NAMES, NOTICE AND THE DEMANDS OF DUE PROCESS

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Abstract

Our apex court has recently given renewed support for a general rule that requires the claimant to name her defendant at the outset of a civil action; exceptionally, she may prove that the defendant will discover the proceedings in the process of enforcing an ensuing court order. The purpose of this article is to consider the justification for a general identification threshold, and to develop a corresponding blueprint for this part of our procedural framework. I argue that the role of procedural identification is two-fold: first, it serves the distributive goal of ensuring that judicial resources are not directed towards fruitless actions; second, it serves the corrective goal of ensuring that the defendant can participate in the decision-making process through which her adversary seeks redress, which is a crucial aspect of the law's commitment to procedural fairness. I argue that we should distinguish two kinds of case, which correspond to these goals: if the efficacy of the order sought depends upon provision of the defendant's name, the claimant should be required to provide a name; if it does *not*, the claimant should be required to prove – whether or not she can name her defendant – that she can give notice.

I. Introduction

What information must a claimant provide to the court at the outset of a civil action in order to identify her defendant? Absent explicit statutory guidance, courts have answered that question plainly: she must provide a *name*.[1] The logic of this rule seems compelling, perhaps self-evident: in a typical case, a claim against "person(s) unknown" would bear little fruit. But a growing number of cases are, in this respect, atypical. Often, a court order may be communicated to the unnamed wrongdoer herself, or to her (actual or anticipated) contractual counterparty, in such a way as to inhibit an ongoing or anticipated wrong. Several cases follow this pattern, involving *inter alia*: trespass;[2] defamation;[3] intellectual property infringement;[4] breach of contract;[5] and digital fraud.[6] Others concern the liability of a particular entity – typically, an insurer – for the conduct of a category of persons to which the wrongdoer may provably belong.[7] In these cases, the naming rule is not simply an averment of common sense; it is, it seems, a serious impediment to the victim's access to justice.

Before the Civil Procedure Rules 1998, the naming rule was widely accepted as a legacy of the formal writs. In particular contexts, that rule gave way to particular "anomalous"[8] exceptions that originated in the equitable jurisdiction of Chancery – actions against unincorporated organisations,[9] later (by extension) representative actions against groups of persons accused of the same wrong.[10] Those judicial exceptions were accompanied by a specific statutory rule for claims against unnamed

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[1] More precisely, the claimant must communicate the defendant's full name, via the claim form, to the issuing court.

[2] E.g. *Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site* [2004] Env LR 9; *Ineos Upstream Ltd v Persons Unknown* [2017] EWHC 2945; *UK Oil and Gas Investments plc v Persons Unknown* [2018] EWHC 2252.

[3] E.g. *Brett Wilson LLP v Person(s) Unknown* [2015] EWHC 2628; *Smith v Unknown Defendant Pseudonym "Likeicare"* [2016] EWHC 1775.

[4] E.g. *EMI Records Ltd v Kudhail* [1985] FSR 35.

[5] In the context of ticket-touting see *Jockey Club Racecourses Ltd v Persons Unknown* [2019] EWHC 1026.

[6] E.g. *CMOC Sales and Marketing Ltd v Persons Unknown* [2018] EWHC 2230; *Middleton v Persons Unknown* [2016] EWHC 2354; *PML v Persons Unknown* [2018] EWHC 838.

[7] See e.g. *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6.

[8] *Bloomsbury Publishing Group plc and another v News Group Newspapers Ltd and others* [2003] 1 WLR 1633 at [11] (Sir Andrew Morritt VC).

[9] *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] AC 426.

[10] *EMI Records Ltd v Kudhail* [1985] FSR 35.

trespassors.[11] The result was a piecemeal framework; no sustained effort was made to justify the procedural pre-eminence of names, much less an holistic concept of "identity" through which one might extrapolate from that rule to permissible actions against "persons unknown".

