

NOTE

OLD PRINCIPLES, NEW TECHNOLOGY, AND THE FUTURE OF NOTICE IN NEWSPAPERS

I. INTRODUCTION

The American newspaper industry is dying.¹ Nearly two hundred newspapers have turned their last pages in recent years² due to declining advertising and subscription revenue, and the propagation of free information on the Internet.³ In 2008, the 100-year-old *Christian Science Monitor* announced that it would cease printing daily and instead, publish its content online.⁴ In 2009, the 146-year-old *Seattle Post-*

1. The market for newspapers published in newsprint is in jeopardy. See ROBERT W. MCCHESENEY & JOHN NICHOLS, *THE DEATH AND LIFE OF AMERICAN JOURNALISM: THE MEDIA REVOLUTION THAT WILL BEGIN THE WORLD AGAIN* 3 (2010) (“Daily newspapers are in free-fall collapse. The entire commercial news-media system is disintegrating.”). The total circulation of daily newspapers has steadily declined from 1950-2008. See *id.* at 32 tbl.2. But see Tony Jackson, *Paper Dinosaurs Refuse to Fold*, FIN. TIMES, Dec. 12, 1995, at 21 (explaining that since newspapers survived competition from the radio and television, newspapers are also likely to weather the threat of the Internet).

2. For data concerning newspaper closings across the country, job losses in the industry, and a list of newspapers that are now online-only publications, see PAPER CUTS, <http://newspaperlayoffs.com/> (last visited Aug. 31, 2010).

3. For an excellent exposé of the roots of the American newspaper crisis, and proposals to sustain the economic viability of the industry, see generally MCCHESENEY & NICHOLS, *supra* note 1. On June 15, 2010, the Federal Trade Commission (“FTC”) hosted a workshop on the future of journalism to discuss proposals for the “‘reinvention’ of journalism.” See FTC, FEDERAL TRADE COMMISSION STAFF DISCUSSION DRAFT: POTENTIAL POLICY RECOMMENDATIONS TO SUPPORT THE REINVENTION OF JOURNALISM 1, <http://www.ftc.gov/opp/workshops/news/jun15/docs/new-staff-discussion.pdf> [hereinafter FTC DISCUSSION DRAFT]. The FTC distributed a document containing proposals for improving the state of the newspaper industry, which were collected during previous panel discussions and from reports and articles. Some of the proposals, which are also briefly mentioned in Part III.B of this Note, include tax exemptions, additional taxes, antitrust exemptions, increased government funding, and other alternative sources of revenue. See *generally id.* The FTC has noted that the discussion draft is solely for the purposes of discussion and that it does not represent the final conclusions or recommendations by the FTC. *Id.* at 1.

4. See Stephanie Clifford, *Christian Science Paper to End Daily Print Copies*, N.Y. TIMES, Oct. 29, 2008, at B8. The newspaper’s print circulation dropped to 52,000 in 2008, from more than 220,000 in 1970. *Id.*; John Nichols & Robert W. McChesney, *The Death and Life of Great American Newspapers*, NATION, Apr. 6, 2009, at 12.

Intelligencer became an online-only publication.⁵ Recently, Arthur J. Sulzberger, Jr., the chairman and publisher of *The New York Times*, revealed that the company will stop printing the newspaper “‘sometime in the future, date TBD.’”⁶ The demise of the newspaper institution is unsettling, not only because newspapers have played a paramount role throughout American history, but also because their decline may compromise citizens’ statutory and constitutional rights.⁷

Newspapers have traditionally been statutorily selected as the chief tool for disseminating legal notices⁸ to the public.⁹ In the past, no other easily accessible, inexpensive vehicle for mass communication existed that could serve the dual goals of publishing notice:¹⁰ (1) to ensure that a notice is given the widest publicity practicable,¹¹ and (2) to make sure that the rights of all concerned are safeguarded.¹² In the twenty-first century, however, citizens are not reading print newspapers like they used to;¹³ instead, they are using the Internet to fulfill their information needs.¹⁴ Given the preeminence of the Internet, it seems paradoxical—and inimical to the public interest—for notices to appear in print

5. Dan Richman & Andrea James, *Seattle P-I to Publish Last Edition Tuesday*, SEATTLE POST-INTELLIGENCER, Mar. 17, 2009, http://www.seattlepi.com/business/403793_piclosure17.html. The newspaper lost \$14 million in the year preceding the closing, attributable to falling advertising revenue and Internet competition. *Id.*

6. See Keith J. Kelly, *Takeover Talk Boosts Shares of NY Times*, N.Y. POST, Sept. 9, 2010, at 31. Mr. Sulzberger made this remark at the ninth International Newsroom Summit in London on Sept. 8, 2010, when asked whether *The New York Times* would no longer publish in print by 2015. See *id.*

7. See *infra* Part II.

8. This term is interchangeable with “notice by publication,” or “public notice.” Each term pertains to notices to the public regarding “matters of public concern.” BLACK’S LAW DICTIONARY 1165 (9th ed. 2009).

9. See, e.g., SHANNON E. MARTIN & KATHLEEN A. HANSEN, NEWSPAPERS OF RECORD IN A DIGITAL AGE: FROM HOT TYPE TO HOT LINK xii (1998); Shannon E. Martin, *State Laws Mandating Online Posting of Legal and Public Notices Traditionally Published in Newspapers*, 25 COMM. & L. 41, 44 (2003). Legal notices provide the public with information about government activities. See *infra* Part II.A. In adversarial proceedings, newspapers are used to provide constructive notice to a defendant in order to satisfy due process. See *infra* Part II.C.

10. See MARTIN & HANSEN, *supra* note 9, at 57; Martin, *supra* note 9, at 43.

11. MARTIN & HANSEN, *supra* note 9, at 5.

12. JAMES E. POLLARD, THE NEWSPAPER AS DEFINED BY LAW 1 (1940).

13. In 1964, eighty-one percent of American adults read a newspaper regularly, while in 2000 only fifty-five percent read a paper. LEONARD DOWNIE JR. & ROBERT G. KAISER, THE NEWS ABOUT THE NEWS 95 (2002). An increase in the price of newsprint during the recession in the early 1990s resulted in a sharp decline in newspaper readership. *Id.* Among the causes of the recent major decline in newspaper readership are alternate avenues for news consumption, and a growing interest in entertainment and gossip rather than hard news stories. *Id.* at 27-28.

14. See, e.g., Brian Walters, “Best Notice Practicable” in the Twenty-First Century, 2003 UCLA J.L. & TECH. 4 (“[T]he Internet has overtaken print newspapers as the standard of mass communication in legible media.”).

newspapers without also being published online.¹⁵ Constructive notice¹⁶ via the Internet may be constitutionally superior to notice published in newsprint¹⁷ because the Internet offers distinct and invaluable capabilities, such as the availability of “push technology” to disseminate notices directly to interested parties.¹⁸

While it is true that the Internet provides an inexpensive¹⁹ and accessible form of notice,²⁰ newspapers will lose substantial revenue if notices are published just anywhere in cyberspace. Despite President Obama’s admission that he is a “big newspaper junkie,” and his concern that newspapers are “absolutely critical to the health of our democracy,” in 2009, the Obama administration set out to save \$6.7 million by publishing judicial forfeiture notices on the Department of Justice’s website, rather than in newspapers.²¹ In some states, including

15. See Jessica Klander, Comment, *Civil Procedure: Facebook Friend or Foe?: The Impact of Modern Communication on Historical Standards for Service of Process*—Shamrock Development v. Smith, 36 WM. MITCHELL L. REV. 241, 252 (2009).

When the methods available are no longer reasonably calculated to reach the defendant, the courts must, in turn, make the changes necessary to comply with the standard. Because of the influence of modern technology on communication patterns, electronic service may be a significantly better means for reaching a defendant, making the exclusion of electronic service suspect.

Id. at 250-51; see also Jordan S. Ginsberg, Comment, *Class Action Notice: The Internet’s Time Has Come*, 2003 U. CHI. LEGAL F. 739, 771 (explaining that the Internet is superior to newspapers for providing notice to large, unidentifiable classes in class action litigation because large, diverse groups use the Internet more frequently than they read national newspapers).

16. See BLACK’S, *supra* note 8, at 1164 (defining constructive notice as “notice presumed by law to have been acquired by a person and thus imputed to that person”); see also *infra* Part II.C. (discussing newspapers as a medium for constructive notice).

17. This Note does not attempt to argue that Internet notice is superior to, or will improve the quality of, notice by other means in cases where individual notice is feasible. See *infra* Part II.C. Rather, the purpose of this Note is to highlight that providing legal notices online, instead of solely in newsprint, will increase the likelihood that citizens will become aware of notices. Providing notices in newspapers is traditionally deemed a legal fiction, since it is unlikely that the notices are seen by those affected. However, technology offers opportunities to change the status of notice by publication to a more useful method of notice.

18. Push technology refers to a specific method for accessing Internet content; instead of causing users to search for content, particular content is automatically delivered directly to their e-mail accounts. See BARRIE GUNTER, *NEWS AND THE NET* 26 (2003). As will be discussed *infra*, this feature may enhance the likelihood that citizens will see legal notices affecting their interests, as they can register to have pertinent notices delivered straight to their e-mail accounts automatically.

19. See, e.g., Rachel Cantor, Comment, *Internet Service of Process: A Constitutionally Adequate Alternative*, 66 U. CHI. L. REV. 943, 944 (1999).

20. See Ginsberg, *supra* note 15, at 772. The advantages of using websites to provide notice have been realized in class action litigation. See Robert H. Klonoff et al., *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. PITT. L. REV. 727, 729 (2008). This Note suggests that the use of websites should not be limited to class actions; newspapers’ websites should be used to provide constructive notice in every context where notices would otherwise be published in print newspapers, such as government and business notices. See *infra* Parts II, IV.

21. Dave Murray, *Newspaper Journalism Gets Words of Praise; Print Media’s Role Vital*,

Pennsylvania and Connecticut, proposed legislation would permit governments to post notices of their activities on their websites in lieu of newspapers.²² Posting notices on websites run by the government or a private entity²³ not only detracts revenue from newspapers²⁴ and exacerbates the crisis in the industry, but it also decreases government transparency and the likelihood that citizens will become apprised of such notices.²⁵ To relieve the tension between newspapers' need to sustain legal notices as a source of revenue and protecting the public's interest in adequately publicized notice, states should require that when constructive notice by publication is due, such notices should be published in online newspapers.²⁶

Obama Says, BLADE (Toledo, Ohio), Sept. 20, 2009, <http://www.toledoblade.com/article/20090920/NEWS16/909200326>; Sheryl Gay Stolberg, *Obama Tells His Cabinet to Look for Efficiency*, N.Y. TIMES, Apr. 21, 2009, at A17; *Official Notice Publication*, DEP'T OF JUSTICE, <http://www.forfeiture.gov/AllNotices.aspx> (last visited Aug. 31, 2010).

22. See H.B. 795, 2009 Gen. Assemb., Reg. Sess. (Pa. 2009); Gov't B. 5031, 2010 Gen. Assemb., Feb. Sess. (Conn. 2010).

23. Notices pertaining to class action litigation are frequently posted on private websites that are so "obscure" that "only legal mavens are likely to find them." Walters, *supra* note 14, at 17.

24. Classified advertising is traditionally the source of twenty to forty percent of all newspaper revenue. DOWNIE & KAISER, *supra* note 13, at 95. Classified revenue for daily print newspapers declined seventy percent in the last nine years, from \$19.6 billion in 2000 to \$6 billion in 2009. The Project for Excellence in Journalism, *Newspapers*, THE STATE OF THE NEWS MEDIA 2010, http://www.stateofthemediamedia.org/2010/newspapers_economics.php (last visited Aug. 31, 2010).

25. It would entail a great deal of effort for citizens to check multiple websites to determine whether their interests are implicated. See *infra* Part IV. Further, "[p]utting public notices on a government-run website is like trusting the fox to build *and* watch the henhouse—it violates the public's trust and undermines its right to know." Pa. Newspaper Ass'n, *Public Notices and Internet "Advertising" Legislation*, 3 (Jan. 2009), http://www.pa-newspaper.org/core/contentmanager/uploads/PDFs/govt_affairs/Position%20paper%20public%20notices.pdf.

