWA R. CIV. P. 1.305(1); KAN. STAT. ANN. § 60-303(d)(1)(B) (2017); LA. CODE CIV. P.1232–34; ME. R. CIV. P. 4(d)(1); MD. R 3-121(a); MINN. R. CIV. P. 4.03(a); MISS. R. CIV. P. 4(d)(1)(B); MO. STAT. § 506.150 (2017); NEB. REV. STAT. § 25-508.01 (2017); NEV. R. CIV. P. 4(d)(6); N.J. R. CIV. P. 4:4-4(a)(1); N.M. R. CIV. P. 1-004(F)(2) (2017); N.Y. C.P.L.R. § 308; N.C. R. CIV. P. 4 (j)(1)(a); N.D. R. CIV. P. 4(d)(2)(A)(ii); OHIO R. CIV. P. 4.1(B); OKLA. STAT. tit. 12 § 2004(C)(1) (2011); OR. R. CIV. P. 7(D)(2)(b) & (D)(3)(a)(i); PA. R. CIV. P. NO. 402(a)(2); R.I. R. CIV. P. 4(d)(1); S.C. R. CIV. P. 4(d)(1); S.D. CODIFIED LAWS § 15-6-4(e) (2018); TENN. R. CIV. P. 4.04(1); UTAH R. CIV. P. (4)(d)(1)(A); VT. R. CIV. P. 4(d)(1); VA. CODE ANN. § 8.01-296(2)(a) (2017); WASH. R. CIV. P. 4(d)(2); W. VA. R. CIV. P. 4(d)(1)(B); WIS. STAT. § 8.01.11(1)(b) (2018); WYO. R. CIV. P. 4(e)(2).

170. ALA. R. CIV. P. 4(e) & (i)(2); ALASKA R. CIV. P. 4(h); ARIZ. R. CIV. P. 4.1; ARK. R. CIV. P. 4(d)(8); CAL. CIV. PROC. CODE § 415.30 (West 2018); DEL. CODE ANN. tit. 10, § 1065(a)(3) (2017); IND. R. CIV. P. 4.1(A)(1); IOWA R. CIV. P. 1.305(1); KAN. STAT. ANN. § 60-303(c)(1) (2017); KY. R. CIV. P. 4.01(1)(a); MD. R. 3-121(a); NEB. REV. STAT. § 25-505.01(1)(c) (2017); N.J. R. CIV. P. 4:4-4(c); N.M. R. CIV. P. 1-004(F)(1)(b); N.C. R. CIV. P. 4 (j)(1)(c) & (e); N.D. R. CIV. P. 4(d)(2)(A)(5); OHIO R. CIV. P. 4.1(A)(1); OKLA STAT. tit. 12 § 2004(C)(2) (2011); OR. R. CIV. P. 7(D)(2)(d) & (3)(A)(i); R.I. R. CIV. P. 4(d)(1); S.C. R. CIV. P. 4(d)(8)–(9); TENN. R. CIV. P. 4.04(11); TEX. R. CIV. P. 106(a)(2); UTAH R. CIV. P. (4)(d)(2); W. VA. R. CIV. P. 4(e)(2).

171. *See, e.g.*, DEL. CODE ANN. tit. 10, § 1065(b) (2017) (requiring "reliable proof that such party has received notice" for mailed service to be effective); IND. R. CIV. P. 4.1(A)(1) (requiring a return demonstrating receipt); KAN. STAT. ANN. § 60-303(c)(1) (2017) (requiring the mailing to be "evidenced by a written or electronic receipt showing to whom delivered, the date of delivery, the address where delivered and the person or entity effecting delivery"); KY. R. CIV. P. 4.01(1)(a) (requiring that a return receipt be requested); MD. R. 3-121(a) (requiring restricted delivery showing to whom service was mailed, date, and address of delivery, and making service effective only upon actual receipt); NEB. REV. STAT. § 25-505.01(1)(c) (2017) (requiring return receipt showing to whom and where delivered and date of delivery); N.M. R. CIV. P. 1-004(F)(1)(b) (noting that service is only effective if defendant signs to acknowledge receipt); N.D. R. CIV. P. 4(d)(2)(A)(5) (requiring defendant's signature). In an extreme example, in New Jersey, mailed service is only effective if the defendant files an answer or otherwise physically appears at the hearing. N.J. R. CIV. P. 4:4-4(c).

ant can accept receipt of service—if the defendant does not, the plaintiff must attempt the other methods of service permitted by the rules.[172] Seven states permit service of process to be left or posted at the defendant's abode, typically accompanied by mailed service;[173] five permit service on the defendant's place of business;[174] and three permit personal service upon the defendant's spouse if there is reason to believe the two reside together.[175]

Each of these methods of substitute service requires that the defendant have a stable, identifiable residential or business address,[176] which creates serious challenges in communities with higher rates of housing instability, homelessness, job insecurity, and unemployment.[177] If a plaintiff does not know a de-

172. CAL. CIV. PROC. CODE § 415.30 (West 2018); FLA. R. CIV. P. 1.070(i); GA. CODE ANN. § 9-11-4(d) (2017); 735 ILL. COMP. STAT. 5/2-213 (2016); ME. R. CIV. P. 4(c); MICH. CT. R. 2.105(A)(2); MINN. R. CIV. P. 4.05; MISS. R. CIV. P. 4(c)(3); MO. STAT. § 506.150(2)–(5) (2017); MONT. R. CIV. P. 4(d)(3); N.Y. C.P.L.R. § 312-a; PA. R. CIV. P. 403; S.D. CODIFIED LAWS § 15-6-4(i) (2018).

173. CONN. GEN. STAT. § 52-57(a) (2017); IND. R. TRIAL P. 4.1(A)(3); KAN. STAT. ANN. § 60-303 (d)(1)(C) (2017); MASS. R. CIV. P. 4(d)(1); MASS. GEN. LAWS ch. 223, § 31 (2000) (requiring service left at abode to be accompanied by mailing); N.H. REV. STAT. ANN. § 510:2 (2017); N.Y. C.P.L.R. § 308(4) (where personal service and service on a co-resident cannot be effected after "due diligence"); VA. CODE ANN. § 8.01-296(2)(b) (2017) (where personal service and service on a co-resident cannot be effected).

174. COLO. R. CIV. P. 4(e)(1) (must be left "with the person's supervisor, secretary, administrative assistant, bookkeeper, human resources representative or managing agent"); N.M. R. Civ. P. 1-004(F)(3) (accompanied by mailing); N.Y. C.P.L.R. 3 § 308(2) (must be left with someone of suitable age and discretion); OR. R. CIV. P. 7(D)(2)(c) (must be left with a "person who is apparently in charge"); PA. R. CIV. P. 402(a)(2)(iii) (must be left with defendant's agent or "the person for the time being in charge"); WYO. R. CIV. P. 4(e)(3) (must be left with "an employee of the defendant then in charge of such place of business").

175. FLA. STAT. § 48.031(2)(a) (2017) (if action is not between the spouses, the spouse requests such service, and the spouse lives with defendant); IOWA R. CIV. P. 1.305(1) (if there is probable cause to believe the spouse lives with the defendant); N.D. R. CIV. P. 4(d)(2)(A)(iii) (if served on the spouse at the "office" of a "process server").