In 2003, the Court of Appeal embraced the procedural mandate conferred by the CPR,[12] dispensing with prior authorities and implementing a new test: a claimant could proceed against any person(s) whom she had identified by means of a description that was "sufficiently certain as to identify both those who are included and those who are not".[13] Yet, that revolution was short-lived. In 2019, giving judgment for the Supreme Court in *Cameron v Liverpool Victoria Insurance Co Ltd*,[14] Lord Sumption insisted that the CPR had not displaced the general rule: the claimant must provide her defendant's name,[15] or (exceptionally) proof that she will discover the proceedings at some point – whether prior to the hearing or in the process of enforcing an ensuing court order.[16]

The decision of the Supreme Court in *Cameron* raises several questions about the purpose and scope of the naming rule in civil procedure. In light of modern forms of communication, the provision of a legal name is rarely necessary to ensure that the claimant is able to convey notice of her claim, but it may well be insufficient for that purpose. Moreover, if an unnamed defendant may be sued wherever the court order "can be enforced in a way that will bring the proceedings to [her] attention"[17] *Cameron* prescribes a ready way to emaciate that rule. Yet, it is not easy to reconcile that derogation with more fundamental concerns of access to justice: a defendant who is made aware of proceedings in sufficient time to prepare a defence is in a markedly different position from one who discovers them *ex post*.

The question of whether and when a claimant may sue a defendant whom she cannot name has clear implications for the courts' ability to deliver justice in a variety of cases that involve successful disguise or flight.[18] Answering it is now an urgent task: the rapid growth of online activities conducted anonymously or pseudonymously has made strict adherence to the naming rule increasingly untenable,[19] and judges have identified a pressing need to develop the courts' procedural armoury to "meet the challenges posed by the modern electronic methods of communication and of doing business".[20] That goal cannot be met without systemic evolution, steered by a clear understanding of the role of procedural identification. The purpose of this article is, accordingly, twofold – to elucidate that role, and to set out a corresponding blueprint for this part of our procedural framework.

In Part II, I describe the existing approach to, and justification of, a general procedural identification threshold. I argue that the role of such a threshold is two-fold, broadly corresponding to a distinction between distributive justice (resource-allocation *tout court*) and corrective justice (resource-allocation *inter partes*):[21] first, it helps to ensure that limited judicial resources are not directed towards actions that cannot bear fruit; second, it helps to ensure that the defendant is equipped to participate in the decision-making process. This second goal is a crucial aspect of the law's commitment to procedural fairness. In an adversarial system, justice is borne out of a "sharp clash of proofs"[22] presented by self-interested opponents. Thus, due process is not a uni-directional concern: if the claimant ought to be able to put her case to the court, the defendant ought to be able to answer it.

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[11] RSC Ord. 113, r.1.

[12] *Bloomsbury Publishing Group plc and another v News Group Newspapers Ltd and others* [2003] 1 WLR 1633 at [15]; [20].

[13] *Bloomsbury Publishing Group plc and another v News Group Newspapers Ltd and others* [2003] 1 WLR 1633 at [21] (Sir Andrew Morritt VC).

[14] *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6.

[15] *Cameron* [2019] UKSC 6 at [9]. That rule was underpinned by a "fundamental principle of justice": an individual could not be subjected to the court's jurisdiction without notice "such notice of the proceedings as will enable him to be heard" (at [17]).

[16] *Cameron* [2019] UKSC 6 at [15].

[17] *Cameron* [2019] UKSC 6 at [15].

[18] That wrongdoers do conceal pertinent information successfully has precipitated discrete pockets of compensation for claimants without recourse e.g. MIB Untraced Drivers Scheme and the Criminal Injuries Compensation Scheme.

[19] For Lord Sumption, the Internet is a "powerful tool for anonymous wrongdoing": *Cameron* [2019] UKSC 6 at [11].

[20] *CMOC Sales and Marketing Ltd v Persons Unknown* [2018] EWHC 223 at [188] (Waksman J).

[21] With the goal of correcting a prior bilateral injustice; see generally J. Gardner, "What is Tort Law For? Part 1. The Place of Corrective Justice" (2011) 30 Law and Philosophy 1.

[22] S. Landsman, "A Brief Survey of the Development of the Adversarial System" (1983) 44 Ohio State Law Journal 713, 714. See further R. Assy, *Injustice in Person: The Right to Self-Representation* (Oxford: Oxford University Press 2015).

In Part III, I address the consequences of this account for the scope of the naming rule. I argue that we should draw a clear division between two kinds of case, which correspond to the goals of procedural identification. If the practical efficacy of any interim or final award depends upon provision of the defendant's name, the claimant cannot sue an unnamed defendant. However, if the practical efficacy of any interim or final award does *not* depend upon provision of the defendant's name, the naming rule has no place. Instead, the claimant must prove – whether or not she can name her defendant – that she can give notice; this ensures that the defendant is not precluded from participating in a judicial process through which her rights and duties are to be determined.