26. Some newspapers already publish the same notices they publish in print in their online editions. James J. Kelly, Jr., *Bringing Clarity to Title Clearing: Tax Foreclosure and Due Process in the Internet Age*, 77 U. CIN. L. REV. 63, 113 (2008). However, most states recognize newsprint as the primary medium for providing notice by publication; online newspapers are generally a "secondhand source." Andrew Garcia, *As Seen on the Web: With More Print Publications Going Under, New Rules are Needed for Online Public Notices*, EWEEK, Feb. 2, 2009, at 40; see also *infra* Part IV.A. (discussing the ways in which state statutes define the requirements for newspapers fit to publish legal notices). The newspaper industry has indicated its desire to keep legal notices in newsprint and on their newspapers' websites, rather than lose advertising revenue in the event the state permits posting of notices on alternative websites. See Garcia, *supra*. The American Court & Commercial Newspapers created the Public Notice Resource Center ("PNRC") to advocate for preserving states' publication statutes in their traditional form. See Sasha Issenberg, *On Notice*, LEGAL AFF. 38, 40 (July-Aug. 2005). The PNRC justifies its opposition to using the Internet for legal notices on the grounds that readers should continue to be notified in a "stable format" that has worked for hundreds of years. *Id.* However, despite the PNRC's opposition to Internet notices, it has advocated for keeping notices on newspapers' websites instead of governments posting notices on their own websites. *Id.*

This Note will establish that online newspapers can ensure government transparency²⁷ and protect the public's constitutional rights,²⁸ just as print newspapers have done in the past.²⁹ In Part II, this Note explores the history and policy behind providing notice in newspapers. Part III discusses the state of the newspaper industry and proposals for ensuring its economic viability. Part IV advises that states should amend their publication statutes to require that where notice by newspaper is due, such notices must be posted in online newspapers, rather than solely in print newspapers or elsewhere on the Internet.³⁰ Further, states' newspaper associations should maintain a website comprised of links to notices contained in online newspapers throughout the state, so there is one central medium citizens can rely on to find out whether their interests are implicated. This tenable solution will both safeguard newspapers' tradition of generating revenue from legal notices, and accommodate the public's need for superior notice.³¹

II. NOTICE BY PUBLICATION

Newspapers have historically played a critical role in shaping American democracy.³² In exercising their rights in the political process,³³ citizens turn to newspapers during elections for information on candidates' qualifications, records, and activities.³⁴ Newspapers play an equally vital role in disseminating information about day-to-day societal affairs.³⁵ This Note is primarily concerned with newspapers' essential role in providing legal notices to the public. As will be

27. See *infra* Part II.A.

28. See *infra* Part II.C.

29. Notices in online newspapers may even be superior to notices in newsprint because technology makes them more accessible. See *infra* Part IV.

30. See *infra* Part IV.

31. See *infra* Part IV.

32. See, e.g., MARTIN & HANSEN, *supra* note 9, at 55 (explaining that the electorate must be able to access information about governments' activities in order to make informed decisions); *Why Public Notices?*, PUB. NOTICE RESOURCE CENTER, <http://www.pnrc.net/about-public-notices/legislative-updates/> (last visited Aug. 31, 2010).

33. The Constitution established a system of government in which citizens would play a role in the political process by electing leaders to represent their interests. See, e.g., ERIC LANE & MICHAEL ORESKES, *THE GENIUS OF AMERICA* 123 (2007). The Framers of the Constitution believed that a representative government would both protect against majority tyranny and suppress the tendencies of self-interested individuals. *Id.* at 23, 168.

34. See MARTIN & HANSEN, *supra* note 9, at xi; Timothy E. Cooke, *The Functions of the Press in a Democracy*, in *THE PRESS* 115, 115 (Geneva Overholser & Kathleen Hall Jamieson eds., 2005).

35. THE COMM'N ON FREEDOM OF THE PRESS, *A FREE AND RESPONSIBLE PRESS: A GENERAL REPORT ON MASS COMMUNICATION: NEWSPAPERS, RADIO, MOTION PICTURES, MAGAZINES, AND BOOKS* 20-21 (1947).

discussed *infra*, legal notices may be required to be published by law, rule, order, decree of court, by a person, or a private or public corporation in the conduct of the business, or by an order of a government agency, *inter alia*.³⁶ Most legal notices fall into one of three categories: (1) citizen participation; (2) business and commerce; or (3) court notices.³⁷ Certain professions depend on the classified section of newspapers for information concerning their livelihood.³⁸

A. *Notices Published for Citizen Participation*

The origin of publishing legal notices can be traced to the Bible, Greco-Roman city-state government fora, and town criers.³⁹ In the Roman Forum between 59 B.C. and A.D. 222, the “daily gazette,” called the *Acta Diurna*, reported on senate votes, legal notices, and gladiatorial results.⁴⁰ In colonial America, newspapers played a role in civilizing society by educating the public through legal notices.⁴¹ Before mass public education came to fruition, newspapers helped to create an informed society by transmitting information to readers about how the government works, as well as on other matters that concern the public.⁴²

In the nineteenth century, newspapers were the chief tools for mass communication in America.⁴³ Citizens posted notices to the public in newspapers regarding matters of personal concern, including notices to creditors, notices of stolen property, notices of divorce, and notices of the contents of a will.⁴⁴ The tradition of publishing legal notices

36. *See, e.g.*, 45 PA. CONS. STAT. ANN. § 101 (West 2009).

37. *Types of Public Notices*, PUB. NOTICE RESOURCE CENTER, <http://www.pnrc.net/about-public-notices/what-is-a-public-notice/types-of-public-notices/> (last visited Aug. 31, 2010).

38. *See* MARTIN & HANSEN, *supra* note 9, at xii. Businesses look to newspapers for calls for bids on contracts; real estate and banking professionals seek notices regarding foreclosures and repossessions; lawyers use the notices to learn about court orders or settlement proposals. *Id.*

39. CHARLES L. ALLEN, A SERIES OF ARTICLES ON PUBLIC NOTICE 7-11 (1964); Martin, *supra* note 9, at 44 n.11 (citing ALLEN, *supra*, at 7).

40. *See* MICHAEL EMERY & EDWIN EMERY, THE PRESS AND AMERICA: AN INTERPRETIVE HISTORY OF THE MASS MEDIA 1-2 (7th ed. 1992).

41. *See* GEORGE H. DOUGLAS, THE GOLDEN AGE OF THE NEWSPAPER xi (1999); *History of Public Notice*, PUB. NOTICE RESOURCE CENTER, <http://www.pnrc.net/about-public-notices/legislative-updates/history-of-public-notice/> (last visited Aug. 31, 2010).

42. DOUGLAS, *supra* note 41, at xi.

43. *Id.*

44. *See Notice to Creditor*, CHEROKEE PHOENIX, May 21, 1828, at 3, <http://neptune3.galib.uga.edu/ssp/News/chrkphnx/18280521c.pdf> (“Notice: I hereby forewarn all persons against crediting my wife . . . on my account, as she has absconded without my consent. I am therefore determined to pay none of her contracts.”); *id.* (“Notice: Taken up on Tarripin Creek . . . a bay horse with a small white on his forehead, about six years old, and five feet and two inches high, and without any brand.”); *see also Administrator’s Notice for Estate of Mrs. Frances Woodman*, reprinted in JANICE E. RUTH ET AL., AMERICAN WOMEN: A LIBRARY OF CONGRESS GUIDE FOR THE

eventually evolved into a mandatory requirement in the United States.⁴⁵ Cognizant of the need to inform citizens of the government's affairs, Congress passed legislation in 1789 to require government reporting in newspapers.⁴⁶ An Act by the First Session of the First Congress required the Secretary of State to publish "every such law, order, resolution, and vote . . . in at least three of the public newspapers printed within the United States."⁴⁷ States soon followed suit by requiring that certain legal notices be published in newspapers.⁴⁸

There is an underlying assumption pervading the Supreme Court, and federal and state governments, that the public has a right to know certain information.⁴⁹ Presumably, without such information, citizens would not have an opportunity to respond to local government

STUDY OF WOMEN'S HISTORY AND CULTURE IN THE UNITED STATES 75 (Sheridan Harvey ed., 2001); *Executor's Notice For Will of Anna Carpenter*, reprinted in RUTH, *supra*, at 75.

45. See MARTIN & HANSEN, *supra* note 9, at xi.

46. Martin, *supra* note 9, at 42.

47. An Act To Provide for the Safe-Keeping of the Acts, Records and Seal of the United States, and for Other Purposes, ch. 14, § 2, 1 Stat. 68, 68 (1789).

48. See Martin, *supra* note 9, at 50-54 tbl. (indicating the type of content required to be published as a legal or public notice in each state). Arizona, for example, requires that legal notices be reported under various circumstances. See, e.g., ARIZ. REV. STAT. ANN. § 13-4202 (2010) (recovery of monies in crime victim accounts); *id.* § 48-688 (2000 & Supp. 2009) (call for bids on street and highway improvement bonds sold at a public sale); *id.* at § 9-529 (2008) (call for bids on bonds for public utilities sold at a public sale); *id.* § 42-18109 (2006) (notice of tax sale); *id.* § 37-281.01 (2003) (lease of state lands for grazing purposes); *id.* § 11-264.01 (2001) (calls for bids on bonds of the county sold at public sale); *id.* at § 11-377 (2001) (call for bids on street and highway improvement bonds sold at a public sale).

49. The federal government advanced the idea of government transparency in formulating the Freedom of Information Act ("FOIA"), which President Lyndon B. Johnson signed into law in 1966. See FOIA 5 U.S.C. § 552 (2006). Prior to the enactment of FOIA, Justice Black emphasized the importance of government exposure in his concurring opinion in *Barr v. Matteo*:

The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees. Such an informed understanding depends, of course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important.

360 U.S. 564, 577 (1959) (Black, J., concurring). This particular postulation was explicitly reiterated in the OPEN Government Act of 2007, which President Bush signed into law in 2007. See Openness Promotes Effectiveness in our National Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524. The law reformed FOIA in order to make the executive branch of government more open and accountable. *Id.* The law was enacted because "our constitutional democracy, our system of self-government, and our commitment to popular sovereignty depends upon the consent of the governed; [and] such consent is not meaningful unless it is informed consent." *Id.* The axiom underlying the federal and state acts discussed (FOIA and the OPEN Government Act)—the idea that the public has a right to be informed about governmental activities—also underpins legal notice laws and the constitutional notice requirement for initiating adversarial proceedings. See *infra* Part II.C.

initiatives, pending legislation, or court-ordered actions.⁵⁰ Legislatures enacted laws requiring the publication of legal notices to inform the public of proceedings affecting the general welfare.⁵¹ Governments encourage citizens' participation in the political process⁵² by requiring that notices publicize the date, time, and location of public hearings regarding legislative changes that impact the local community.⁵³ For example, notices may be published to announce what area of land will be affected by a zoning change, or to publicize a petition made by an individual or business for a variance that may affect the surrounding community.⁵⁴

B. *Notices Pertaining to Business and Commercial Interests*

State and local governments require that certain government agencies, companies, and private individuals provide notice regarding activities affecting the public.⁵⁵ For example, states may enact statutes requiring newspaper publication of legal notices regarding government contracts, purchases, and other business-related matters.⁵⁶ The purpose of government transaction notices is to ensure that interested businesses have an equal opportunity to compete for government contracts.⁵⁷ Further, such notices allow the public to monitor how the government is spending taxpayers' money.⁵⁸

Another facet of business and commercial notices includes laws requiring certain entities to publish their intention to do business in an area, or to inform the community of an intention to dissolve.⁵⁹ To

50. See MARTIN & HANSEN, *supra* note 9, at xi.

51. *In re Monrovia Evening Post*, 248 P. 1017, 1020 (Cal. 1926).

52. See generally *Types of Public Notices*, *supra* note 37 (discussing three different types of public notices).

53. *Community Changes*, PUB. NOTICE RESOURCE CENTER, <http://www.pnrc.net/about-public-notices/when-is-a-public-notice-used/community-changes/> (last visited Aug. 31, 2010). "These laws are intended to make sure that the citizens affected by the proposed government action are given the opportunity to participate in the decision-making process. Public notices equip local residents with the information they need to support or oppose local government actions." *Id.* Governments tend to use taxpayer money to pay the fee for publishing legal notices. MARTIN & HANSEN, *supra* note 9, at 122.

54. *Community Changes*, *supra* note 53.

55. *The Purpose of Public Notices*, PUB. NOTICE RESOURCE CENTER, <http://www.pnrc.net/about-public-notices/legislative-updates/purpose-of-public-notice/> (last visited Aug. 31, 2010).

56. *Types of Public Notices*, *supra* note 37.

57. *Id.*

58. *Monitoring Government Transactions*, PUB. NOTICE RESOURCE CENTER, <http://www.pnrc.net/about-public-notices/when-is-a-public-notice-used/monitoring-government-transactions/> (last visited Aug. 31, 2010).