176. This, of course, excludes the three jurisdictions that permit service on a spouse; in many domestic violence cases, the spouse may be the plaintiff in the suit, and presumably would not be able to accept service on behalf of her abusive partner.

177. Most studies evaluating the topic conclude that poverty has a direct correlation with proceeding pro se. Steinberg, *supra* note 54, 752, 752 n.40. There is also an intuitive connection between poverty, housing instability, homelessness, job insecurity, and unemployment. Numerous studies have demonstrated those relationships. *See generally, e.g.*, JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, THE STATE OF THE NATION'S HOUSING 2017 (2017), http://www.jchs.harvard.edu/sites/default/files/harvard_jchs_state_of_the_nations

fendant's residential or business address, she cannot serve a defendant's co-resident or employer, leave posted notice, or send process by mail. In other words, if a plaintiff does not know where a defendant resides or works and cannot locate him, she is unable to accomplish service by these primary methods.

B. Agency Costs

Service of process rules across the country forbid plaintiffs themselves from accomplishing service on defendants.[178] As a result, plaintiffs must secure the assistance of a third party to perform the task. This imposes agency costs—the collective expenditure of time, money, planning, emotional distress, or other resources required to arrange for service. When a lawyer represents a plaintiff, the lawyer is likely to prevent agency costs from hampering efforts at service.[179] Indeed, an effective lawyer will spend time facilitating service of process on behalf of the client.[180] Lawyers are likely to have expertise in court rules and, therefore, to know how to satisfy the requirements of

---

_housing_2017_0.pdf [https://perma.cc/RB6K-ZBJL] (detailing the prevalence of housing instability nationwide); Matthew Desmond & Carl Gershenson, *Housing and Employment Insecurity Among the Working Poor*, 63 SOC. PROBS. 46 (2016) (discussing link between housing loss and job loss); NATIONAL COALITION FOR THE HOMELESS, FORECLOSURE TO HOMELESSNESS 2009: THE FORGOTTEN VICTIMS OF THE SUBPRIME CRISIS (2009), http://www.nationalhomeless.org/advocacy/ForeclosuretoHomelessness0609.pdf [https://perma.cc/Z6L2-8NRN].

178. *See, e.g.*, CAL. CIV. PROC. CODE § 414.10 (West 2018) ("A summons may be served by any person who is at least 18 years of age and not a party to the action."); 735 ILL. COMP. STAT. 5/2-202(a) (2016) ("Process shall be served by a sheriff."); N.D. R. CIV. P. 4(d)(1)(A) ("[Process] may be made . . . by any person of legal age and not a party to nor interested in the action."); Tex. R. Civ. P. 103 ("[N]o person who is a party to or interested in the outcome of a suit may serve any process in that suit."). Presumably, the rules prohibit the plaintiff from serving process because of the plaintiff's incentive to misrepresent whether the defendant has been served. Courts rely on sworn statements of the person who serves process in order to verify personal service. *See, e.g.*, D.C. SUPER. CT. DOM. VIO. R. 5(c). Where alternative methods of service can be verified with tangible evidence—for example, presenting a return receipt for process served by certified mail, or a screenshot of an email or text message for electronic service—an unconditional bar against plaintiffs serving process is less compelling. *See infra* Part VI.

179. Lawyers do not, however, fully eliminate logistical burdens associated with personal and residential service. *See supra* Section V.A.

180. *See, e.g.*, Kleeman v. Rheingold, 81 N.Y.2d 270, 275 (1993) (noting the "central importance" of the lawyer assisting the client with serving process).

those rules on the ground.[181] Moreover, as a part of their legal service to the client, lawyers can act as—or hire—"private investigators" to learn more about a defendant's residence or routine and increase the chances that primary methods of service will succeed.[182]

Pro se plaintiffs lack that assistance. Nonetheless, while pro se plaintiffs cannot serve process themselves, they are often still responsible for ensuring that someone does properly serve the defendant.[183] In some jurisdictions, court rules require clerks' offices to orchestrate service, typically by mail or through local law enforcement.[184] Service by mail, as explained above, will only succeed when a defendant has a stable mailing address. When service by mail is returned, most of these jurisdictions implicitly place the burden back on the plaintiff to accomplish service some other way.[185]

Plaintiffs with the means to afford it can retain a professional process server. Professional process servers typically prepare copies of the materials to be served, attempt personal service at locations identified by the plaintiff, and draft and sign affidavits averring that service has been accomplished or attempted.[186] Private process servers, however, charge a fee for their services,[187] which low-income plaintiffs may struggle to afford. By way of example, in the District of Columbia, one private process server charged roughly $100 to wait for and serve a respondent at a local café.[188] The process server charged an additional $150 to rush service,[189] which is often of critical importance to survivors who cannot enforce a temporary protec-

181. Zimerman & Tyler, *supra* note 88, at 476–77.

182. Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 423 (1994) (noting that lawyers take on the responsibilities of "gathering facts" and "discovering facts of the opposing party").

183. Some jurisdictions are explicit about this responsibility. *See, e.g.*, D.C. SUPER. CT. DOM. VIO. R. 5(a)(1) ("The petitioner is responsible for arranging service on the respondent."); *see also* 735 ILL. COMP. STAT. 5/2-202(c) (2016) (where the sheriff neglects to serve process, plaintiff is responsible for filing motion to cause sheriff to serve).

184. *See, e.g.*, OHIO CIV. R. 4.1; KY. R. CIV. P. 4.01(1).

185. *See, e.g.*, OHIO CIV. R. 4.1(A)(2) (noting that a failure of mailed service shall be entered on the docket); KY. R. CIV. P. 4.01(1)(a) (same).

186. *See, e.g.*, *Reliable Same Day Process Serving Available Nationwide*, SAME DAY PROCESS, https://www.samedayprocess.com/services/process-serving.html [https://perma.cc/5MPH-8KX8] (describing services).

187. *See id.*

188. Capitol Process Service, Inc., Invoice (Feb. 7, 2018) (on file with author).

189. *Id.*

tion order with contempt proceedings until it has been served on the respondent.[190] Rates like these are both typical and too expensive for many low-income pro se plaintiffs to pay.[191]

When a plaintiff does not have the means to hire a process server, she must find a way to serve process at a lower cost or for free. Sheriffs' departments in most (if not all) jurisdictions offer to serve process in civil cases for a fee.[192] Those fees do not apply in domestic violence cases—jurisdictions are only eligible for federal funding under the Violence Against Women Act if their laws ensure that survivors of domestic violence do not bear the cost of serving process on their abusive partners.[193] Jurisdictions have responded to that mandate by directing local law enforcement to serve process in protection order cases.[194] With perfect information, this system would address the agency costs imposed by service of process rules.

In practice, however, service by law enforcement has not alleviated agency costs. Many of the logistical barriers that make it difficult to serve a defendant apply equally when law enforcement attempts service. For example, officers are unlikely to be more successful than plaintiffs in locating a defendant without a known home address—they often will have only as much information as the plaintiff, if not less.[195] Law enforce-

190. *See, e.g.*, Banks v. United States, 926 A.2d 158, 164 (D.C. 2007) (violation of a court order must be "willful").