The formal writs were developed almost a millennium before portable communication devices became ubiquitous, when names and residential addresses were the best possible insurance that the claimant could convey notice. We now have devices that not only facilitate reliable transmission on-the-go, but which also allow senders to ensure that recipients have accessed the content of their missive. Thus it is that courts often permit service by email, text message or social-media post. In these circumstances, the naming rule is both overinclusive (where it permits an action in which notice cannot be conveyed), and underinclusive (where it precludes an action in which notice can be conveyed via some mechanism that does not require the defendant's legal name). I argue, therefore, that the general rule for these cases should be revised: where the defendant's name is not a prerequisite to the practical efficacy of the court order sought, the claimant may sue a defendant – named or unnamed – upon whom she can serve notice of her claim.

II. Towards a Concept of Procedural Identity

1. Introduction

English civil procedure is defined by its enduring formalism. That formalism has not always limited access to the courts,[23] but it does tend to obstruct efforts towards normative retrodiction – in particular, to abstract from prior law the sort of general reasons that support sound legal categorisation. In consequence, much of our modern law has been developed through taxonomic practices that would have been alien to the Medieval or Early Modern judge. The Civil Procedure Rules 1998 were designed with the goal of counteracting that particularism, and the judicial ingenuity to which it gave rise.

In what follows, we will see that the courts have been reluctant to take this opportunity to rationalise procedural identity. In the absence of any clear statutory prescription, the pre-CPR *status quo* has prevailed: a claimant cannot access the court without supplying her defendant's name. Where necessary, courts have derogated from the naming rule on an *ad hoc* basis. No sustained effort has been made to justify the longevity of that rule, or the various exceptions to it.

An increase in anonymous and pseudonymous activity online has placed this framework under growing strain, and judges have been explicit in their concerns about its ability to meet the challenges posed by modern forms of social and commercial interaction.[24] Modernity is hardly a trump card; there may yet be good reasons to insist upon strict adherence to the orthodox framework. But it is long past time to articulate those reasons, and set them against those that exist for widening access to the courts.

In what follows, I argue that the demand for identification acts in service of two goals: the first is to ensure that the courts' resources are not directed wastefully; the second is to ensure that the defendant is able to participate in judicial proceedings through which her rights and duties are to be determined. The second goal is part of a broader, bi-directional concern for procedural fairness. If courts must be accessible, their remedial architecture supports a specific, participative mode of delivering justice: the claimant must make, and the defendant must answer, the case against her.

2. Naming and Claiming: The Formulaic Approach

[23] Baker notes there were once "as many writ formulae as there were types of action" J. H, Baker, *An Introduction to English Legal History* (Oxford: Oxford University Press 2002), at p.62. See also H. de Bracton, *On the Laws and Customs of England,* Vol IV 286. That list, long as it was, was open.

[24] See e.g. *CMOC Sales and Marketing Ltd v Persons Unknown* [2018] EWHC 223 at [188] (Waksman J).

From the mid-Thirteenth Century until the procedural reforms of the Nineteenth, the process for commencing an action was conducted by way of discrete, highly-formulaic writs. These writs were a sort of "pass" – "admitting a suitor to the court, and to the kind of justice for which he had paid". [25] There were a variety of writs, and it was incumbent upon the claimant to choose the correct one for her purpose. Yet, each recorded the full name of each party; most required additional (familial or residential) details.[26]

There was only one standard route for circumventing the naming requirement, and it concerned the real action of "ejectment" and a set of (now well-known)[27] fictional protagonists. Ejectment, a species of trespass, was originally developed to furnish lessees with a way of recovering possession in cases of unlawful ouster. The action spread to disputes over freehold title by means of two powerful fictions – a lease, and the putative parties to it. In these cases, the plaintiff would cause a notional lessee ("John Doe")[28] to bring an action against a notional ejector ("Richard Roe"); the plaintiff would then enter an appearance to the action on behalf of Richard Roe, and deliver notice to the real defendant. As an order for possession would otherwise follow without more, the real defendant was effectively "compelled to go along with the charade" – to accept the fictions and enter a plea of "Not Guilty".[29] In this way, the plaintiff could ensure that the only matters put before the jury concerned the freehold title, rather than the "web of supporting fictions".[30] This new form of action had a number of procedural advantages – not least, a fast mesne process and trial by jury in the claimant's county (*nisi prius*). These advantages bred sufficient popularity that for three centuries the standard action to recover possession of real property involved two fictional parties.[31]