59. See *id.*; *Fraud Prevention and Debt Collection*, PUB. NOTICE RESOURCE CENTER, <http://www.pnrc.net/about-public-notices/when-is-a-public-notice-used/fraud-prevention-and-debt->

illustrate this point, some states require various partnerships, mostly limited partnerships, to publish legal notices at or immediately after their formation.⁶⁰ New York, for example, requires an LLC to publish a legal notice that contains its name, county, and address for service of process for six consecutive weeks, in two newspapers printed in the county in which the LLC is located.⁶¹ Arizona and Nebraska have similar publication requirements.⁶² The purpose of requiring a newly formed business to publish a notice is to inform the local public of the LLC's existence and operations, to ensure that the public has adequate business information concerning the LLC, and to protect the public against fraud or the non-performance of contractual or financial obligations.⁶³

Another important type of business notice is an unclaimed property notice.⁶⁴ If an insurance company or business has property belonging to a customer who has not recovered it, the business is required to keep the property for a specified amount of time, after which it is given to the federal or state government for safe keeping.⁶⁵ The government must then publish a notice so that the rightful owner may claim the property.⁶⁶ Similarly, in probate matters, states may require that notice be published in a newspaper to creditors of a decedent's estate who have not filed a claim within two years after the decedent's death, or to those creditors who are not readily ascertainable upon a due diligence inquiry.⁶⁷

The federal government mandates notice by publication in the context of the judicial sale of real property.⁶⁸ Under 28 U.S.C. § 2002, the government is required to publish notice of

[a] public sale of realty or interest therein under any order, judgment or decree of any court of the United States . . . once a week for at least four weeks prior to the sale in at least one *newspaper regularly issued*

collection/ (last visited Aug. 31, 2010).

60. Anthony Q. Fletcher, *Publish or Perish: The New York Limited Liability Company Law Publication Requirement, The Fundamental Flaw of an Otherwise Flawless Law*, 1 N.Y.U. J.L. & BUS. 139, 163 (2004).

61. N.Y. LTD. LIAB. CO. § 206 (McKinney 2007); see Fletcher, *supra* note 60, at 142-43. An LLC's failure to comply with this statutory obligation within 120 days prevents the LLC from maintaining any action or special proceeding in New York State. Fletcher, *supra* note 60, at 145.

62. See ARIZ. REV. STAT. ANN. § 29-635(c) (1998 & Supp. 2009); NEB. REV. STAT. ANN. § 21-2653 (LexisNexis 2008).

63. Fletcher, *supra* note 60, at 143, 163-64.

64. *Types of Public Notices*, *supra* note 37.

65. *Id.*

66. *Id.*

67. See, e.g., FLA. STAT. ANN. § 733.2121 (West 2005). The notice must contain information about the decedent, the name and address of the personal representative, and the time period allotted for creditors to file claims against the estate with the court. *Id.*

68. See 28 U.S.C. § 2002 (2006).

and of general circulation in the county, state, or judicial district of the United States wherein the realty is situated.⁶⁹

The purpose of this publication requirement is to inform the public of the nature and condition of the property to be sold, and to provide the details and terms of the sale.⁷⁰ Moreover, such notice is made to secure bidders for the property.⁷¹

C. Notices Required to Initiate Adversarial Proceedings

As a prerequisite to adjudicating a claim in American federal courts, the court must have a statutory basis for exercising personal jurisdiction,⁷² and it must determine that constitutional requirements have been satisfied.⁷³ The Due Process Clause of the Constitution⁷⁴ requires that in certain situations, a defendant must have adequate notice of a lawsuit before a court may constitutionally adjudicate a matter that could result in deprivation of the defendant's constitutional rights.⁷⁵ The purpose of this procedural safeguard is to protect the government from arbitrarily encroaching on an individual's life, liberty, or property interests, and "to minimize substantively unfair or mistaken deprivations."⁷⁶ The requirement that a party be notified of a claim

69. *Id.* (emphasis added).

70. See *Breeding Motor Freight Lines v. Reconstr. Fin. Corp.*, 172 F.2d 416, 422 (10th Cir. 1949).

71. *Id.*

72. Cantor, *supra* note 19, at 945.

73. Due process limits a court's exercise of personal jurisdiction over a non-resident defendant. Once there is a statutory basis for the court's jurisdiction, "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The second requirement is that the method of notice be reasonably calculated to apprise a defendant of a proceeding. See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

74. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."); U.S. CONST. amend. XIV, § 1 ("No state shall . . . deprive any person of life, liberty, or property, without due process of law . . ."); BLACK'S, *supra* note 8, at 575 (defining procedural due process as "[t]he minimal requirements of notice and a hearing guaranteed by the Due Process Clauses" of the Fifth and Fourteenth Amendments to the Constitution).

75. "Since properly effected service meets due process requirements, it allows the court—a state actor—to have jurisdiction over an action that may result in deprivation of the defendant's property without violating the defendant's constitutional rights." Cantor, *supra* note 19, at 945.

76. *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972). The federal government sometimes affords process to individuals in the event the government desires to seize real property in civil forfeiture actions. Compare *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 62 (1993) (holding that absent exigent circumstances, "the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture"), with *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679-80 (1974)

against him has ancient roots in the Laws of Eshnunna.⁷⁷ According to the Code, which was inscribed on two tablets over 4000 years ago,⁷⁸ the act of suing was expressed by terms meaning to “speak” or “shout.”⁷⁹ Today, notice of a lawsuit is not expressed through verbal communication, but through paper-based or electronic communication. Nevertheless, the historical notice requirement continues to be of paramount importance.

1. Reasonable Notice as a Constitutional Prerequisite to a Court’s Exercise of Jurisdiction

Traditionally, before a court—acting on behalf of the federal or state government—could adjudicate a claim, it had to have physical power over the defendant.⁸⁰ In *Pennoyer v. Neff*, the Supreme Court asserted that personal or in-hand service of process⁸¹ on a defendant within the forum state established personal jurisdiction in an in personam action.⁸² The Court eventually disposed of the *Pennoyer* principle in in personam cases, because personal service was not always feasible, and because a defendant could evade service by remaining outside of the forum state.⁸³ Today, a court may constitutionally assert

(holding that the government could seize a yacht subject to civil forfeiture without affording prior notice or hearing because of exigent circumstances associated with movable property). Likewise, notice may be required where government seeks to levy upon a deficient taxpayer’s property under 26 U.S.C. § 6212 (2006). Procedural protections such as a hearing may also be due where the terminate parental rights. *Stanley v. Illinois*, 405 U.S. 645, 658 (1972).

77. See Aaron R. Chacker, *E-fectuating Notice: Rio Properties v. Rio International Interlink*, 48 VILL. L. REV. 597, 597 n.1 (2003) (citation omitted).

78. The exact date of promulgation is unknown, but researchers believe it was developed by the ruler of Eshnunna nearly 4000 years ago. REUVEN YARON, *THE LAWS OF ESHNUNNA* 21, 87 (The Magnes Press 2d rev. ed. 1988). The Code was found between 1945 and 1947 during an excavation of Baghdad. *Id.* at 20. The tablets are presently kept at the Iraq Museum. *Id.*

79. The necessity of publicizing notice of a lawsuit is a basic tenet of the American legal system. See *infra* Parts II.C.1-3.

80. See *Pennoyer v. Neff*, 95 U.S. 714, 734 (1877).

81. See BLACK’S, *supra* note 8, at 1491 (defining service of process as the “formal delivery of a writ, summons, or other legal process”).

82. See *Pennoyer*, 95 U.S. at 722 (explaining that every state possesses exclusive jurisdiction over persons and property within the territory, and no state may exercise direct jurisdiction over persons or property outside the territory). “[D]ue process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered.” *Id.* at 734.

83. *Shaffer v. Heitner*, 433 U.S. 186, 200 (1977) (“The *Pennoyer* rules generally favored nonresident defendants by making them harder to sue.”); see *Cantor*, *supra* note 19, at 946. Nevertheless, both before and since *Shaffer*, the Court has indicated a preference for actual notice. See *Greene v. Lindsey*, 456 U.S. 444, 449 (1982) (“Personal service guarantees actual notice of the pendency of a legal action; it thus presents the ideal circumstance under which to commence legal proceedings against a person”); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (“Personal service of written notice within the jurisdiction is the classic form of notice

jurisdiction over a person outside its borders.⁸⁴ Moreover, no longer is it required that a defendant receive actual notice of an action against him.⁸⁵

The Constitution does not require a particular method for serving process.⁸⁶ Rather, all that is required is that the form of notice chosen to notify a defendant in a particular case 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.”⁸⁷ Where notice is required, it must be “reasonably certain to inform those affected.”⁸⁸ To determine what constitutes “reasonable” notice, courts must balance the state’s interest against an individual’s interest, protected by the Fourteenth Amendment.⁸⁹

2. Statutory Notice Requirements

Federal and state procedural rules govern the type of notice required in the context of judicial adversarial proceedings.⁹⁰ Compliance with approved means for serving process is paramount, as failure to provide adequate service may be fatal to the potential life of a lawsuit.⁹¹ In federal district courts, Rule 4 of the Federal Rules of Civil Procedure (“Federal Rules”) governs notice procedures. Rule 4 permits service of process on an individual in the United States by:

- (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or
- (2) doing any of the following:
 - (A) delivering a copy of the summons and of the complaint to the individual personally;

always adequate in any type of proceeding.”).

84. *See* *Hess v. Pawloski*, 274 U.S. 352, 356 (1927) (holding that a state can assert jurisdiction over a non-resident defendant who drives on the state’s highways, because by using those highways, the out-of-state motorist appointed a designated state official as his agent to accept process on his behalf).

85. *See* *Mullane*, 339 U.S. at 313-14.

86. *Id.* at 315.

87. *Id.* at 314 (emphasis added). “The notice must be of such nature as reasonably to convey the required information, . . . and it must afford a reasonable time for those interested to make their appearance.” *Id.* (citations omitted).

88. *Id.* at 315.

89. *Id.* at 314.

90. *See* *infra* notes 92-98 and accompanying text.

91. A defendant may move to dismiss the suit for lack of personal jurisdiction on the grounds that the plaintiff made an insufficient service attempt. *See* FED. R. CIV. P. 12(b)(5).

- (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or
- (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.⁹²

States have adopted process rules that are generally more liberal than the Federal Rules.⁹³ Some states permit a defendant to leave papers at the defendant's dwelling within the state,⁹⁴ to post papers at an unattended dwelling,⁹⁵ or to send the summons and complaint by first-class mail to the defendant's last known address.⁹⁶ As a prerequisite to serving process by any of the means discussed above, a plaintiff or his attorney must seek court approval; the court will use a case-by-case analysis to determine whether such notice would comport with due process requirements.⁹⁷ In most jurisdictions, plaintiffs are required to make a showing that personal service is impractical before a court will approve alternate methods of service.⁹⁸

Over time, methods of serving process have expanded considerably with the advent of new technologies.⁹⁹ Electronic service by e-mail, although not expressly permitted on domestic defendants by the Federal Rules,¹⁰⁰ was found to satisfy due process in the context of providing

92. See FED. R. CIV. P. 4(e)(1)–(2).

93. See, e.g., N.Y. C.P.L.R. § 308 (McKinney 2001).

94. *Id.* § 308(4) (“[W]here service . . . cannot be made with due diligence, [service is permissible] by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by . . . mailing the summons to such person at his or her last known residence . . .”).

95. *But see* *Greene v. Lindsey*, 456 U.S. 444, 456 (1982) (holding that posting on the door of an apartment in a public housing project was not reasonably calculated to notify the defendant because such notices could easily be torn down). In *Greene*, the Supreme Court indicated that posting notice may have been adequate if service had also been delivered by mail. *Id.* at 455 n.9.

96. See *Int'l Controls Corp. v. Vesco*, 593 F.2d 166, 177 (2d Cir. 1979) (approving service by mail to last known address).

97. *Cantor*, *supra* note 19, at 947 n.30.

98. Compare *Settlemier v. Sullivan*, 97 U.S. 444, 447 (1878) (holding that service of summons on defendant's wife at their home was not sufficient without a showing that the officer was unable to find the defendant), with *Sgitcovich v. Sgitcovich*, 241 S.W.2d 142, 148 (Tex. 1951) (holding that substituted service was permissible after numerous unsuccessful attempts were made to serve defendant personally).

99. Perhaps the most inimitable evidence of the influence of technology on the courts appears in the context of service of process, where the inevitable shift toward electronic service of process has materialized. See Jeremy A. Colby, *You've Got Mail: The Modern Trend Towards Universal Electronic Service of Process*, 51 *BUFF. L. REV.* 337, 380-82 (2003) (discussing the modern trend toward universal electronic service).