191. A single mother of two earning $20,780 annually falls within the federal poverty guidelines. *See* Annual Update of the Federal Poverty Guidelines, 83 Fed. Reg. 2525, 2643 (Jan. 18, 2018). That single mother would have roughly $400 per week of gross income to cover her and her children's expenses, in addition to whatever government assistance is available to her. At that level of income, spending $100 on a process server may well be unmanageable. Indeed, in my experience advising petitioners in the District of Columbia Superior Court's Domestic Violence Unit, petitioners frequently report being unable to afford that expense.

192. *See, e.g.*, ARLINGTON COUNTY GOVERNMENT, CIVIL PROCESS, https://sheriff.arlingtonva.us/civil-process/ [https://perma.cc/ZS2F-2SMV]; BALTIMORE COUNTY GOVERNMENT, SERVICE OF PROCESS, https://www.baltimorecountymd.gov/Agencies/sheriff/processservice.html [https://perma.cc/UZ8U-MXWZ].

193. 34 U.S.C. § 10461(c)(1)(D) (2012 Supp. V, Vol. VI (2013–2018)).

194. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3602(D) (2017); N.Y. FAM. CT. ACT § 153-b(c) (2010).

195. Typically, the police attempt to serve the respondent using the information the petitioner provides to the court when she files her petition. *E.g.*, METROPOLITAN POLICE DEPARTMENT CPO/TPO UNIT, RESPONDENT DESCRIPTION SHEET, https://www.dccourts.gov/services/forms [perma.cc/BSC8-35XZ] (noting that the petitioner should "print[ ] all [she] know[s] about the Respondent" on the form, and that "incomplete information will possibly result in routine

ment may also lack the time, resources, or incentive to track down and serve a defendant who cannot be located with the information provided. Moreover, the relationship between law enforcement and the communities they serve may well impact the effectiveness of attempts at service. In many low-income, urban communities, law enforcement is more widely distrusted,[196] making it more likely that a defendant and his co-residents will avoid officers attempting service and, thereby, evade service of process.[197]

In addition, the variability in how different law enforcement officers carry out the role of process server can render them ineffective. Many of my clients have experienced the reluctance of law enforcement to assist with service of process firsthand. In one case, officers refused to continue attempting service at a home address after the respondent's family member denied that he lived there. The respondent was, in fact, staying at that address—a private process server later accomplished service on the respondent there. In another case, officers refused to serve process because the address did not include an apartment number, even though the address was not in an apartment building (it was a unit with a distinct street address). In yet another case, officers refused to meet my client outside of police headquarters to pick up the service packet and serve it on the respondent two blocks away—they insisted that my client meet them at the respondent's exact location, despite her insistence that she would not feel safe being near her abusive partner before and during service. This phenomenon is not isolated to the District of Columbia—one practitioner recounted numerous occasions where law enforcement in Los Angeles refused to serve process due to minor clerical errors on the forms,

---

service delays").

196. *See generally* NANCY LA VIGNE, JOCELYN FONTAINE & ANAMIKA DWIVEDI, HOW DO PEOPLE IN HIGH-CRIME, LOW-INCOME COMMUNITIES VIEW THE POLICE? 12 (Urb. Inst. 2017), http://www.urban.org/sites/default/files/publication/88476/how_do_people_in_high-crime_view_the_police.pdf [https://perma.cc/QA93-E255] (finding that, of those surveyed in six cities in different parts of the country, only 36.3 percent agreed that they were comfortable around the police, 30.1% agreed that they personally trust the police, and 23.8 percent agreed that the police are honest).

197. *See, e.g.*, Doug Dennis, *40 Percent of Black Americans Distrust the Criminal Justice System: Why I'm One of Them*, VOX (Dec. 21, 2016, 8:00 AM), https://www.vox.com/first-person/2016/12/21/13854666/criminal-justice-police-distrust [perma.cc/EB96-HT5N] ("If people are afraid to interact with the police, they avoid them in times of need, which negates the function of the police force . . . .").

including one case where officers refused to serve a temporary protection order because the judge had written in an additional term, and the officers questioned the validity of the order.[198] These practices are not dictated by any policy, rule, or statute, and are manifestly unreasonable.

None of this is to say that all law enforcement officers actively resist serving process; nor do police officers fail to accomplish service of process in all cases. It makes sense that under-resourced police departments cannot engage in the efforts necessary to locate and serve all defendants. Nevertheless, the shortcomings of police service routinely disadvantage low-income litigants, who are forced to find another low- or no-cost agent to accomplish service for them. And, even when an officer wants to accomplish service, the logistical barriers discussed above[199] will make it even more difficult for the officer to succeed.

In the absence of law enforcement assistance or availability, plaintiffs must turn to other third parties, such as family members and friends. This option imposes additional obstacles that, although not financial, often prevent successful service. Pro se plaintiffs may not be able to find someone willing to serve process. Many survivors attempting to cut off abusive relationships have been isolated from the people closest to them.[200] Some survivors may fear that their abusive partner will become violent when served and want to avoid endangering their family or friends.[201] Or, those same family and friends may refuse to help serve process out of fear of the abusive partner.[202] Other plaintiffs may simply prefer not to involve their friends and family in a sensitive and deeply personal part of their lives.[203]

198. Email from Pooja Dadhania, Assistant Professor of Law, San Diego School of Law, to Andrew Budzinski (Jan. 20, 2018) (on file with author).

199. *See supra* Section V.A.

200. *See* Johnson, *supra* note 161, at 1119.

201. GOODMAN & EPSTEIN, *supra* note 135, at 25 ("A woman's family members and friends may be threatened with, or actually subjected to, violence and other forms of abuse by a batterer.").

202. For example, in the District of Columbia, recently amended court rules require the proof of service to include the third party's residential or business address. D.C. SUPER. CT. DOM. VIO. R. 5(c)(1)(B)(3). This presents a potential safety risk to the person accomplishing service, who must in essence provide the respondent with the server's address.

203. GOODMAN & EPSTIEN, *supra* note 135, at 25 ("If the abuser is successful in intimidating her family and friends, these threats will prevent the victim from

Allowing plaintiffs to serve process themselves would not remove the logistical barriers to accomplishing service in low-income communities—the plaintiff would still need to locate the defendant to serve him, as she would if law enforcement or another third party served the defendant for her. But agency costs augment those logistical challenges by adding the impediment of finding someone else to attempt service.

C. Stringency of Alternative Service Procedures

When primary methods of service fail, a plaintiff's only option is to request that the court authorize alternative service.[204] Methods of alternative service of process, however, also impose significant barriers. Rules governing alternative service in nearly every jurisdiction require plaintiffs to file a motion or affidavit demonstrating why primary methods of service have not been successful.[205] All jurisdictions impose some variation of a "diligent efforts" standard,[206] which, in its most lenient form, requires proof that the plaintiff has diligently attempted, without success, to determine the defendant's whereabouts or accomplish personal service.[207] Some jurisdictions retain the *in*

---

seeking and obtaining support from key people in her life, forcing her to cope with the abuse alone.").

204. *See, e.g.*, D.C. SUPER. CT. DOM. VIO. R. 5(a)(4).