The fictions were officially abolished by the Common Law Procedure Act 1852, and the forms of action by the Judicature Acts 1873–75.[32] Yet, formalism prevailed: the proper procedure was still to issue a writ to "C D of, etc in the County of…", with which the courts demanded strict compliance. In *Friern Barnet Urban District Council v Adams* in 1927,[33] Lord Hanworth insisted that a writ must name "a particular defendant of a specified address";[34] thus, the claim to enforce a debt for repair works against "the owners of certain lands adjoining Alexandra Road" failed for want of procedural propriety. That approach stood the test of time: some 50 years later in *In re Wykeham Terrace*,[35] Stamp J rejected a claim in trespass against unnamed squatters. The court would not, he said, "admit any other procedure for obtaining relief against another than one commenced either by writ or by originating summons issued on behalf of the plaintiff and naming as a defendant the person against whom the relief is sought".[36]

There were certain discrete exceptions to the naming requirements. Order 113, Rule 1 of the Rules of the Supreme Court instituted a special rule for claims against trespassors: a claimant could sue without giving her defendant's name, provided that she had an immediate right to possession.[37] Moreover, if a claimant could name one of a group of wrongdoers, she could sue the rest by proxy.[38]

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[25] See further *CMOC* [2018] EWHC 223 at 60.

[26] e.g. "John Smith, son of John of Clavering"; "Jane Simpson of County Devon"

[27] See e.g. *OBG Ltd v Allan* [2007] UKHL 21; [2008] 1 A.C. 1 at 229 "There was a time when John Doe and Richard Roe were popular characters…" (Lord Nicholls).

[28] Sometimes called e.g. "Goodtitle"; the defendant was sometimes termed e,g. "Shamtitle" or "Thrustout".

[29] See J. H. Baker, *An Introduction to English Legal History* (Oxford: Oxford University Press 2002), at p. 448–450.

[30] See further ibid.

[31] From the C16th to the C19th. According to Sir Thomas Egerton, it had "amost utterly overthrown" the assizes and writs of entry. See further J. H. Baker, *An Introduction to English Legal History* (Oxford: Oxford University Press 2002), at p.321.

[32] See further *Secretary of State for Environment, Food, and Rural Affairs v Meier and another* [2009] UKSC 11 at [33] (Lord Rodger).

[33] *Friern Barnet Urban District Council v Adams* [1927] 2 Ch 25.

[34] *Friern Barnet* [1927] 2 Ch 25 at 30.

[35] *In re Wykeham Terrace, Brighton, Sussex, Ex p Territorial Auxiliary and Volunteer Reserve Association for the South East* [1971] Ch. 204.

[36] *In re Wykeham Terrace* [1971] Ch. 204 at 208.

[37] *Manchester Airport plc v Dutton* [2000] QB 133; [1999] 3 WLR 524.

[38] *Bloomsbury Publishing Group plc and another v News Group Newspapers Ltd and others* [2003] 1 WLR 1633 at [11].

In its original form, the latter exception allowed judges to draw substantive parallels between companies and some forms of unincorporated organisation; over the course of the 20th Century, it came to encompass cases in which the alleged wrongdoers were not members of any formal association, but merely shared some common interest.

When the Civil Procedure Rules were introduced in 1998, CPR Part 7 took over the role of prescribing the manner in which proceedings should be commenced. The rules for identification are neither mandatory nor complete: Practice Direction 7A, para 4.1 provides that a claim form must be headed with the title of the proceedings, which "should state" the "full name of each party"; Rule 55.3(4) exceptionally permits a claim for possession against trespassers whose names are unknown;[39] Rule 8.2 lists the necessary contents of a claim form for action brought under Part 8, but says nothing about the need to provide a name; finally, Rule 8.2A provides that a practice direction "may set out circumstances in which a claim form may be issued under this Part without naming a defendant",[40] but no such practice direction has yet been made.

Nevertheless, it appeared at first that the courts would be prepared to depart from the framework established by pre-CPR authorities.[41] Not long after the CPR were introduced, the High Court in *Bloomsbury Publishing Group Ltd and JK Rowling v News Group Newspapers Ltd* considered the question of how (if at all) they had affected the procedural formula for identification.[42] In that case, the claimants sought to extend an interlocutory injunction awarded against "the person or persons who have offered the publishers of [certain] newspapers a copy of the book *Harry Potter and the Order of the Phoenix*".[43] According to Sir Andrew Morritt VC, the CPR had wiped the slate clean: prior authorities were no longer binding, and Rule 1.1 and its attendant judicial obligations were inconsistent with the type of "undue reliance on form over substance"[44] typical of cases like *Friern* and *In re Wykeham Terrace*. The judge rejected the "anomalous"[45] position of English law, favouring the Canadian conclusion: a claimant should not "be frustrated in his claim by a procedural requirement that the defendant be named where the circumstances are such that the name is not known or ascertainable".[46] Thus, individuals could be sued by description, if the description was "sufficiently certain as to identify both those who are included and those who are not".[47] The claimants passed that test, and were granted the extension sought.