100. See FED. R. CIV. P. 4(f). *But see* Matthew R. Schreck, *Preventing “You've Got Mail”™ From Meaning “You've Been Served”*: How Service of Process by E-Mail Does Not Meet Constitutional Procedural Due Process Requirements, 38 *J. MARSHALL L. REV.* 1121, 1149 (2005) (explaining that because courts permit alternative service without knowing a defendant's exact

notice to evasive foreign defendants in *Rio Properties v. Rio International Interlink*.¹⁰¹ In that case, the plaintiff was unable to serve process by traditional means, and the defendant apparently favored electronic communication.¹⁰² Similarly, in *In re International Telemedia Associates, Inc.*,¹⁰³ a U.S. bankruptcy court determined that the use of alternate methods of service, including service by e-mail, comported with due process requirements.¹⁰⁴ According to the court, because communication via the Internet is publicly accepted, “courts are not required to turn a blind eye to society’s embracement of such technological advances.”¹⁰⁵

E-mail service has notable advantages, such as speed, cost efficiency, reliability, and security.¹⁰⁶ Generally, four criteria must be satisfied as a prerequisite to service by e-mail: (1) the plaintiff must have made prior attempts to serve the defendant by traditional means; (2) e-mail must be the defendant’s preferred method of communication; (3) the defendant must have evaded service by relying on electronic communication and not disclosing contact information that would facilitate traditional service; and (4) e-mail service must not “be contrary to the receiving country’s laws.”¹⁰⁷ Other courts worldwide recognize the advantages of incorporating technology into their notice procedures; for example, in 2008, the Supreme Court of the Australian Capital Territory acquired jurisdiction over a party served by Facebook¹⁰⁸ after numerous unsuccessful attempts at serving process by more traditional

location, domestic defendants may be inadvertently served under Federal Rule 4(f)(3).

101. 284 F.3d 1007 (9th Cir. 2002). For a general discussion on service of process via e-mail, see generally Colby, *supra* note 99; Kevin W. Lewis, Note, *E-Service: Ensuring the Integrity of International E-mail Service of Process*, 13 ROGER WILLIAMS U. L. REV. 285 (2008) (discussing the use of e-mail for serving process); John M. Murphy III, Note, *From Snail Mail to E-Mail: The Steady Evolution of Service of Process*, 19 ST. JOHN’S J. LEGAL COMMENT. 73 (2004) (same).

102. *Rio Props.*, 284 F.3d at 1007, 1016-17 (9th Cir. 2002).

103. 245 B.R. 713, 718-21 (Bankr. N.D. Ga. 2000).

104. *Id.*

105. *Id.* at 721. “It would be akin to hiding one’s head in the sand to ignore such realities and the positives of such advancements.” *Id.* at 719.

106. See Cantor, *supra* note 19, at 944, 964-66; Frank Conley, *:-) Service With a Smile: The Effect of E-Mail and Other Electronic Communications on Service of Process*, 11 TEMP. INT’L & COMP. L.J. 407, 424 (1997); Yvonne A. Tamayo, *Are You Being Served?: E-Mail and (Due) Service of Process*, 51 S.C. L. REV. 227, 252 (2000).

107. David P. Stewart & Anna Conley, *E-Mail Service on Foreign Defendants: Time for an International Approach?*, 38 GEO. J. INT’L L. 755, 764 (2007). The last requirement is problematic, however, because a court cannot undertake a foreign law analysis without knowing the foreign jurisdiction in which a defendant resides. *Id.* at 772-75.

108. Facebook, a social networking website, was founded in 2004. *About Facebook*, FACEBOOK, <http://www.facebook.com/press/info.php?factsheet> (last visited Aug. 31, 2010).

means.¹⁰⁹ The Australian case is a prime illustration of the trend in the law towards electronic service.¹¹⁰

3. The Last Resort: Constructive Notice by Publication in Newspapers

Where a defendant's identity or location cannot be found with due diligence, a statute or court rule may permit notice by publication in a newspaper.¹¹¹ As a general rule, notice by publication is warranted only in the event that other substitute methods for service are impracticable.¹¹² Furthermore, despite the fact that a defendant may have had actual notice¹¹³ of a proceeding, if notice by publication does not strictly comply with the statute authorizing such service,¹¹⁴ the court does not obtain jurisdiction over the defendant.¹¹⁵

In *Mullane v. Central Hanover Bank & Trust Co.*, the Supreme Court considered whether notice by publication afforded procedural due process to interested parties in a proceeding for the judicial settlement of common trust fund accounts.¹¹⁶ Mullane, the appointed special guardian and attorney for certain persons known or unknown not otherwise appearing who had or might have had an interest in the proceeding, claimed that the purported notice provided to defendants in a newspaper

109. See Andriana L. Shultz, Comment, *Superspoked and Served: Service of Process via Social Networking Sites*, 43 U. RICH. L. REV. 1497, 1497 (2009); Nick Abrahams, *Australian Court Serves Documents via Facebook*, SYDNEY MORNING HERALD, Dec. 12, 2008, available at <http://www.smh.com.au/technology/technology-news/australian-court-serves-documents-via-facebook-20090615-cc11.html>; see also Klander, *supra* note 15, at 258 (“[W]hen it is significantly more likely that a defendant would receive notice through a posting on her Facebook page, or through a friend on Facebook, than by leaving a copy with a roommate, it may be unconstitutional to disallow this form of notification.”); Shultz, *supra*, at 1528 (explaining that attempted service through Facebook in America is unlikely to constitute a per se due process violation).

110. See Colby, *supra* note 99, at 381-82; Shultz, *supra* note 109, at 1498.

111. See, e.g., N.Y. C.P.L.R. § 308(5) (McKinney 2001) (permitting service by publication in in personam actions where service by personal delivery, service on a person of suitable age and discretion, service by first-class mail, and service by “nail and mail” is impracticable).

112. See *Contimortgage Corp. v. Isler*, 853 N.Y.S. 2d 162, 162 (N.Y. App. Div. 2008) (holding that service by publication alone was improper because the defendant's address could have been ascertained).

113. *Napoleon B. Broward Drainage Dist. v. Certain Lands Upon Which Taxes Were Due*, 33 So. 2d 716, 718 (Fla. 1948) (“The fact that the defendant had actual knowledge of the attempted service cannot be relied upon to justify the failure of the plaintiff to strictly observe and substantially comply with a statute authorizing service by publication.”).

114. See *supra* Part II.C.2.

115. *Davis v. Woollen*, 71 P.2d 172, 173 (Wash. 1937) (“Statutes authorizing constructive service by publication or by service of summons outside of the state are in derogation of the common law, and are to be strictly construed, and all statutory requirements must be accurately taken in order to confer upon the court jurisdiction over the defendant, although the subject-matter of the action is within the power of the court.”).

116. See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 307 (1950).

was inadequate to afford due process.¹¹⁷ In analyzing the adequacy of publication notice in the particular case at issue, the Court set forth a now famous notice standard:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice *reasonably calculated, under all the circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections

. . . [P]rocess which is a mere gesture is not due process. The means employed must be such as *one desirous of actually informing the absentee* might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself *reasonably certain* to inform those affected, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.¹¹⁸

Under the circumstances in *Mullane*, the Court held that notice by publication was reasonably calculated to apprise those beneficiaries whose interests or whereabouts could not be ascertained with due diligence,¹¹⁹ but not as to known present beneficiaries of a known place of residence.¹²⁰ The Court recognized that although notice by newspaper is an “indirect and even a probably futile means of notification,” in the case of persons missing or unknown, it “creates no constitutional bar to a final decree foreclosing their rights.”¹²¹

It would be idle to pretend that publication alone . . . is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. *Chance alone brings to the attention of even a local resident an advertisement*

117. *See id.* at 311.

118. *Id.* at 314-15 (emphasis added). “The notice must be of such nature as reasonably to convey the required information, . . . and it must afford a reasonable time for those interested to make their appearance.” *Id.* (citations omitted).

119. *Id.* at 317. A due diligence inquiry requires “an honest and well-directed effort to ascertain the whereabouts of a defendant by inquiry as full as circumstances permit.” *Bank of New York v. Unknown Heirs and Legatees*, 860 N.E.2d 1113, 1117 (Ill. App. Ct. 2006). More than a cursory effort is required to locate the defendant. *Bell Fed. Sav. & Loan Ass’n v. Horton*, 376 N.E.2d 1029, 1032 (Ill. App. Ct. 1978).

120. *Mullane*, 339 U.S. at 318.

121. *Id.* at 317.

in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. *The chance of actual notice is further reduced* when . . . the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention.¹²²

Thus, *Mullane* stands for the principle that newspaper notice should only be used as a last resort¹²³ because it is the "the method of notice least calculated to bring to a potential defendant's attention the pendency of judicial proceedings."¹²⁴

The Supreme Court again articulated its distaste for notice by publication in *Mennonite Board of Missions v. Adams*.¹²⁵ The Court reasoned that even where notice by publication is reasonably calculated under the circumstances to apprise interested parties of a proceeding, publication of notice would not suffice to afford due process as to any interested party whose name and address were "readily ascertainable."¹²⁶ In recent years, the Supreme Court has provided further limitations on

122. *Id.* at 315. (emphasis added). "Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best." *City of New York v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 293, 296 (1953)); *see also* *Walker v. City of Hutchinson*, 352 U.S. 112, 116 (1956) (holding that notice of a condemnation proceeding in a newspaper was inadequate to inform a landowner whose name was known to the city and was on the official records). "It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property." *Id. Compare* *Dusenbery v. United States*, 534 U.S. 161, 172-73 (2002) (holding that notice of an administrative forfeiture by both mail and publication to an incarcerated individual was reasonably calculated under all the circumstances to apprise the inmate of the forfeiture action), *with* *Schroeder v. City of New York*, 371 U.S. 208, 211 (1962) (holding that notice by newspaper and posting was inadequate to apprise a property owner of a condemnation proceeding because the owner's name and address were readily ascertainable).

123. *Mullane*, 339 U.S. at 317 ("This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning."); *see also* *Brady v. Brauer*, 529 A.2d 159, 162 (Vt. 1987) (explaining that notice by publication "is a process rooted in the necessity raised by the total inability of other service procedures to be used to provide notice"). Before a court will permit service by publication, the plaintiff will ordinarily be required by state statute to submit an affidavit indicating that he exercised due diligence in trying to find the defendant in the state, or ascertain his or her place of residence, or, if it is claimed that the defendant is unknown, to ascertain his or her name and address. *See, e.g.*, 735 ILL. COMP. STAT. ANN. 5/2-206 (West 2003). "Extraordinary steps to ascertain the whereabouts of the party are not required." *McDaniel v. McElvy*, 108 So. 820, 832 (Fla. 1926).

124. *Boddie v. Connecticut*, 401 U.S. 371, 382 (1971). For this reason, a state may not authorize service of process by publication where personal service is practicable. *Sgitcovich v. Sgitcovich*, 241 S.W.2d 142, 146-47 (Tex. 1951).

125. 462 U.S. 791, 800 (1983) (holding that notice by publication and posting was not reasonably calculated to provide a mortgagee of real property with adequate notice of a proceeding to sell his property).

126. *Id.* at 797.

the availability of notice by publication; notice by publication may not be used simply to avoid the cost of individualized notice,¹²⁷ nor may notice by publication suffice as an adequate alternative to actual notice merely to reduce the onus on the party with the burden of providing notice.¹²⁸

D. What Constitutes a “Newspaper” for Purposes of Publishing Notices?

Though states have traditionally agreed that legal notices should be published in newspapers to achieve wide publicity, ironically there is no consensus among states on the type of newspaper sufficient for publication.¹²⁹ As defined by ordinary dictionaries, the term “newspaper” is ambiguous.¹³⁰ Likewise, no universal legal definition of a “newspaper” exists.¹³¹ Every state statutorily defines the requirements

127. The Supreme Court has plainly rejected the view that notice by publication may be permissible to dodge extremely high costs of providing individual notice in class action suits. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974).

128. In 2006, the Supreme Court held in that notice by publication, as a supplement to notice by mail, did not constitute constitutionally adequate notice because the letters were returned to the State as “unclaimed.” *Jones v. Flowers*, 547 U.S. 220, 237 (2006). According to the Court, because the State was aware that its attempts at providing notice to Jones regarding his unpaid taxes had failed, “the State should have taken additional reasonable steps to notify Jones, if practicable to do so.” *Id.* at 234. The Court further indicated that since notice by publication is only permissible where it is “not reasonably possible or practicable to give more adequate warning,” publication of notice in this context was insufficient because it was possible and practicable to warn Jones of the impending tax sale by other reasonable means. *Id.* at 237 (citing *Mullane*, 399 U.S. at 317). The Court followed the *Mullane* “actually desirous” standard, and found that one who actually wanted to alert Jones of the potential property deprivation would have done more than simply publishing notice in a newspaper once the original letter was returned unclaimed. *Id.* at 238 (citing *Mullane*, 399 U.S. at 315).

129. See MARTIN & HANSEN, *supra* note 9, at 63-65.

130. See THE AMERICAN HERITAGE DICTIONARY 572 (4th ed. 2001) (defining a newspaper as “[a] publication, usu[ally] issued daily or weekly, containing current news, editorials, feature articles, and advertising”); CHAMBERS 21ST CENTURY DICTIONARY 921 (Mairi Robinson ed., 1996) (defining a newspaper as “a daily or weekly publication composed of folded sheets, containing news, advertisements, topical articles, correspondence, etc.”); THE MERRIAM-WEBSTER DICTIONARY 487 (11th ed. 2004) (defining a newspaper as “a paper that is published at regular intervals and contains news, articles of opinion, features, and advertising”); POLLARD, *supra* note 12, at 4-8.