205. *See, e.g.*, ALA. R. CIV. P. 4.3(d)(1); ALASKA R. CIV. P. 4(e); ARIZ. R. CIV. P. 4.1(k), (l); ARK. R. CIV. P. 4(f); CAL. CIV. PROC. CODE § 415.50(a) (West 2018); COLO. R. CIV. P. 4(f); CONN. GEN. STAT. § 52-57(f) (2017); FLA. STAT. § 49.031 (2017); GA. CODE ANN. § 9-11-4(f)(1)(A) (2017); HAW. REV. STAT. § 601-13 (2017); IDAHO CODE § 5-508 (2017); 735 ILL. COMP. STAT. 5/2-206(a) (2016); IND. R. TRIAL P. 4.13; IOWA R. CIV. P. 1.310; OKLA. STAT. tit. 12, § 2004(c)(3) (2011); S.D. CODIFIED LAWS § 15-9-7 (2018). There are only a few exceptions to this pattern, in state rules that do not explicitly require a litigant to file a motion or affidavit. *See, e.g.*, DEL. CODE ANN. tit. 10, § 1065(a)(5) (2017); D.C. SUPER. CT. DOM. VIO. R. 5(a)(3)(D). It is possible, therefore, that litigants can request alternative service orally at their hearing under these rules. Other jurisdictions, like Louisiana, appear not to allow alternative service on individuals at all. *See, e.g.*, LA. CODE CIV. P. 1261(b) (only permitting alternative service on corporations).

206. *See, e.g.*, ALA. R. CIV. P. 4.3(d)(1) ("reasonable diligence"); ALASKA R. CIV. P. 4(e)(1) ("diligent inquiry"); ARIZ. R. CIV. P. 4.1(l)(1)(A)(i) ("reasonably diligent efforts"); COLO. R. CIV. P. 4(f) ("due diligence"); FLA. STAT. § 49.041(1) (2017) ("diligent search and inquiry"); VA. CODE ANN. § 8.01-316(A)(1)(b) (2017) ("diligence").

207. *See, e.g.*, C504750P LLC v. Baker, 397 P.3d 599, 602 (Utah Ct. App. 2017), *cert. denied* 398 P.3d 52 (Utah 2017) ("Plaintiffs exercise reasonable diligence if they 'take advantage of readily available sources of relevant information' to locate defendants. . . . It is inadequate, however, for litigants to focus on only one or two sources without also pursuing other leads as to the whereabouts of the party to be

rem/in personam distinction laid out in *Pennoyer*,[208] explicitly authorizing alternative service by publication only when the action involves real property within the state or an analogue thereof.[209]

Engaging in diligent efforts is often impractical for plaintiffs without resources or time to pursue them. Traditionally, satisfying the diligent efforts standard at least requires multiple attempts at service under the primary service rules.[210] In cases where a defendant has no known home or business address, it is impossible to make those attempts. Diligent efforts also typically involve identifying what steps a plaintiff took to attempt to learn the defendant's location.[211] In some jurisdictions, court rules identify explicit and exacting standards necessary to meet the diligent efforts standard.[212] For example, in Pennsylvania, the comparable diligence standard requires proof of "(1) inquiries of postal authorities including inquiries pursuant to the Freedom of Information Act, (2) inquiries of

served.") (citation omitted); Urban P'ship Bank v. Ragdale, 73 N.E.3d 1284, 1289 (Ill. Ct. App. 2017) (explaining that "due diligence" requires an "honest and well-directed effort to ascertain the whereabouts of a defendant by an inquiry as full as circumstances can permit").

208. Pennoyer v. Neff, 95 U.S. 714, 727 (1877). The *in rem* regime laid out in *Pennoyer* was overruled in *Shaffer v. Heitner*, 433 U.S. 186 (1977), which held that the power of courts to exert jurisdiction would thereafter be governed by the test laid out in *International Shoe Co. v. Office of Unemployment Comp. & Placement*, 326 U.S. 310, 324 (1945).

209. *See, e.g.*, N.D. R. CIV. P. 4(e)(1).

210. *Compare* Blair v. Burgener, 245 P.3d 898, 904 (Ariz. Ct. App. 2010) (upholding alternative service after process server made five in-person attempts at defendant's place of business and seven consecutive calls to place of business to inquire whether defendant was present), *with* Austin v. Tri-Cty. Mem'l Hosp., 39 A.D.3d 1223, 1224 (N.Y. Sup. Ct. 2007) (finding three attempts on weekdays during normal business hours insufficient), *and* Calabro v. Leiner, 464 F. Supp. 2d 470, 473 (E.D. Pa. 2006) (finding three attempts over the course of two days insufficient).

211. For example, in the District of Columbia, a plaintiff filing for alternative service in family law cases must show:

> (1) the time and place at which the parties last resided together as spouses; (2) the last time the parties were in contact with each other; (3) the name and address of the last employer of the defendant either during the time the parties resided together or at a later time if known to the plaintiff; (4) the names and addresses of those relatives known to be close to the defendant; and (5) any other information which could furnish a fruitful basis for further inquiry by one truly bent on learning the present whereabouts of the defendant.

Bearstop v. Bearstop, 377 A.2d 405, 408 (D.C. 1977).

212. *See, e.g.*, PA. R. CIV. P. 430.

relatives, neighbors, friends, and employers of the defendant, (3) examinations of local telephone directories, courthouse records, voter registration records, local tax records, and motor vehicle records, and (4) a reasonable internet search."[213] Cases in other jurisdictions impose equally stringent standards.[214]

Meeting diligent efforts standards can be extraordinarily challenging, particularly for unrepresented low-income plaintiffs. Plaintiffs without resources must take on the responsibility of investigating a defendant's life. While investigatory requirements like Pennsylvania's would be daunting to any unsophisticated litigant,[215] survivors of domestic violence face particular risk by contacting their abusive partner's friends, family, and employers. They may fear retaliation from their abusive partners,[216] or the stigma associated with domestic violence may make survivors reluctant to reveal their experience.[217] Even when a plaintiff is willing to engage in those efforts, it requires a great deal of time and energy.

Moreover, most appellate guidance fleshing out which efforts are "diligent" analyzes the efforts of represented parties, which negatively impacts pro se parties expected to engage in the same.[218] Represented parties are able to exert greater dili-

---

213. *Id.* (internal citations omitted).

214. *See Bearstop*, 377 A.2d at 408.

215. *See generally* Zimerman & Tyler, *supra* note 88, at 476–77 (exploring "the legal background and legal challenges presented by the pro se phenomenon, the centrality of lawyers, and the connection between access to counsel and access to justice in the American legal system").

216. *See* Shannon Selden, *The Practice of Domestic Violence*, 12 U.C.L.A. WOMEN'S L.J. 1, 29–32 (2001). This is a particular risk during the pendency of a civil protection order case, when the survivor is typically separate from her abusive partner and, according to substantial data, at the "greatest risk of serious violence and homicide." GOODMAN & EPSTEIN, *supra* note 135, at 76.

217. *See* Pranava Upadrashta, *Child Exclusion Provisions: The Harmful Impacts on Domestic Violence Survivors*, 27 BERKELEY J. GENDER L. & JUST. 113, 115 (2012).