Bloomsbury is hardly a blueprint for procedural coherence. Beyond a general wish to soften the rigours of the naming rule, Sir Andrew Morritt VC did not espouse any justification for his test, and it appears largely self-referential: a description suffices to identify the defendant wherever it is "sufficiently certain as to identify [the defendant]". Nevertheless, the decision laid the groundwork for future courts to craft a new, holistic grounding for the procedural rules in light of Rule 1.1. It was against this background that the Supreme Court was given the opportunity in *Cameron v Liverpool Victoria Insurance Co Ltd* to consider the "basis and extent of the jurisdiction"[48] to proceed against unnamed defendants.

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[39] CPR 55.3(4) permits a claim for possession of property to be brought against trespassers whose names are unknown In addition, there are specific statutory exceptions, such as the exception for proceedings for an injunction to restrain "any actual or apprehended breach of planning controls" under section 187B of the Town and Country Planning Act 1990 Section 187B(3) provides that "rules of court may provide for such an injunction to be issued against a person whose identity is unknown".

[40] CPR 8.2A envisages that the permission of the court will be required, and that the court will issue directions as to the management of the claim, but that notice of application "need not be served on any other person".

[41] See e.g. *Purdy v Cambran* [2000] CP Rep 67 at [51] (Swinton Thomas LJ): "It is clear, in my view, that what Lord Woolf was saying was that reference to authorities under the former rules is generally no longer relevant. Rather is it necessary to concentrate on the intrinsic justice of a particular case in the light of the overriding objective".

[42] *Bloomsbury Publishing Group plc and another v News Group Newspapers Ltd and others* [2003] 1 WLR 1633.

[43] As well as those who had obtained such a copy – in each case without consent.

[44] *Bloomsbury Publishing Group plc and another v News Group Newspapers Ltd and others* [2003] 1 WLR 1633 at [19].

[45] *Bloomsbury* [2003] 1 WLR 1633 [11].

[46] *Golden Eagle Liberia Ltd v International Organisation of Masters, Mates and Pilots, Marine Division, International Longshoremen's Association* [1974] 5 WWR 49 at 52.

[47] *Bloomsbury* [2003] 1 WLR 1633 at [21].

[48] *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6 at [11].

Cameron involved a "hit and run" motoring offence. The claimant, Bianca Cameron, was injured in a car crash caused by the negligence of the driver of a Nissan Micra, who – having failed to stop or notify the police – could not be located. Cameron sued the registered keeper, but later amended the claim to include Liverpool Victoria Insurance Co Ltd ("the insurer"), who had provided a policy over the Micra to an apparently-fictitious person. Cameron then sought to amend the claim to substitute the registered owner with "the person unknown driving vehicle registration number Y598 SPS who collided with vehicle registration number KG03 ZJZ on 26 May 2013", seeking a declaration under s151 of the Road Traffic Act 1988 that the insurer was obliged to satisfy any otherwise-unsatisfied judgment obtained against the driver.

The district judge granted summary judgment in favour of the insurer,[49] concluding that Rule 1.1 gave reason to deny the claimant an alternative to her existing remedy under the Motor Insurers' Bureau Untraced Drivers' Scheme, where the insurer would otherwise be burdened by the dual impact of s151 and a prospect of indemnity that was "no more than fanciful".[50] A majority of the Court of Appeal disagreed. Giving the leading judgment, Gloster LJ rejected the insurer's submissions that an unnamed defendant could only be joined in exceptional circumstances, and only in a claim for specific relief;[51] Rule 1.1 demanded an award of damages, as it would otherwise be impossible to obtain a judgment that the insurer would be bound to satisfy.[52] Sir Ross Cranston dissented: in his opinion, the CPR warranted a "high threshold"[53] for claims against unnamed parties; that threshold was not met where any "real potential for injustice" was negated by the alternative remedy under the MIB Untraced Drivers' Scheme.[54]