131. MARTIN & HANSEN, *supra* note 9, at 63-65. As a result, states’ definitions of “newspapers” are frequently litigated, usually where a defendant argues he was deprived of due process because of the specific publication in which a purported notice was published. *Id.* at 63. Most of the litigation is concerned with the reach of the publication, rather than the publication’s tangible format. Shannon E. Martin, *Record Newspapers, Legal Notice Laws and Digital Technology Solutions*, 8 INFO. & COMM. TECH. L. 59, 64 (1999). The overwhelming evidence of public policy in favor of choosing a format that will achieve the widest readership, combined with little discussion of the importance of providing notice in a newsprint publication of certain dimensions and pagination, supports the idea that the Internet is superior to newspapers for

for a publication to be considered a newspaper for legal purposes; some states have more specific requirements than others.¹³² The qualifications set forth by each state are particularly important where notice is required as a procedural due process safeguard.¹³³

States generally agree on broad characteristics of the type of newspaper that will achieve the widest public reach. Such newspapers are those that (1) publish at regular intervals in the vicinity where the newspaper itself is published,¹³⁴ (2) have general paid circulation,¹³⁵ and (3) contain content devoted to the general interest of the public.¹³⁶ A

providing legal notices. *See infra* Part IV.

132. *See* ALA. CODE § 6-8-60 (2005); ALASKA STAT. § 09.35.140(2)(c) (2008); ARIZONA REV. STAT. ANN. § 39-201 (2001); ARK. CODE ANN. § 1-3-106 (2008); ARK. CODE ANN. § 16-3-105 (1999); CAL. GOV'T CODE §§ 6000-08 (West 2008); COLO. REV. STAT. ANN. §§ 24-70-102 to 103 (West 2008); CONN. GEN. STAT. ANN. § 1-2 (West 2007); DEL. CODE ANN. tit. 9, § 2652 (2006 & Supp. 2010); D.C. CODE § 1-201.03 (2006); FLA. STAT. ANN. §§ 50.011, 50.031, 163.3164 (West 2006); FLA. STAT. ANN. § 165.031 (West 2000); GA. CODE ANN. § 9-13-142 (2006); HAW. REV. STAT. §§ 46-2, 91-9.5 (1993); IDAHO CODE ANN. § 60-106 (2002); 715 ILL. COMP. STAT. ANN. 5/5, 10/1, 10/2 (West 2007 & Supp. 2010); IND. CODE ANN. § 5-3-1-4 (West 2008); IOWA CODE ANN. § 618.3 (West 1999 & Supp. 2010); IOWA CODE ANN. § 349.2 (West 2000); KAN. STAT. ANN. § 64-101 (West 2008); KY. REV. STAT. ANN. § 424.120 (LexisNexis 2005 & Supp. 2009); LA. REV. STAT. ANN. § 43:142 (West 2007); ME. REV. STAT. ANN. tit. 1, § 601 (1989 & Supp. 2009); MD. CODE ANN., art. 1, § 28 (West 2007); MASS. GEN. LAWS ANN. ch. 4, § 6, cl. 8 (West 2006); MICH. COMP. LAWS ANN. § 600.1461 (West 1996); MICH. COMP. LAWS ANN. § 691.1051 (2000); MINN. STAT. § 331A.01, subdiv. 8 (West 2004 & Supp. 2009); MISS. CODE ANN. § 13-3-31 (West 1999 & Supp. 2009); MO. REV. STAT. § 493.050 (West 1996 & Supp. 2010); MO. REV. STAT. § 493.070 (West 1996); MONT. CODE ANN. § 18-7-201 (2009); NEB. REV. STAT. ANN. §§ 25-523, 25-2228 (LexisNexis 2004); NEV. REV. STAT. ANN. §§ 238.030, 238.240 (West 2000); N.H. REV. STAT. ANN. § 24:9-d (2009); N.J. STAT. ANN. §§ 35:1-2 to 1-2.2 (West 2002); N.M. STAT. ANN. § 14-11-2 (West 2003); N.Y. GEN. CONSTR. LAW § 60 (McKinney 2003 & Supp. 2010); N.C. GEN. STAT. ANN. § 1-597 (2009); N.D. CENT. CODE § 46-05-01 (2007); OHIO REV. CODE ANN. § 7.12 (West 2004); OKLA. STAT. ANN. tit. 25, § 106 (West 2008); OR. REV. STAT. ANN. § 193.010 (West 2009); 45 PA. CONS. STAT. ANN. § 101 (West 2009); R.I. GEN. LAWS § 9-19.1-1 (1997); S.C. CODE ANN. §§ 15-29-50 to 80 (2005); S.D. CODIFIED LAWS §§ 17-2-2 to 2.4 (2004); TENN. CODE ANN. § 2-1-104 (2003 & Supp. 2009); TEX. GOV'T CODE ANN. § 2051.043 (Vernon 2007); UTAH CODE ANN. § 45-1-101 (LexisNexis Supp. 2009); VT. STAT. ANN. tit. 1, § 174 (West 2007); VA. CODE ANN. § 8.01-324 (2007); WASH. REV. CODE ANN. § 65.16.020 (2005); W. VA. CODE ANN. § 59-3-1 (West 2002); WIS. STAT. ANN. § 985.03 (West 2007); WYO. STAT. ANN. § 18-3-519 (2009).

133. *See supra* Part II.C.

134.

It appears reasonable to require such notices to be published in newspapers having a fixed and permanent domicile and a substantial circulation at the city or place where the inhabitants live who are most vitally interested in the transactions respecting which notices are required. At least, it is not unreasonable to expect the citizens of a particular community to rely upon their local newspaper primarily to inform them of the proceedings of their own local officers and the affairs of local public importance.

In re Monrovia Evening Post, 248 P. 1017, 1020 (Cal. 1926).

135. *See* MARTIN & HANSEN, *supra* note 9, at 67; *Burak v. Ditson*, 229 N.W. 227, 228 (Iowa 1930) (“Whether a newspaper is one of general circulation is a matter of substance, and not of size.”).

136. A newspaper that contains general content allows its readers to “become appraised of

newspaper defined by statute need not have a large number of readers, but it must have a diversity of readership within the context of a particular community.¹³⁷ A state may also choose to designate an “official newspaper” to publish notices for this purpose in accordance with the state’s requisite statutorily-defined qualifications for newspapers.¹³⁸

III. THE STATE OF THE NEWSPAPER INDUSTRY

A. *A New Kind of Trouble for Newspapers*

Because newspapers serve important legal functions, it is befitting to disclose details of the crisis in the industry in order to appreciate why a change in legal notice procedure is necessary.¹³⁹ The newspaper industry is seeing a significant decline in readership and circulation, which is commonly linked to the threat posed by electronic competition.¹⁴⁰ Hard-copy newspapers are fading largely because many individuals prefer accessing news electronically.¹⁴¹ Moreover, the abundance of free online alternatives, such as free dailies¹⁴² and online

passing events of a political, religious, commercial or social nature.” *Record Publ’g Co. v. Kainrad*, 551 N.E.2d 1286, 1290 (Ohio 1990).

137. See MARTIN & HANSEN, *supra* note 9, at 5. In small or obscure publications, it is unlikely that the requisite notice will achieve the goal of procedural due process protections. See *Wahl v. Hart*, 332 P.2d 195, 196-97 (Ariz. 1958) (explaining that if the number of readers in a given area dwindles to zero, the statute’s goal of giving notice will be defeated).

138. See *Myers-Brooks Publ’g Co. v. Bd. of Supervisors*, 328 N.Y.S.2d 741, 743 (N.Y. Sup. Ct., Fulton County 1972) (explaining that the purpose of selecting an official newspaper for publication is to ensure that legal notices are read by as many people as possible). State government officials have wide discretion in designating an official newspaper as long as the newspaper comports with a state’s statute specifying the qualifications for legal newspapers. *Thayer v. King County*, 731 P.2d 1167, 1170 (Wash. Ct. App. 1987).

139. See *infra* Part IV.

140. See generally GUNTER, *supra* note 18 (discussing the influence of technology on the newspaper business).

141. *Id.* at 23-24.

142. See Piet Bakker, *Reinventing Newspapers: Readers and Markets of Free Dailies*, in MEDIA FIRMS: STRUCTURES, OPERATIONS AND PERFORMANCE 77, 77-85 (Robert G. Picard ed., 2002) (discussing the history and the rise of the free daily news market worldwide); Claire Cain Miller, *Publisher Rethinks the Daily: It’s Free and Printed and Has Blogs All Over*, N.Y. TIMES, Jan. 22, 2009, at B3 (explaining that while many newspapers lose readers to the Internet, most free papers have survived from advertising profits). However, some free dailies have even been forced to close due to falling advertising revenue and the rising costs of ink and newsprint. *Id.*

blogs,¹⁴³ threatens newspapers' ability to generate revenue through subscriptions.¹⁴⁴

A substantial loss of subscription revenue has crippled the industry, as newspapers cannot rely solely on classified ads and advertising for income.¹⁴⁵ As a result, many newspaper businesses are merging, closing, filing for bankruptcy, and conducting mass layoffs.¹⁴⁶ In 2008, more than 15,992 jobs were cut in the newspaper industry;¹⁴⁷ in 2009, more than 14,783 jobs were cut;¹⁴⁸ in 2010, newspapers laid off more than 1939 people.¹⁴⁹ Trouble in the newspaper industry is not unprecedented. Newspapers were not immune to the effects of the worldwide financial depression in the twentieth century; circulation and newspaper advertising, which had reached their peak in 1930, plummeted twelve percent in 1933.¹⁵⁰ As an inevitable result of the troubled economy, newspapers sought to ensure their survival by consolidating, and deflecting the increased costs of labor and materials on to the consumer with increased circulation and advertising rates.¹⁵¹ An emergency in the newspaper industry also transpired during World War II when newsprint from overseas was cut off during a time of high demand.¹⁵² In these instances, the newspaper industry was able to rebound naturally because the problems involved external influences, rather than problems with

143. A blog is a web-based technology used by ordinary individuals who post their views on national, local, or personal events on a website. See GUNTER, *supra* note 18, at 14. Blogs allow ordinary Internet users to produce, as well as receive, content. *Id.*

144. See Jonathan Handel, *Uneasy Lies the Head that Wears the Crown: Why Content's Kingdom is Slipping Away*, 11 VAND. J. ENT. & TECH. L. 597, 615 (2009).

145. The Project for Excellence in Journalism, *Online Economics*, THE STATE OF THE NEWS MEDIA 2010, http://www.stateofthemedial.org/2010/online_economics.php (last visited Aug. 31, 2010).

146. John Sturm, President & C.E.O., Newspaper Ass'n of Am., Statement Before the U.S. Congress, Joint Econ. Comm., Hearing on "The Future of Newspapers: The Impact on the Economy and Democracy," 3 (Sept. 24, 2009), <http://www.naa.org/docs/Press-Release/JFS-Statement-Joint-Economic-Committee-092409-Hearing.pdf> ("Publishers in virtually every market—large and small—have been forced to lay off highly valued, veteran journalists and other employees and to take other drastic cost-saving measures.").

147. See PAPER CUTS, <http://newspaperlayoffs.com/maps/2008-layoffs> (last visited Aug. 31, 2010).

148. See PAPER CUTS, <http://newspaperlayoffs.com/maps/2009-layoffs> (last visited Aug. 31, 2010). An estimated 584 newspapers conducted layoffs in 2009, 34 of which conducted layoffs of 100 or more employees. *Id.* These statistics exclude layoffs conducted by the Associated Press, Dow Jones Co., Gannett Co. Inc., GateHouse Media News Service, Lee Enterprises, McClatchy Interactive, Media General's Washington, D.C. Bureau, and Sun Newspapers. *Id.* In California, 55 newspapers conducted layoffs, which was the most of any state. *Id.*

149. See PAPER CUTS, <http://newspaperlayoffs.com/maps/2010-layoffs/> (last visited Aug. 31, 2010).

150. See FRANK LUTHER MOTT, *AMERICAN JOURNALISM* 675 (rev. ed. 1950).

151. See *id.* at 775, 784.

152. See *id.* at 717.

newspapers' business models.¹⁵³ However, the problems afflicting newspapers in the past are inapposite to the problems facing the industry today. While various industries across the nation hurt by the current economic recession¹⁵⁴ may naturally bounce back with time as demand increases, newspapers are unlikely to recover from the recession because the industry's downfall was not caused by the state of the economy, but by a broken business model and new technology.¹⁵⁵

B. Reviving Newspapers' Traditional Revenue Model

Because newspapers play an integral role in American democracy,¹⁵⁶ countless proposals for repairing the newspaper industry have emerged. One proposed legal solution is government aid for newspapers,¹⁵⁷ including direct subsidies¹⁵⁸ and tax breaks.¹⁵⁹

153. See Jeffrey Pfeffer, *Lay Off the Layoffs*, NEWSWEEK, Feb. 15, 2010, at 32, 34.

154. "A recession is a significant decline in economic activity spread across the economy, lasting more than a few months, normally visible in production, employment, [and] real income . . . [that] begins when the economy reaches a peak of activity and ends when the economy reaches its trough." Press Release, The Nat'l Bureau of Econ. Research, Determination of the December 2007 Peak in Economic Activity (Dec. 11, 2008), <http://www.nber.org/dec2008.pdf>. The beginning of the recent economic recession began in December 2007. *Id.*

155. See Pfeffer, *supra* note 153, at 34 (explaining that because the newspaper industry is permanently shrinking, layoffs are necessary to adjust to the new market size, unlike other industries where layoffs occur to minimize profit-loss and as a response to a temporary drop in demand).