218. For example, in *Cruz v. Sarmiento*, the Court of Appeals for the District of Columbia applied the *Bearstop* standard, *see supra* note 211, to deny alternative service to a plaintiff who supplied the date on which he and his wife separated, the last date they had contact, his wife's last known address, that his wife did not have a last place of employment "because she worked as a baby sitter," and that he asked his wife's brother and father where she was. 737 A.2d 1021, 1024 (D.C. 1999). The plaintiff also listed "other routine steps" he had taken, including checking telephone directories, motor vehicle records, city directories, military establishments, and local jails. *Id.* The court found his motion insufficient on the grounds that he had not provided any of the addresses at which his wife babysat, the names or addresses of the people he consulted to ascertain his wife's location, or information to satisfy the catchall requirement in *Bearstop* for "any other

gence, both because they are more likely to have the resources to make those attempts, and because their lawyers can engage in those efforts for them.[219] As a result, low-income pro se parties are held to the high standard set by represented parties, but likely lack the resources and time to make those efforts,[220] thus running the risk that the efforts they do take will be perceived as less than "diligent." For example, one judge in the District of Columbia Domestic Violence Unit requires petitioners to call every hospital, jail, and morgue in the area, as well as the United States military, to verify that the respondent is not present there, even if the petitioner has other reliable information to show he is not hospitalized, incarcerated, deceased, or enlisted. This is no mere idiosyncrasy—it stems from one of the few cases analyzing diligent efforts in the jurisdiction.[221]

While it is difficult for pro se plaintiffs to engage in the efforts necessary to obtain alternative service, even those that do face additional procedural barriers. Nearly every jurisdiction requires that the plaintiff file a motion or affidavit before attempting alternative service.[222] It can be challenging for pro se plaintiffs to adequately plead their efforts by motion.[223] Pro se litigants typically lack the expertise to sufficiently document their efforts.[224] Some may not know which efforts are relevant to the diligent efforts inquiry. Others may not know how to present their efforts in a way that demonstrates why alternative service is necessary. And many will not know the legal standard at all.[225]

Even when a plaintiff makes diligent efforts, successfully pleads them by motion, and has their motion granted by the court, the methods of alternative service available are often insufficient to accomplish service. Some jurisdictions explicitly

---

information which could furnish a fruitful basis for further inquiry by one truly bent on learning the present whereabouts of the defendant." *Id.* at 1027.

219. *See supra* Section V.A.

220. *See supra* Part II.

221. *Sarmiento*, 737 A.2d at 1024.

222. *See supra* note 205.

223. *See* Steinberg, *supra* note 54, at 744.

224. *Id.* at 796 ("Most procedural rules in lower state court civil proceedings require party action and initiative, which is a particular problem for pro se litigants who are often not aware that the rules exist and have difficulty taking proactive measures to comply with them.").

225. *See id.* at 744.

authorize any method of service permissible under the Due Process Clause and granted by the court. Those jurisdictions provide the greatest access to justice for plaintiffs unable to comply with primary service rules because they allow the court to fashion an appropriate and constitutional solution to the problems posed by the rules. But only a few jurisdictions have taken that approach.[226]

Other jurisdictions list a specific set of alternative service methods for courts to authorize, such as service by mail (in jurisdictions that do not permit that method as primary service), service by posting at the courthouse, or service by publication.[227] Each of these specific alternative methods pose comparable logistical barriers to low-income pro se plaintiffs as primary methods of service. Service by mail, for example, presents many of the same challenges as personal and residential service—for plaintiffs attempting service on defendants without a stable address or place of employment, service by mail is no alternative at all.

Many jurisdictions provide service by publication in a newspaper as the main, if not only, form of alternative service that does not require a mailing address.[228] Statutes, or the applicable court rules, typically require notice to be published for a reasonable period of time to put the defendant on constructive notice of the claims.[229] After the set time has passed, a plaintiff can proceed to obtaining a default judgment[230]—when notice has been published for long enough, the law presumes that a defendant has had an opportunity to read it and inquire further.[231]

---

226. *See, e.g.*, ALASKA R. CIV. P. 4(e)(3); D.C. SUPER. CT. DOM. VIO. R. 5(a)(3)(D); DEL. CODE ANN. tit. 10, § 1065(a)(5) (2017); 735 ILL. COMP. STAT. 5/2-203.1 (2016); IOWA R. CIV. P. 1.305(14); N.M. R. CIV. P. 1-004(J); OR. R. CIV. P. 7(D)(6)(a); UTAH R. CIV. P. 4(d)(5)(B).

227. *E.g.*, VT. R. CIV. P. 4.

228. *See, e.g.*, ALA. R. CIV. P. 4.3(d)(1); ARK. R. CIV. P. 4(f)(1); CAL. CIV. PROC. CODE § 415.50(b) (West 2018); FLA. STAT. § 49.041 (2017); GA. CODE ANN. § 9-11-4(f)(1)(A) (2017); IDAHO CODE § 5-508 (2017); 735 ILL. COMP. STAT. 5/2-206 (2016); IND. R. CIV. P. 4.13.

229. *See, e.g.*, OKLA. STAT. tit. 12, § 2004(C)(3)(c) (2011).

230. *See, e.g.*, *id.* §§ 2004(C)(3)(d)–(f).

231. *See* Melodie M. Dan, Note, *Social Networking Sites: A Reasonably Calculated Method to Effect Service of Process*, 1 CASE W. RES. J.L. TECH. & INTERNET 183, 207 (2010) ("Service by publication involves publishing a summons and complaint in a newspaper, where the general public is able to see the notice.").

Service by publication imposes additional access barriers to both parties. Judges widely recognize that service by publication is a symbolic effort that is extraordinarily unlikely to accomplish actual notice.[232] Nonetheless, plaintiffs bear the cost of publication in the newspaper,[233] which many pro se plaintiffs are unable to afford. Despite the fact that publication is likely to fail to provide actual notice, plaintiffs must still wait the prescribed amount of time before proceeding with their claim, causing additional delays on top of those experienced while making diligent efforts in the first place.[234] In short, service by publication is inefficient, detrimental to the interests of both parties, and out of sync with modern communication norms.

* * *

Logistical challenges, agency costs, stringent rules governing requests for alternative service, and inadequate access to effective methods of alternative service all work together to magnify the negative impact of service of process rules on pro se plaintiffs, particularly in low-income communities.

For the same reasons, rules governing service have a negative impact on the rights of defendants. A defendant's due process right is in notice of the suit and an opportunity to be heard.[235] Rules that make it difficult for a plaintiff to serve process make it just as difficult to give a defendant notice of, and a hearing on, the claim. Because a defendant has no constitutional interest in avoiding service, rules that hamper a plaintiff's efforts at giving notice fail to protect the rights of both parties.

VI. EXPANDING THE RULES: ACCESS-TO-JUSTICE SOLUTIONS

Service of process rules are drafted in a way that reflects outmoded assumptions about what is likely to give defendants

232. *Id.* at 195 (describing service by publication as "a last resort method . . . unlikely to give interested parties actual notice of an action"). Indeed, the *Pennoyer* Court's primary rationale for severely limiting constructive service was that "mere publication of process . . . in the great majority of cases, would never be seen by the parties interested." Pennoyer v. Neff, 95 U.S. 714, 726 (1877).

233. *E.g.*, WASH. REV. CODE § 26.50.125 (2002).

234. *See, e.g.*, OKLA. STAT. tit. 12, § 2004(C)(3)(c) (2011) (requiring publication for three consecutive weeks).

235. *E.g.*, Dusenbery v. United States, 534 U.S. 161, 167 (2002).

actual notice, in large part because they ignore practical realities of many low-income litigants' lives. Current rules seem to reflect the incorrect assumption that defendants are the only party with an interest in how service of process is accomplished. Defendants' rights are important and must be protected; but so, too, must the rights of plaintiffs. The current rules regime does not strike a reasonable balance between those concomitant interests.

Expanding the permissible methods of service would increase the likelihood that defendants receive actual notice and will therefore better protect their constitutional rights to notice. Where a plaintiff cannot accomplish service, she is deprived of access to justice. In those cases, the plaintiff must either abandon her suit or attempt the challenging and overly burdensome process of requesting alternative service.[236] Where a defendant does not receive actual notice through alternative service, he, too, is deprived of access to justice.[237] By expanding the primary methods of service available to plaintiffs without requiring judicial pre-approval, rules can increase the ability of plaintiffs to accomplish service and thereby increase the chance that defendants will receive actual notice.

Moreover, the historical justifications for personal and residential service do not apply with equal force in the modern age. As I discuss above, the tradition of personal service dates back to pre-colonial England, when a person's address was likely the most reliable way to locate that person.[238] Today, we have a far more expansive array of communication tools. We transfer and receive information through electronic media, such as email, text messaging, and social media, and do so increasingly through smartphones.[239] The law should react to technological advances to increase the efficiency of legal systems.[240] Indeed, electronic communication has become so

236. *See supra* Section V.C.

237. *See supra* Section III.A.

238. MOORE'S FEDERAL PRACTICE, *supra* note 96, at § 120 app. at 02.

239. In *Riley v. California*, the Supreme Court noted the increasing popularity of smart phones, their role in public life, and how those realities forced a new look at Fourth Amendment doctrine. Riley v. California, 134 S. Ct. 2473, 2484 (2014) ("[M]odern cell phones . . . are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.").

240. *See* James E. Cabral et al., *Using Technology to Enhance Access to Justice*, 26 HARV. J.L. & TECH. 241, 287–88 (2012).

widespread that it makes little sense for the legal system to ignore it.[241] Despite these advances, no jurisdiction permits electronic service as a primary method of service, and only three jurisdictions explicitly permit it as an alternative form of service.[242]

Permitting electronic service will help deconstruct the access barriers posed by personal and residential service requirements while increasing actual notice to defendants. Electronic service includes service by email, text message, social media messaging services, and any other medium which can transmit images or documents. For example, consider Donna's case: she could have served process over text message, Instagram message, or Facebook message, each of which she and the respondent used to communicate during their relationship. Donna could have simply taken a picture of each page of the documents constituting process and sent those images to the respondent's three accounts.[243] Not only would this have allowed Donna to proceed with her claim, it very likely would have given the respondent actual notice of the suit.

Electronic methods of service would likely meet the constitutional threshold for service of process. A given method of electronic service need only be "reasonably calculated" to deliver notice to the defendant, meaning that the defendant might choose to be notified through that method.[244]

Federal courts have vetted the constitutionality of electronic methods of service to some extent, though only in the context of alternative service. In 2002, the Ninth Circuit became the first federal appellate court to address the constitutionality of alternative service of process by email in *Rio Properties, Inc. v. Rio International Interlink*.[245] The court upheld service by email, noting that "the Constitution does not require any particular means of service of process," and that "[i]n proper circumstances, this broad constitutional principle

241. *See generally* Aaron Smith, *U.S. Smartphone Use in 2015*, PEW RES. CTR. (Apr. 1, 2015), http://assets.pewresearch.org/wp-content/uploads/sites/14/2015/03/PI_Smartphones_0401151.pdf [https://perma.cc/QK5C-J8CA] (detailing the ubiquity of cell phone use nationwide).

242. ALASKA R. CIV. P. 4(e); D.C. SUPER. CT. DOM. VIO. R. 5(c) (amended 2017); ME. R. CIV. P. 4(g).

243. *See, e.g.*, Wagner & Castillo, *supra* note 108, at 271–79 (discussing why service of process by Facebook should be permissible as alternative service).

244. *See supra* Section III.A.

245. 284 F.3d 1007, 1018–19 (9th Cir. 2002).

unshackles the federal courts from anachronistic methods of service and permits them entry into the technological renaissance."[246] Since then, federal courts have authorized alternative service by email where there is evidence that the defendant utilizes the email address—in other words, that sending messages to that email address is "reasonably calculated" to give the defendant notice.[247] Both federal and state courts have expanded on the federal trend, permitting alternative service over social media in addition to email.[248]

The same analysis would authorize initial service of process through electronic means. Courts have not vetted the constitutionality of electronic service as an initial method of service because no state currently authorizes it. The constitutional standard for initial service of process, however, is the same as the analysis for alternative service of process. As a result, there is no argument under the Due Process Clause that states should prevent electronic service of process on a defendant initially, so long as that same method would be permitted as alternative service.

Today, electronic means of communication are ubiquitous—we are, no doubt, in the advanced stages of the "technological renaissance" to which the Ninth Circuit alluded in *Rio Properties*.[249] Adults in the United States are increasingly likely to have and use a smartphone,[250] and are highly likely to use that phone to check an email address,[251] send and receive

246. *Id.* at 1017; *see also* Baidoo v. Blood-Dzraku, 5 N.Y.S.3d 709, 711 (N.Y. Sup. Ct. 2015) ("[T]he next frontier in the developing law of the service of process over the internet is the use of social media sites as forums through which a summons can be delivered.").

247. *E.g.*, Tracfone Wireless, Inc. v. Hernandez, 126 F. Supp. 3d 1357, 1365 (S.D. Fla. 2015) (authorizing alternative service by email because it was "apparent that [the defendant] [wa]s utilizing the email address"); Popular Enter., LLC v. Webcom Media Grp., Inc., 225 F.R.D. 560, 563 (E.D. Tenn. 2004).

248. *See, e.g.*, Fed. Trade Comm'n v. PCCare247 Inc., No. 12 Civ. 7189(PAE), 2013 WL 841037, at *3–4 (S.D.N.Y. Mar. 7, 2013); *Baidoo*, 5 N.Y.S.3d at 716; Order for Service by Publication on the Internet, Mpafe v. Mpafe, No. 27-FA-11-3453 (Minn. 4th May 10, 2011), http:// www.scribd.com/doc/70014426/Mpafe-v-Mpafe-order [https://perma.cc/JQ36-5EEX].

249. 284 F.3d at 1017; *cf.* Cabral et al., *supra* note 240, at 287–88 (predicting that jurisdictions will begin using the internet to facilitate service of process).

250. The percentage of Americans who own a smartphone increased from 35 percent in 2011 to 64 percent in 2015. Smith, *supra* note 241, at 2.

251. *Id.* at 8 ("Some 88% of smartphone owners used email on their phone at least once over the course of the [one-week] study period . . . .").

text messages,[252] and check a variety of social media accounts that each permit the transmission of images or electronic documents.[253]

Access to electronic forms of communication is also increasing among low-income Americans. Ninety-two percent of individuals with income at or below $30,000 per year own a cellphone of some kind, and 67 percent own a smartphone specifically.[254] In fact, government programs have expanded access to cellular devices and the internet for people living in poverty.[255] For example, the Federal Communications Commission issued updated rules regarding its Lifeline program to increase access to smartphone technology for residents of each state who qualify for government assistance.[256] The rules require, among other things, that distributors make cellular devices available with internet access, that they provide a set number of call minutes, and often that they provide unlimited text messaging.[257] Even if not all low-income litigants have access to this technology, reforming the rules could have a significant positive effect on the experience of those who do.