156. See, e.g., Nichols & McChesney, *supra* note 4, at 16.

157. See MCCHESENEY & NICHOLS, *supra* note 1, at 166-68 (explaining that many European democracies, most notably Nordic countries, have instituted subsidies for newspapers); *id.* at 274 fig.1 (depicting the amount of money spent on public media in various countries). In 1792, the American federal government passed the Postal Act, which allowed newspapers to be sent between printers free of charge. An Act To Establish the Post-Office and Post Roads within the United States, ch. 7, 1 Stat. 232 (1792). In addition to direct subsidies, Congress promoted the perpetuation of newspapers with the Newspaper Preservation Act of 1970. 15 U.S.C. §§ 1801-04 (1970). The Act permitted newspapers to create joint operating agreements and receive "immunity from antitrust prosecutions when an 'economically distressed' newspaper shares a physical plant with but has separate editorial functions from another newspaper." Timothy E. Cook, *Public Policy Toward the Press: What Government Does For The News Media*, in THE PRESS, *supra* note 34, at 248, 257. For more information on joint operating agreements, see WAYNE OVERBECK, MAJOR PRINCIPLES OF MEDIA LAW 508-13 (2006). The solutions proposed to save newspapers today would not likely run afoul of the First Amendment guarantee of a free press because "[w]hile the First Amendment prohibits state censorship, it does not in any sense prohibit—or even discourage—the public from using their government to subsidize and spawn independent media." MCCHESENEY & NICHOLS, *supra* note 1, at xii-xiii.

158. See Clay Calvert, *Bailing Out the Print Newspaper Industry: A Not-So-Joking Public Policy and First Amendment Analysis*, 40 MCGEORGE L. REV. 661, 666-71 (2009) (proposing a one-time government bailout for daily general-interest newspapers that will not stop decline in advertising revenue or circulation, but that will at least help sustain the newspaper industry). *But see* Ryan Blethen, Editorial, *Tweaks in Policy or Taxes, Not Major Bailouts, Would Help Newspapers Serve Readers*, SEATTLE TIMES, Oct. 4, 2009, at B9 (explaining that a federal bailout is a bad idea

Newspapers can also change their own destinies by reviving their traditional business models in the online marketplace.¹⁶⁰ In the past, newspapers generated revenue from advertisements, subscriptions, and newsstands;¹⁶¹ however, this model has not been effectively executed in the online newspaper business.¹⁶² Though many newspapers are switching to web-only formats to meet the needs of our Internet-savvy society,¹⁶³ most organizations are hesitant to charge for online content because they fear readers will abandon their websites for free alternatives.¹⁶⁴ Newspapers also suffer from declining classified advertising revenue, and as discussed *supra*, laws permitting notices to be published on governments' own websites will result in a further loss of revenue for newspapers.¹⁶⁵ States should instead promote online newspapers and sustain a source of revenue for newspapers by requiring that notices be published in online newspapers to protect the interests of newspapers and citizens alike.¹⁶⁶ Citizens need an official, authentic

because the press should be independent from the government in order to operate in a free democracy; “[a]ccepting federal dollars would taint newspapers for generations to come”).

159. As an alternative to direct subsidies, the government could help to keep the industry afloat by creating tax exemptions for newspapers by allowing them to operate as non-profits. *See* Newspaper Revitalization Act, S. 673, 111th Cong. (2009). The Newspaper Revitalization Act would create a new option under the Internal Revenue Code for a “qualified newspaper corporation,” allowing newspapers to operate under 501(c)(3) status for educational purposes, the same status used by public broadcasting and other non-profit entities. Press Release, Senator Cardin Introduces Bill That Would Allow American Newspapers to Operate as Non-Profits (Mar. 24, 2009), <http://cardin.senate.gov/pdfs/newspaper.pdf>. Under this plan, advertising and subscription revenue would not be taxable, though this would be conditional on newspapers' loss of the ability to make political endorsements. *Id.* An alternative to the 501(c)(3) model is the L3C (low-profit limited liability company) business ownership model, which would help smaller newspapers realize profits without limiting newspapers' ability to make political endorsements. MCCHESENEY & NICHOLS, *supra* note 1, at 184. Unlike non-profit organizations, L3Cs are profitable and do not receive tax exemptions. *Frequently Asked Questions*, AMERICANS FOR COMMUNITY DEVELOPMENT, <http://www.americansforcommunitydevelopment.org/faqs.php> (last visited Aug. 31, 2010).

160. *See infra* Parts III.B.1-2.

161. *See* GUNTER, *supra* note 18, at 29.

162. *See supra* note 145 and accompanying text.

163. For a list of newspapers that have switched to online-only publications, see PAPER CUTS, <http://newspaperlayoffs.com/maps/web-only-newspapers> (last visited Aug. 31, 2010). *See also* Jackson, *supra* note 1 (“The Internet offers newspapers a chance to address a computer-literate younger generation.”). Aside from the costs of online staff and website maintenance, it does not seem to be a particularly onerous burden for newspapers to post content online, since online staff members generally pull stories and graphics from the print version of the newspaper; they rarely make substantive changes to articles before posting them online. *See* Shannon E. Martin, *How News Gets From Paper to Its Online Counterpart*, 19 NEWSPAPER RES. J. 64, 69-70 (1998).

164. *See* David Carr, *United, Newspapers May Stand*, N.Y. TIMES, Mar. 9, 2009, at B1 (suggesting that newspapers have contributed to their own downfall by giving away content for free).

165. *See supra* notes 21-24 and accompanying text. On average, newspapers generate ten percent of their revenue from online advertising. FTC DISCUSSION DRAFT, *supra* note 3, at 3.

166. *See infra* Part IV.

medium that they can trust to alert them of notices affecting their interests.¹⁶⁷

1. A “Free Press” Does Not Require Free News

Ultimately, news organizations must charge readers for access to online content in order to pull themselves out of a financial rut.¹⁶⁸ The issue of *how* newspapers are to generate revenue online is debatable. One option is for newspapers to use a traditional subscription model by implementing a fee for daily, weekly, monthly, or yearly online access.¹⁶⁹ Another viable solution is for newspapers to adopt a micropayment system, similar to that used by iTunes and the Amazon Kindle.¹⁷⁰ A “one-click system” would allow users to make impulse purchases of particular news articles or other features for a price set by the creator.¹⁷¹ However, if news organizations choose to continue to disseminate content for free, they can also generate revenue via Kachingle software.¹⁷² With Kachingle, newspapers can make money

167. See *infra* Part III.B.2.

168. See Tim Rutten, Editorial, *Setting the Price for a Free Press*, L.A. TIMES, Aug. 22, 2009, at A27 (explaining that newspapers must charge for access to content online, and sue anyone who makes unauthorized use of such content). There are three basic forms for accessing online newspapers: (1) free-access to content; (2) free-access with prior registration; (3) access for a charge. GUNTER, *supra* note 18, at 30. In the third category, some newspapers charge a single fee for access to a certain number of news articles on the site. *The New York Times* uses this model effective January 2011. See Richard Pérez-Peña, *The Times to Set Fee for Some on Web Site*, N.Y. TIMES, Jan. 21, 2010, at B1. Under the new model, one who visits NYTimes.com will be able to view certain articles each month for free; however, access to additional stories will require the reader to pay a flat fee for unlimited access. *Id.* Subscribers to the print edition will receive unlimited access. *Id.* Other newspapers charge the same fee no matter how many news articles the user chooses to access, but charge a higher fee for access to premium content. See *Help & Information Center*, WALL ST. J., <http://help.wsj.com/help/about-wsjcom/wsjcom-site-information/> (last visited Aug. 31, 2010) (indicating that *The Wall Street Journal* charges for premium content, i.e., core business and financial news and analysis, and industry and market news).

169. This solution is consonant with the traditional subscription model traditionally utilized by newspapers in print. See *supra* note 161.

170. Walter Isaacson, *How to Save Your Newspaper*, TIME, Feb. 16, 2009, at 30, 30, 33 (suggesting that newspapers should implement a micropayment system whereby readers can pay for the particular stories they choose to read on a particular day, or allow users to pay for a day’s full edition or for a month’s worth of access).

171. *Id.* at 33. But see Steve Outing, *Forget Micropayments—Here’s a Far Better Idea for Monetizing Content*, EDITOR & PUBLISHER, Feb. 10, 2009, <http://www.editorandpublisher.com/Columns/forget-micropayments-heres-a-far-better-idea-for-monetizing-content-60108-.aspx> (explaining that micropayment schemes for online news content are doomed to fail because restricting access will decrease the level of traffic to newspapers’ websites).

172. Kachingle software would allow readers of online content to “pay” for their consumption by way of a voluntary contribution. *Overview*, KACHINGLE, <http://www.kachingle.com/site/overview> (last visited Aug. 31, 2010).

through users' voluntary donations to the news website, rather than by instituting for-pay subscriptions or micropayment services.¹⁷³

The industry might also find relief in a uniform pricing system for online content whereby newspaper executives could agree to simultaneously use a pay-wall¹⁷⁴ to protect content.¹⁷⁵ In order for this to work, Congress would have to grant the newspaper industry exemption from antitrust and price-fixing laws, essentially allowing publishers to "collude for survival."¹⁷⁶ This mechanism would also allow newspaper organizations to simultaneously demand fees from online services, like Google, which offer their news content for free.¹⁷⁷

2. Sustaining Legal Notices as a Source of Revenue for News Organizations

In addition to the proposals for helping the industry, discussed *supra*, legislatures can prevent a further loss of revenue for newspapers by requiring that, where notice by publication is warranted by law, online newspapers should be utilized.¹⁷⁸ Newsprint is becoming increasingly passé as the entire industry makes the inevitable leap to the Internet. In the future, print newspapers may no longer be "reasonably calculated," under *Mullane*, to notify a defendant of the proceedings against him.¹⁷⁹ In the event that newspapers become obsolete, the public should be assured that governments are protecting their statutory and constitutional interests by providing a uniform medium where they can search to find out whether their legal interests are implicated.¹⁸⁰ Moreover, notices should be disseminated by a third-party intermediary,

173. Outing, *supra* note 171.

174. A paywall is a device websites use to derive revenue by charging for access to online content. *The Year of the Paywall*, ECONOMIST, Jan. 5, 2010, http://www.economist.com/business-finance/displaystory.cfm?story_id=15207305 ("The chief cause of the move towards paywalls is a steep drop in online advertising.").

175. Ben Sheffner, *Collusion Course: Does Today's Hush-Hush Meeting of Newspaper Executives Violate Antitrust Law?*, SLATE, May 28, 2009, <http://www.slate.com/id/2219260>.

176. See Rutten, *supra* note 168, at 4.

177. See Oliver Burkeman, *U.S. House Speaker Urges Easing Competition Laws for Newspapers*, GUARDIAN (UK), Mar. 17, 2009, <http://www.guardian.co.uk/media/2009/mar/17/pelosi-newspapers-anti-trust-leniency>.

178. See Martin, *supra* note 131, at 60 (citing Joseph M. Fisher, *Internet Seen as Means of Providing Legal Notice*, NAT'L L.J., July 1, 1996, at C3 ("The Internet offers an ideal means of enhancing procedural due process by facilitating the delivery of notices: Posting information to an Internet site can afford instant and broad access to millions of users as part of a genuine effort to inform potentially affected parties.")). *But see id.* at 60-61 (explaining that the public may be unwilling to accept the notion that the Internet would completely replace newspapers as a medium for providing legal notices, and therefore it seems feasible for the Internet to provide a supplemental form of notice).

179. See *supra* Part II.C.3.

180. See *infra* Part IV.

rather than by the government itself, in the event that the government is the party responsible for publishing legal notices.¹⁸¹

A simple tweak to states' publication statutes can protect the future of legal notices in newspapers.¹⁸² Since many courts have already permitted various forms of technology to satisfy due process in certain circumstances,¹⁸³ online newspapers, too, should be included as a permissible stand-alone medium for providing constructive notice.¹⁸⁴ Even if online newspapers charge for content by any of the means discussed *supra*,¹⁸⁵ online newspapers should still qualify for publication of notice because subscriptions are an essential component of many states' publication statutes.¹⁸⁶ In the next section, this Note will discuss the ways states can provide explicit authority for notices to be published in online newspapers.¹⁸⁷ Further, the next section will suggest that constructive notice in online newspapers may in fact be constitutionally superior to both notices in newsprint and notices published elsewhere on the Internet.¹⁸⁸

IV. AUTHORIZING ONLINE NEWSPAPERS TO SATISFY NOTICE REQUIREMENTS IN ORDER TO SUSTAIN NEWSPAPER REVENUE AND PROMOTE ACCESSIBILITY

Because online news sites are increasing in popularity,¹⁸⁹ they bare a viable alternative to providing notices in print. Online newspapers are favored for the following reasons: online newspapers are updated frequently and they are not bound by meeting production deadlines for being published in newsprint; they can provide more information because they are not restrained by limited space in newsprint; users can access online archives; they can be accessed from any location with an

181. *See supra* note 25.

182. *See infra* Part IV.C.

183. *See supra* Part II.C.2.

184. This Note suggests that online newspapers can stand as an essential public notice medium, rather than a tool to provide mere supplemental notice. *Cf.* Walters, *supra* note 14, at 9-12 (explaining that newspapers' online websites would be a positive supplement to a class action notice scheme).

185. *See supra* Part III.B.1.

186. *See supra* Part II.D.

187. *See supra* Part II.D.

188. *See infra* Part IV.B.

189. *See* Press Release, Newspaper Ass'n of Am., Newspaper Web Sites Continue to Draw More than One-Third of All Web Users (Feb. 2, 2010), <http://www.naa.org/PressCenter/SearchPressReleases/2010/newspaper-web-sites-continue-to-draw-more-than-one-third-of-all-web-users.aspx>. Online newspapers attracted more than seventy-two million visitors on average each month in the fourth quarter of 2009. *Id.*

Internet connection and from many mobile phones at any time;¹⁹⁰ and finally, they are generally cheaper to produce.¹⁹¹ Online newspapers may also be cost efficient for the newspaper industry because news organizations can save the costs of paper, ink, and delivery services.¹⁹²

Like print newspapers, however, online newspapers have met financial difficulties. In 2009, online advertising revenue dropped for the first time since 2002; the greatest loss was in classified advertising revenue, which declined from \$3.2 billion in 2008, to \$2.2 billion in 2009.¹⁹³ Though the loss of revenue could be attributed to the recession to a certain degree, in order to reverse this decline and ensure a steady source of revenue for news organizations in the future, states should require that legal notices are published in online newspapers rather than elsewhere on the Internet.

A. *Statutory Barriers to Providing Notices in Online Newspapers*

Strict compliance with certain states' statutes specifying the qualifications of a newspaper fit for publication of legal notices will be totally impossible if notice is provided on online newspapers' websites.¹⁹⁴ In their current form, the language of state statutes that set forth the qualifications of newspapers fit for publication of legal notices excludes online newspapers.¹⁹⁵ If online newspapers are to officially achieve the legal notice status traditionally held by print newspapers, states' legal notice publication statutes must be amended to remove the language in newspaper statutes describing characteristics relevant to newsprint, and instead permit online newspapers to satisfy publication requirements.¹⁹⁶ Online newspapers would not likely qualify under

190. GUNTER, *supra* note 18, at 66-68.

191. *Id.* at 72-73. *But see* MASS MEDIA IN 2025: INDUSTRIES, ORGANIZATIONS, PEOPLE, AND NATIONS 57 (Erwin K. Thomas & Brown H. Carpenter eds., 2001) (explaining that some traditionalists praise newsprint "for its flexibility, its portability, and the tactile sense of the newspaper").

192. GUNTER, *supra* note 18, at 73. Newspapers can save approximately fifty percent of their costs if they move online-only, avoiding printing and distribution expenses. FTC DISCUSSION DRAFT, *supra* note 3, at 3.

193. *Online Economics*, *supra* note 143.

194. MARTIN & HANSEN, *supra* note 9, at 74.

195. *See supra* Part II.D.

196. MARTIN & HANSEN, *supra* note 9, at 122-24. Statutes that require newspapers to adhere to specific format requirements, such as particular pagination or dimensions, prohibit online newspapers from qualifying. However, format requirements are the "least pervasive" of the statutory requirements and "should be the easiest to overcome." Martin, *supra* note 131, at 64; *see infra* note 199 and accompanying text. The requirement that a newspaper qualify for a periodicals permit with the U.S. Postal Service ("USPS") is among the "most difficult descriptions to confront." Martin, *supra* note 131, at 64; *see infra* note 200 and accompanying text. Furthermore, the requirement that a newspaper be sold for a certain price and be distributed to a minimum number of

statutes that require, *inter alia*, paid subscribers and distribution,¹⁹⁷ specific circulation,¹⁹⁸ format particular to newsprint,¹⁹⁹ and second-class mailing status.²⁰⁰ The Attorney General of Ohio, for example, determined that an online newspaper does not constitute a “newspaper of general circulation” as required by the state’s statute governing notice by publication,²⁰¹ particularly because it is not issued “for a definite price or consideration paid for by not less than fifty per cent [sic] of those to whom distribution is made” and because it does not have a “second class mailing privilege.”²⁰² In order for online newspapers to qualify, Ohio’s law would have to be amended removing these two requirements.²⁰³

subscribers precludes certain online newspapers from qualifying, particularly those with weak subscribership or those that can be accessed free of charge. *See infra* notes 197-98 and accompanying text. Content requirements, on the other hand, do not present a problem because online newspapers may provide a larger database of content, including verbatim speech transcripts and letters in response to debated issues that may be too large or numerous to publish in print. Martin, *supra* note 131, at 65. Moreover, since online newspapers tend to be updated frequently throughout the day, the requirement that a newspaper be published at a certain frequency will be satisfied. *Id.*

197. For states that require a newspaper to be supported by subscriptions, online newspapers may not qualify because although some news services charge a fee for access, many online news services are offered for free. For example, California’s publication law requires that a newspaper possess, *inter alia*, “a bona fide subscription list of paying subscribers.” CAL. GOV’T CODE § 6000 (West 2008). This statutory requirement is problematic because of the decline in the number of print publications distributed for a fee, and because it excludes free print papers. *See Garcia, supra* note 26, at 40; Martin, *supra* note 131, at 65.

198. In states that require a specified circulation for newspapers, online newspapers may be incompatible because it is difficult for statisticians to document who is a member of a particular community served by the newspaper. *See MARTIN & HANSEN, supra* note 9, at 123.

199. For example, laws in Kentucky and Maryland require that such a newspaper sufficient for publishing legal notices must have at least four pages. *See KY. REV. STAT. ANN.* § 424.120 (LexisNexis 2005 & Supp. 2009); *MD. CODE ANN.*, art. 1, § 28 (West 2007). This qualification would disqualify online newspapers because of their intangible format.

200. MARTIN & HANSEN, *supra* note 9, at 124. A few states continue to require a newspaper to qualify for a “second-class” mail permit with the USPS. *See, e.g., ALASKA STAT.* § 09.35.140(2)(c) (2008); 45 PA. CONS. STAT. ANN. § 101 (West 2009). The USPS has renamed “second-class” mail status as “periodicals mail,” which has not affected states’ notice requirements. *See Legal Notices Published in Periodical Mail Newspapers*, Op. Fla. Att’y Gen. 96-44 (1996); *Changes to the Domestic Mail Classification Schedule*, Op. Ky. Att’y Gen. 97-16 (1997).

201. *See Online Version of Newspapers*, Op. Ohio Att’y Gen. No. 13 (2008).

202. *See OHIO REV. CODE ANN.* § 7.12 (West 2004).

203. A recent bill in the Ohio legislature proposed an amendment to Ohio’s publication law, *id.* 7.12, which would essentially confer online newspapers with the same status traditionally held by print newspapers by removing the requirement that a newspaper be distributed for a definite price and qualify for a second-class mailing privilege. *See Amended Substitute H.B. 1, 128th Gen. Assemb.*, at 16-17 (Ohio 2009), http://www.legislature.state.oh.us/BillText128/128_HB_1_EN_N.pdf. However, the bill did not propose removing the requirement that a newspaper be no less than four pages. *Id.* If this requirement were to be expunged, online newspapers would likely qualify as sufficient for publishing legal notices.

Governments should explicitly permit notice to be published in online newspapers. Four basic options for implementing this idea exist. First, states may enact statutes that simply permit notice to be published in an online newspaper as an alternative to publication in print.²⁰⁴ In Ohio, a bill was introduced to amend the Ohio Revised Code and provide that “any notice required to be published by a provision of a statute or rule may be published on the state-sanctioned public notice website.”²⁰⁵ The bill further proposed that the state’s Office of Information Technology would establish a state-sanctioned public notice website where parties can publish notices online for a fee fixed by the website’s service provider, and the public can search for legal notices for free. Though the bill does not speak specifically to the idea of publishing notices in online newspapers, it is offered to show an example of a statute where electronic publication is presented as an available alternative to publication only in newsprint. Second, states can require that legal notices be published in online newspapers and publicized on the state’s newspaper association’s website, while simultaneously permitting supplemental notice in newsprint. This idea is closely modeled on Utah’s publication law.²⁰⁶ Third, states may require that notices be published both in newsprint and in online newspapers. Under this model, the states’ newspaper association should also provide a searchable database of legal notices posted in online newspapers throughout the state. In Pennsylvania, a proposed bill advocates for a similar operation.²⁰⁷ Finally, statutes may preclude publication in

204. See H.B. 443, 127th Gen. Assemb., at 1-7 (Ohio 2007), http://www.legislature.state.oh.us/BillText127/127_HB_443_I_Y.pdf.

205. *Id.* at 5-6. If implemented, the legislation would require that the service provider shall, inter alia, (1) use an easily recognizable and remembered domain name; (2) keep the website fully accessible to and searchable by members of the public at all times; (3) not charge a fee for access or searches on the website; (4) ensure that notices displayed conform to statutory requirements; (5) charge a fixed fee to the party posting notice; (6) maintain an archive of notices; (7) enable current and archived notices to be accessed by identifiers such as keyword, party name, case number, or county; and (8) maintain adequate systemic security and backup features. *Id.*

206. See UTAH CODE ANN. §§ 45-1-101(1)–(2) (LexisNexis Supp. 2009); Jeffrey R. Gittins, *Utah Law Developments: Noteworthy Laws Passed During the 2009 Legislative Session*, 22 UTAH BAR J. 45, 45 (2009). This legislation pertains to “communication[s] required to be made public by a state statute or state agency rule . . . [or] a notice required for judicial proceedings or by judicial decision.” § 45-1-101(1)(A)(i). The statute further indicates that the website may not charge more than ten dollars to publish a legal notice on the website on or after January 1, 2012. § 45-1-101(4).

207. The bill proposes an amendment to 45 PA. CONS. STAT. ANN. § 308 (West 2009) to require that:

[E]very notice or advertisement required by law or rule of court to be published in one or more newspapers of general circulation, unless dispensed with by special order of court, shall also be published on an Internet website with a searchable database of legal notices, maintained by or contracted to provide such service by a newspaper of general circulation.

newsprint from satisfying due process altogether, and instead allow publication in online newspapers only.²⁰⁸

B. Due Process Restrictions on Notice in Online Newspapers

As discussed *supra*, the propriety of publishing legal notices in online newspapers depends on whether such notice satisfies the *Mullane* standard as being reasonably calculated under the circumstances to apprise interested parties with notice of proceedings affecting their interests.²⁰⁹ Though there is substantial evidence that the public is accepting the Internet as a primary means for communication, it is important to avoid allowing technology to infiltrate the legal process at the expense of procedural due process guarantees.²¹⁰ On one hand, courts should prefer historically accepted methods of service to non-traditional methods because such notices have been effective in the past.²¹¹ On the other hand, electronic delivery of notice is a better way to ensure that a defendant receives notice of a claim against him because notices can easily be accessed online without the physical restrictions of personal or mail service.²¹²

Internet notice may in fact ameliorate the due process implications posed by constructive notice. The Supreme Court noted in 1950 that when a notice is published in newspaper, only “chance alone” could ensure that an interested party receives notice.²¹³ This chance has been further reduced in recent years because print newspapers are less available and less popular than they previously were.²¹⁴ As a result, the “chance” the Supreme Court referred to is now seemingly non-existent.

H.B. 1876, 2009 Sess., at 4 (Pa. 2009), <http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2009&sessInd=0&billBody=H&billTyp=B&billNbr=1876&pn=2916> (emphasis added).

208. No state has suggested this solution at this time. However, as print newspapers approach the point of extinction, this alternative may be feasible in the future.