Electronic service is as likely as—or in some cases more likely than—other available alternatives to give actual notice to defendants. In many states, alternative service must be accomplished by publication in a newspaper or posting in a courthouse.[258] Electronic service is more likely to give defendants actual notice than publication or posting, which are widely recognized as symbolic attempts at service.[259] Electronic service

252. *Id.* ("Fully 97% of smartphone owners used text messaging at least once over the course of the [one-week] study period . . . .").

253. *Id.* at 8–9. The use of social media, perhaps unsurprisingly, was exponentially greater among Americans aged nineteen to twenty-nine, 91 percent of whom checked social media at least once during the one-week study period. *Id.* at 9. That said, 55 percent of Americans aged fifty and over checked social media over the same time period. *Id.*

254. *Mobile Fact Sheet*, PEW RES. CTR. (Feb. 5, 2018), http://www.pewinternet.org/fact-sheet/mobile/ [https://perma.cc/8GJS-RYUK].

255. *See* Press Release, FCC, FCC Modernizes Lifeline Program for the Dig. Age, at 1–3 (March 31, 2016), https://www.fcc.gov/document/fcc-modernizes-lifeline-program-digital-age [https://perma.cc/5XMX-KBFB].

256. *Id.*

257. One distributor offers a free Android smartphone with, among other things, unlimited text messaging to all qualifying applicants. *What is the Lifeline Assistance Program?,* ASSURANCE WIRELESS, https://www.assurancewireless.com/lifeline-services/how-qualify [https://perma.cc/GXB7-PC3Q].

258. *See supra* note 228 and accompanying text.

259. *See* Wagner & Castillo, *supra* note 108, at 266 (noting that a Minnesota

costs less than publishing service in a newspaper, which incurs a fee for the publication.[260] Additionally, electronic service is instantaneous, whereas publication and posting require the plaintiff and the court to wait until a sufficient amount of time has passed to put the defendant on constructive notice.[261]

Because electronic service is less expensive for plaintiffs, more likely to reach defendants, and more likely to succeed than the available alternatives, it also better serves plaintiffs' and defendants' respective rights. Even where a defendant does not receive actual notice, his rights are minimally impacted if he is given the opportunity to challenge a default judgment. In the District of Columbia, for example, a defendant is entitled to challenge a default civil protection order by alleging good cause for his failure to appear and facts that, if proved, would be sufficient to deny the issuance of the order.[262] If a defendant did not receive actual notice of the hearing, that should be sufficient to show good cause for his failure to appear.[263]

Accordingly, court rules governing service of process should be amended to permit electronic service.[264] Electronic service should be defined to include particular methods, such as email, text message, and social media messaging, but should not be restricted to those platforms. Rather than sanctioning service over particular devices or platforms, rulemakers should

---

court ordered service over social media because publication was expensive and "futile"); Michael Barthel, *Despite Subscription Surges for Largest U.S. Newspapers, Circulation and Revenue Fall for Industry Overall*, PEW RES. CTR. (June 1, 2017), http://www.pewresearch.org/fact-tank/2017/06/01/circulation-and-revenue-fall-for-newspaper-industry/ [https://perma.cc/B9FN-3A8L] (detailing the decline in newspaper readership for every consecutive year since 1988).

260. *See generally* Adam Liptak, *How to Tell Someone She's Being Sued, Without Really Telling Her*, N.Y. TIMES (Nov. 19, 2007), https://www.nytimes.com/2007/11/19/us/19bar.html [https://perma.cc/R6GN-KF4J] (describing the futility and expense of service by publication).

261. *See supra* notes 227–234 and accompanying text.

262. D.C. SUPER. CT. DOM. VIO. R. 7(f)(1).

263. The access-to-justice framework would also encourage courts to construct default rules in a way that low-income, pro se defendants could understand and with which they could comply, to ensure that they, too, have access to a fair merits hearing where appropriate.

264. After entry of a civil protection order, abusive partners can resort to using the court system to harass survivors, in what some have called "paper abuse." Susan L. Miller & Nicole L. Smolter, "*Paper Abuse": When All Else Fails, Batterers Use Procedural Stalking*, 17 VIOLENCE AGAINST WOMEN 637 (2011). It is noteworthy that, while service of court pleadings over electronic media would likely not violate a civil protection order, any willful contact beyond that certainly would.

authorize service over any medium that allows plaintiffs to offer proof of their attempt and of the defendant's use of the medium. This would avoid the need to constantly update court rules as society develops new ways to communicate. Plaintiffs should be permitted to state the relevant information when they file—just as a plaintiff would list a defendant's home address in her pleadings, so too could the plaintiff list the defendant's cell phone number, email address, and social media handles, as well as the basic information necessary to show that each account belongs to the defendant.

Of course, rules governing electronic service must ensure that a defendant is not erroneously served through a medium he does not actually use. Electronic service over a particular account should meet that threshold where the plaintiff can show that the defendant operates the account and that the defendant either accesses it regularly or accessed it recently. For example, service over Facebook message might be appropriate where the plaintiff can show that she and the defendant communicated on that medium consistently over a given period of time, that the defendant regularly posted on his Facebook page in a given period, or that the defendant recently "read" a message on his account or otherwise utilized it. The plaintiff could describe to the court the features of the messages indicating that the account belongs to the defendant—that his picture appears in the profile, that the plaintiff uses his name in a message and he responds, or other distinguishing characteristics. This type of evidence should prove that a Facebook message is a method "reasonably calculated" to actually notify the defendant.[265]

Judges can also verify a defendant's use of various forms of electronic communication with a relatively minimal inquiry.[266] For example, to authorize service by text message to a defendant's phone number, a judge might ask a plaintiff the last time the defendant sent a text message from that number, how often the defendant communicated with the plaintiff using that num-

265. *E.g.*, Baidoo v. Blood-Dzraku, 5 N.Y.S.3d 709, 714–15 (N.Y. Sup. Ct. 2015) (authorizing service over Facebook message because the defendant "regularly log[ged] on to his account").

266. It is important for courts not to create a more complex authentication standard for this type of proof, or to put the burden on pro se parties to understand what facts would meet authentication standards. The most expeditious solution would be permitting judges to ask basic foundational questions to understand why screenshots or images on cell phones are what they purport to be.

ber, and how the plaintiff knows it is the defendant sending the messages. A plaintiff could make similar showings with respect to email addresses and social media accounts. Where available, the plaintiff may also be able to provide a "read receipt," showing that the defendant opened the message.[267]

Defendants might object that permitting electronic service would encourage plaintiffs to fabricate proof of service, or to transmit the documents to an electronic account the defendant is unlikely to check. These potential objections, however, are just as applicable to the methods of service already authorized by most court rules. For example, one might raise the concern that a plaintiff can fabricate proof of electronic service by creating a false record of text message conversations. But that risk is no greater for electronic service than it is for personal or residential service. Personal and residential service require the sworn declaration of the process server, which can only be verified by the server's testimony.[268] There is no reason to suspect plaintiffs are more likely to create false records of text messages or social media conversations than they are to falsely fill out a court form saying personal service was accomplished. The concern that a plaintiff will send documents to a phone number or social media handle not actually operated by the defendant applies with equal force to service by mail, where a plaintiff could falsely report the defendant's home address.[269] A plaintiff could just as easily present false testimony of a defendant's mailing address as a defendant's phone number. One might also worry that, even where the messages are authentic and the plaintiff's belief sincere, someone other than the defendant might actually operate the account or share it with the defendant. That concern applies with equal force to service on a defendant's co-resident, where there is also no guarantee that the co-resident will deliver the paperwork.

---

267. Sarah Silbert, *How to Tell When Someone Reads Your Text Messages*, LIFEWIRE (Jul. 5, 2018), https://www.lifewire.com/read-my-text-message-4148206 [https://perma.cc/KVD7-CWU5]. A number of websites allow users to convey emails as images, which are downloaded when the email is opened and, therefore, allow the sender to see when (and sometimes where) the email was opened. *See, e.g.*, IFREAD, http://www.ifread.com/ [https://perma.cc/93BE-MCBL].

268. The proof of service is typically required to include the date, place, and manner of service, and sometimes a description of the person served. *See, e.g.*, COLO. R. CIV. P. 4(h); MD. R 3-126; VA. CODE ANN. § 8.01-325 (2017).

269. Service by mail is authorized in twenty-four states; service by text message is authorized in none. *See supra* notes 170–171.

Arguments against electronic service place undue focus on providing actual notice to defendants, while ignoring the plaintiff's right to a hearing on the merits of her claim.[270] These arguments highlight circumstances under which a defendant would not receive actual notice, which assumes that the defendant is entitled to actual notice. While service of process rules could require methods meant "to bolster the [plaintiff's] ability to establish that [a defendant] actually received notice,"[271] that is not what the Constitution requires,[272] and that is not how existing rules are written.[273] If it were, the rules governing residential service, for example, might require affidavits from the served co-resident averring that he or she actually delivered the paperwork to the defendant. Nonetheless, no jurisdiction that permits residential service requires proof of actual notice.[274]

In other words, concerns about a defendant getting actual notice are not critical merely of electronic service, but of the *Mullane* standard itself.[275] *Mullane* merely requires a method "reasonably calculated" to give notice, a standard that electronic service meets as applied to text-messaging, email, and social media accounts the defendant uses to communicate.[276] Allowing plaintiffs to attempt methods of electronic service and to show the court why those methods are reasonably calculated to give notice strikes a more equitable balance between the rights at stake. This balance advances plaintiffs' claims to proceed to an adjudication on the merits, while continuing to protect defendants' right to notice.

Moreover, adding electronic service as a permissible method of initial service of process would eliminate the need to file a motion seeking judicial approval to use that method. It would also remove the requirement that a plaintiff engage in diligent efforts to find a defendant's home address or physical location before transmitting process electronically. In other words, the focus would be rightly placed back on the likelihood that the

---

270. *See supra* Part III.

271. Dusenbery v. United States, 534 U.S. 161, 171 (2002).

272. *Id.* ("[O]ur cases have never required actual notice.").

273. *See, e.g.*, D.C. SUPER. CT. DOM. VIO. R. 5(a)(3)(A)(ii).

274. *See supra* note 169.

275. *See Dusenbery* 534 US at 173–83 (Ginsburg, J., dissenting) (positing that because there were more reliable procedures, due process ought to require those more reliable procedures).

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

electronic communication will provide notice, rather than assuming it is a less desirable alternative.

Courts should also permit plaintiffs to serve process themselves, at least in circumstances where service can be easily verified. Traditionally, a party is prohibited from serving process because of their heightened incentive to falsely certify that the opposing party was served. That risk is decreased when a party can provide the court with proof of service beyond a sworn affirmation. For example, plaintiffs can verify their attempts at electronic service more reliably by providing screenshots of text messages, emails, and social media messages. On balance, permitting plaintiffs in domestic violence cases to serve process electronically themselves would eliminate the agency costs imposed by current rules.[277]

Alternatively, courts could create electronic accounts to allow court staff to serve process, as they do in jurisdictions that permit service of process by mail. Court staff could utilize a smart phone, email address, or social media account designed specifically to serve process. Court staff could attempt service through the electronic means the plaintiff requests, provided the plaintiff also files the information necessary for the court to later determine that each method of electronic service meets the constitutional standard.

Allowing electronic service of process would eliminate barriers to a hearing on the merits and to actual notice, and thereby increase access to justice for both plaintiffs and defendants. While it is vital to address the substantive barriers created by these rules, an access-to-justice approach to civil procedure will work best by incorporating other demand-side solutions to the justice gap.[278] Courts should continue to implement other reforms, such as relaxing the judicial role to permit judges to give limited procedural advice to pro se litigants, and expanding the availability of "self-help" resources at courthouses.[279] While those reforms alone do not address the substantive barriers posed by the rules, they are essential to ensuring that litigants understand the ways in which service could be accomplished, as well as the proof necessary to show

277. *See supra* Section V.B.

278. *See* Steinberg, *supra* note 54, at 787–89.

279. Nina Ingwer VanWormer, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 1013–17 (2007).

that it was accomplished reliably. Reforms that help pro se litigants comply with fair rules would create a comprehensive and efficient procedural regime that maximizes access to justice.

CONCLUSION

Viewing the inequities inherent in court rules shows how important procedural fairness is to ensuring access to justice for low-income litigants. In the context of service of process, expanding the permissible methods of service better protects the rights of plaintiffs who can accomplish service, as well as the rights of defendants who are more likely to receive actual notice of the claims against them. Maximizing the opportunity for each party to vindicate their procedural rights is normatively and constitutionally desirable. Making procedural fairness a touchstone for access to justice will, on balance, create a more effective civil system.

Service of process is only one example of a civil procedural rule that disproportionately and negatively affects low-income pro se litigants. The same approach could be brought to any procedural rules, such as rules governing discovery, pleadings, and procedure for drafting and serving motions.[280] Some rules contain substantive inequities, such as requiring low-income litigants to provide a fee to subpoenaed witnesses.[281] Others are written in a way that pro se litigants are simply not equipped to implement, like the rules governing requests for admission and interrogatories.[282] A low-income pro se litigant may misunderstand the impact of answering questions designed to limit the scope of the legal dispute; they may answer with a layperson's generality rather than a lawyer's specificity and inadvertently forfeit a legal contention,[283] or they may not understand their right to pursue the form of discovery at all.

Taking a fresh look at these, and other, rules with access

---

280. Steinberg, *supra* note 54, at 795–96(2015) ("Examples of common procedural operator errors include a failure to complete a pleading, a failure to file the correct pleading in court, a failure to serve documents on an opponent, a failure to schedule necessary hearings, a failure to engage in discovery, and a failure to finalize and enforce court judgments.").

281. *See, e.g.*, FED. R. CIV. P. 45(b)(1).

282. *See, e.g.*, FED. R. CIV. P. 33 (interrogatories), 36 (requests for admission).

283. *See, e.g.*, FED. R. CIV. P. 36(b) ("A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended.").

to justice in mind will reinvigorate the civil system to ensure that all parties have a fair chance at resolving the merits of their legal claims, regardless of representation status or income level. The legal community's effort to increase access to justice for low-income litigants requires employing common sense and an appreciation of the realities of poverty, including the ways in which lack of financial resources makes it more difficult to interact with the civil legal system. Procedural reform is just one step in that effort, but it is central to ensuring meaningful access to the courts.