209. See *supra* Part II.C.3.

210. See *supra* notes 99-110; see also *Rio Props. v. Rio Int'l Interlink*, 284 F.3d 1007, 1017 (9th Cir. 2002) (explaining that the *Mullane* “reasonableness” standard constitutes “a broad constitutional principle [that] unshackles the federal courts from anachronistic methods of service and permits them entry into the technological renaissance”). But see Schreck, *supra* note 100, at 1142-44 (explaining that the right to be heard is not appreciated unless a party is informed that a matter is pending against him, and the Internet may be inadequate to protect this right because defendants may inadvertently delete important e-mail messages without having read them).

211. See Schreck, *supra* note 100, at 1146.

212. *Id.* at 1143. In class actions, for example, courts are “embrac[ing] the belief that [I]nternet notice may be preferable to traditional methods of publication notice.” Klonoff, *supra* note 20, at 734.

213. See *supra* note 122.

214. See Klonoff, *supra* note 20, at 732 n.31; see also *supra* Part III (discussing the depletion of the print newspaper industry).

The Internet will not only improve the chance citizens will receive notices when they are published in the public domain, but in some ways it can make certain that those who wish to receive notice will in fact receive it.²¹⁵ The Internet can overcome one of the difficulties of a traditional paper-based notice system, namely the problem of tracking defendants as they move around the world.²¹⁶

The process of searching online newspapers for legal notices is no different, and arguably no more onerous, than a traditional search in a print newspaper.²¹⁷ With “pull technology,”²¹⁸ readers must affirmatively check online newspapers to see if a legal notice implicates their interests, just like they would search newsprint. However, the Internet provides ways of enhancing and facilitating this process.²¹⁹ “Push technology”²²⁰ enables citizens to receive notices in their e-mail inboxes, without having to visit a website to conduct a manual search.²²¹ This feature, which is simply incompatible with newsprint, is an invaluable advantage for readers who no longer subscribe to print editions of newspapers. Moreover, publishing notices on the Internet can better serve the public by increasing government transparency; websites can store more official content than newspapers, including the full text of legislation and speech transcripts.²²²

One conspicuous argument against Internet notice’s ability to satisfy due process is that not all citizens have Internet access.²²³ However, the number of people who may be inconvenienced and find the solution unfair will decrease as the number of people with Internet access continues to grow and technology continues to develop.²²⁴ Further, the public may access the Internet at public libraries, which offer Internet service and access to subscription-based online services free of charge.²²⁵ The number of Americans visiting online newspapers

215. See *infra* Part IV.C.

216. It is difficult to locate defendants, even with the availability of the National Change of Address database and credit bureau records. Klonoff, *supra* note 20, at 731.

217. But see Kelly, *supra* note 26, at 113 (suggesting that “web publication of legal notices, even if fully searchable, presumes a great deal of effort from [those] . . . seeking information from the Internet” about claims against them). “An Internet-based notification system that continues to treat the computer as a plugged-in mailbox or newspaper that must be checked by humans raises the same issues of constant vigilance” as paper-based notice. *Id.*

218. See GUNTER, *supra* note 18, at 27-28.

219. See *infra* text accompanying notes 220-22, 238-44.

220. See *supra* note 18.

221. See *infra* text accompanying notes 238-41.

222. MARTIN & HANSEN, *supra* note 9, at 74.

223. Lindy Burris Arwood, Note, *Personal Jurisdiction: Are the Federal Rules Keeping Up With (Internet) Traffic?*, 39 VAL. U. L. REV. 967, 1004 (2005).

224. *Id.*

225. Cody Wamsley, *Internet Transmissions: Who Owns the Data and Who Protects It?*, J.

in recent years has increased dramatically. In the fourth quarter of 2009, online newspaper websites in the United States had an average monthly unique audience of seventy-two million visitors, more than one-third of all Internet users.²²⁶ As the audience for online newspapers continues to grow, the likelihood citizens will find out whether their interests are affected may be greater if notice is effectuated in online newspapers, rather than in printed form.²²⁷ Thus, providing constructive notice by publication in online newspapers alone should satisfy constitutional notions of due process.²²⁸

C. Extra! Extra! Read All About It (Online): A Uniform System for Internet Notice

As newspapers become outmoded and the cost of publishing advertisements in print newspapers increases, Internet notice may entirely replace newsprint as a medium for legal notices.²²⁹ However, switching legal notices from newsprint to the Internet need not detract from newspapers' ability to generate advertising revenue.²³⁰ Governments' public and legal notice requirements have provided financial support for newspapers throughout history; at a minimum, state legislatures can help the newspaper industry by continuing to require that legal notices be published in newspapers, though via their online counterparts.²³¹ The competing interests that pervade this Note (i.e., weak circulation and readership of printed newspapers, the need for wide dissemination of legal notices, and the Internet-savvy population) are accommodated in this win-win solution.

INTERNET L., Feb. 2008, at 3, 5.

226. Press Release, *supra* note 189.

227. The "argument that posting on a web site does not necessarily 'furnish' notice to anyone is unfounded. Just as it is impossible to assure that anyone will look at a particular web site, it is equally impossible to assure that anyone will purchase, much less read, a newspaper." Cent. Puget Sound Reg'l Transit Auth. v. Miller, 128 P.3d 588, 595 (Wash. 2006). "[P]osting on a public web site is at least as likely to provide the community with notice as the specifically approved notice given to a newspaper . . ." *Id.*

228. See Klonoff, *supra* note 20, at 749 ("[A]s courts accept the idea that internet notification is often more likely than hard-copy notice to reach the targeted populations, internet notifications may begin to replace, in addition to simply supplementing, traditional notice programs.").

229. See *supra* notes 13-20 and accompanying text.

230. The legal notice industry is an \$800 million industry. See Issenberg, *supra* note 26, at 38. Online newspapers, rather than any ordinary website, should be the preferred medium because permitting notices to be published on an alternative website will detract from the revenue newspapers traditionally derive from posting notice.

231. See FTC DISCUSSION DRAFT, *supra* note 3, at 16 (explaining that newspapers benefit by governments' notice requirements; "[a]s federal and state government entities push to save costs by publishing legal and public notices [on their own websites, rather than newspapers' online websites] . . . this revenue source is likely to decline substantially").

Utah's public notice law provides an excellent paradigm for the publication of legal notices.²³² While many states' newspaper associations have already established public notice databases,²³³ unless states require notices to be published in online newspapers, there is no guarantee citizens will find out whether their interests are implicated by searching in online notice databases.²³⁴ The Ohio bill is problematic because laws that allow for either online notice or print notice will be inconvenient for citizens who will be forced to search two mediums—both print and online newspapers—to find out whether their interests are implicated.²³⁵ The Pennsylvania model is equally as effective as the Utah model because it offers double protection by requiring that notices be published in two mediums.²³⁶ However, the two-medium requirement may become superfluous in the future as the print newspaper market continues to fold.

As an important due process safeguard concomitant with any statute permitting or requiring online newspapers to satisfy publication laws, each state's newspaper association should implement a website of legal notices with a searchable database.²³⁷ A database containing features discussed *infra* will facilitate the process of searching for notices, as well as improve the likelihood that citizens will be alerted of a notice. Parties suspecting their legal interests may be affected by an imminent lawsuit or other notice can easily conduct a “manual search”²³⁸ or register to receive notices by e-mail, a process known as a “smart search.”²³⁹ Akin to states' putative father registry paradigms,²⁴⁰

232. See UTAH CODE ANN. § 45-1-101 (LexisNexis Supp. 2009).

233. *Id.* For an exemplary model of an effective legal notice website, see UTAH LEGAL NOTICES, <http://www.utahlegals.com/> (last visited Aug. 31, 2010).

234. Citizens should be able to rely on only one online medium in which they can search notices. See *infra* text accompanying note 237.

235. See *supra* notes 204-05 and accompanying text.

236. See *supra* note 207 and accompanying text.

237. See *infra* notes 238-48 and accompanying text.

238. See, e.g., *Public Notices in Maryland*, MDCC PRESS ASS'N, <http://www.publicnoticeads.com/MD> (last visited Aug. 31, 2010). Users may conduct a “manual search” by searching notices either by county, name of newspaper, or by inputting certain search terms. *Id.* Similarly, on MyPublicNotices.com, an individual may manually search notices by date range, category, keyword, and state. See MYPUBLICNOTICES.COM, <http://www.mypublicnotices.com/PublicNotice.asp> (last visited Aug. 31, 2010).

239. See, e.g., *Public Notice Messenger*, MYPUBLICNOTICES.COM, <http://www.mypublicnotices.com/Messenger.asp> (last visited Aug. 31, 2010). This private website allows users to register, for a fee, to receive notices via e-mail that are relevant to the registrant's interests. *Id.* The website offers different subscription packages depending on whether users desire notices from a particular newspaper, all newspapers within the state, or newspapers across the nation. *Id.*

240. An unmarried man who suspects he has fathered a child may register with a state's putative father registry to guarantee that he will receive notice of any proceedings involving the adoption of his biological child. See Mary Beck, *Toward a National Putative Father Registry*

this mechanism would permit citizens to input their personal contact information into a database to enable them to receive notification of a relevant notice via e-mail.²⁴¹ Moreover, statewide or countywide RSS feeds similar to those provided on the Utah Press Association's legal notice website, should be implemented to promote accessibility and enhance the visibility of certain notices.²⁴² A database containing legal notices published in online newspapers is consonant with one of the most important features of the Internet generally, namely its ability to provide immediate access to information²⁴³ from any location, at any time.²⁴⁴

The Utah model for public notices satisfies most concerns regarding legal notices: (1) it continues to guarantee revenue for newspaper businesses;²⁴⁵ (2) it increases the likelihood that citizens will receive notice of proceedings affecting their interests by virtue of the ability to conduct a manual or smart-search, or browse RSS feeds;²⁴⁶ (3) it provides for a one-stop search for legal notices, eliminating the need for individuals to search each newspaper's website for notices;²⁴⁷ and finally, (4) for those who disagree that online newspapers alone are reasonably calculated to notify a party, the law permits supplemental notice by publication in a printed newspaper.²⁴⁸

V. CONCLUSION

The propriety of notice by publication is implicated by the troubled state of the newspaper industry.²⁴⁹ If the purpose of notice by publication is to ensure that a notice is given the widest publicity practicable, and to make sure that the rights of all concerned are safeguarded,²⁵⁰ online newspapers should be used to achieve these

Database, 25 HARV. J.L. & PUB. POL'Y 1031, 1032 (2002). The purpose of the registry is to provide a registrant with notice of any adoption plan, and give the registrant the opportunity to consent to, default on, or oppose, the adoption. *Id.* at 1039-40.

241. Citizens can register to receive notification via their state's newspaper association's e-mail alert feature if such is provided. *See* UTAH LEGAL NOTICES, *supra* note 233. Independent service providers also provide "e-mail alert" features for a fee. *See Public Notice Messenger*, *supra* note 239.

242. *See Utah Legal Notices*, *supra* note 233.

243. Fred Galves, *Virtual Justice as Reality: Making the Resolution of E-Commerce Disputes More Convenient, Legitimate, Efficient, and Secure*, 2009 U. ILL. J.L. TECH. & POL'Y 1, 1.

244. *See supra* note 190 and accompanying text.

245. *See supra* Part III.B.2.

246. *See supra* text accompanying note 242.

247. *See supra* notes 237-39 and accompanying text.

248. *See supra* note 206.

249. *See supra* Part III.A.

250. *See supra* notes 11-12 and accompanying text.

ends.²⁵¹ Statutes and procedural rules should no longer embrace only print newspapers as the default vehicle for providing constructive notice.²⁵² Especially in the context of initiating court proceedings, in the future, print newspapers may no longer be “reasonably calculated” to apprise a defendant that he may be deprived of his life, liberty or property rights.²⁵³

In every state where legal notices are required to be published in a newspaper, the state should instead require that notices be published in online newspapers.²⁵⁴ Citizens no longer need to “thumb through the printed pages . . . [or] look at all the current notices”²⁵⁵ to find out whether their interests are implicated. Rather, they can search databases of legal notices, or even have notices delivered to their personal e-mail addresses.²⁵⁶ Furthermore, publishing notices in online newspapers will reduce the amount of litigation concerning whether notice published in a certain newspaper afforded due process protections to an interested party.²⁵⁷ In sum, the transition from paper-based notice to Internet notice published in online newspapers will preserve the source of revenue for newspapers, and it will improve the chance that citizens are actually apprised of the content contained therein.²⁵⁸

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251. *See supra* Part IV.C.

252. *See supra* Part IV.

253. *See supra* Part IV.B.

254. *See supra* Part IV.C.

255. Kelly, *supra* note 26, at 113.

256. *See supra* Part IV.C.

257. *See supra* note 131.

258. *See supra* Part IV.C.

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