The majority's decision was overturned on appeal. Giving judgment for the Supreme Court, Lord Sumption thought that – in providing for a limited set of exceptions, and none at all for claims against unnamed persons – the CPR lent "implicit" support for the pre-CPR *status quo*.[55] Thus, the "general rule" remained that "proceedings may not be brought against unnamed parties".[56] Nevertheless, Lord Sumption reaffirmed two judicial exceptions to that rule, complementing the statutory rules for trespassors: first, claims against representative wrongdoers in which "some of the wrongdoers were known so they could be sued both personally and as representing their unidentified associates";[57] second (of which he considered *Bloomsbury* exemplary), claims for an interim award in which the process of enforcement "would be enough to bring the proceedings to the defendant's attention".[58]

Thus, the decision in *Cameron* putatively negates the impact of *Bloomsbury*, and any attendant suggestion that the CPR had altered the pre-existing common law rules for procedural identity. There remains a general rule that a would-be claimant must identify her counterparty by name; that general rule may only be disapplied in exceptional circumstances.

3. The Modern Challenge

We saw above that *Cameron* appears to signal a renewed commitment to the naming rule. Yet, there are two good reasons to think that the decision may not have the restraining impact that it portends: the first concerns the difference between *Cameron* and the facts of most cases in which the identity question arises; the second concerns the way in which Lord Sumption sought to reconcile these cases with the pre-CPR procedural framework.

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[49] That judgment is set out in *Cameron v Hussain, Liverpool Victoria Insurance Co Ltd* [2017] EWCA Civ 366 at [13].
[50] See further ibid.
[51] Ibid, [53].
[52] This is how Lord Sumption explained the decision in *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6 at [7].
[53] *Cameron v Hussain, Liverpool Victoria Insurance Co Ltd* [2017] EWCA Civ 366 [105].
[54] Ibid, [106].
[55] *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6 at [9].
[56] *Cameron* [2019] UKSC 6 at [9].
[57] *Cameron* [2019] UKSC 6 at [10].
[58] *Cameron* [2019] UKSC 6 at [15].

In a series of decisions over the 16-year period between *Bloomsbury* and *Cameron*, Sir Andrew Morritt VC's test was embraced as a mechanism for allowing the victims of online wrongdoing to access the courts' remedial jurisdiction. Amongst other awards, that test has been applied to ground freezing orders in respect of money obtained by email fraud,[59] and injunctive relief to suppress: a "campaign of harassment";[60] the publication of defamatory materials on websites;[61] and mainstream media publication of confidential information obtained wrongfully from iCloud accounts,[62] and IT systems.[63] In each such case, the court's reasoning betrayed little of the old formulaic approach, emphasising a need for the courts' "procedural armoury" to be sufficiently flexible to "meet the challenges posed by the modern electronic methods of communication and of doing business".[64]

In *Cameron*, Lord Sumption sought to expound a principle that was at once broad enough to accommodate these decisions, and also compatible with the logic of the naming rule: what justified the outcome in these cases was some mechanism for "bringing the proceedings to the defendant's attention" – whether prior to the hearing, or in "the process of enforcing" an interim award.[65] Thus, *Cameron* could be distinguished from *Bloomsbury* on the basis that "the unnamed defendants would have had to identify themselves as the persons in physical possession of copies of the book if they had sought to do the prohibited act".[66]

It bears emphasis that "the process of enforcing" to which Lord Sumption referred does not describe the legal process of issuing a court order or suing for contempt.[67] Rather, it describes the practical impact of the injunction – the moment that the third party on notice rebuffs the attempt at action that, if taken, would contravene the prohibition.[68] Thus, the general rule remains that the claimant must name her defendant; exceptionally, she may show that the defendant will be likely to discover the proceedings at some point – whether prior to the hearing, or when the defendant attempts to act in contravention of the court order.

This notice rule is certainly broad enough to encompass *Bloomsbury*. Indeed, there may be little to distinguish it in practice from the test put forward in that case. Sir Andrew Morritt VC emphasised that the order sought was distinguishable from those that "would not bind any one to do or abstain from doing anything",[69] which had been denied in previous cases. *Bloomsbury* does not, therefore, provide a foundation for the pursuit of fruitless (interim or final) awards. Yet, the effectiveness or otherwise of an interim injunction is very difficult indeed to disentangle from notice. A court order to act or not to act in some specified way will be effective to the extent that: (i) the defendant knows about it, and has some reason (such as wishing to avoid liability for contempt) for acting in compliance with it; or (ii) the defendant can only commit the wrongful act with the help of some third party who knows about it, and has some reason (such as wishing to avoid liability for contempt) for acting in compliance with it. Thus, the rule that the defendant must discover the proceedings in the course of attempting to perform the prohibited act is, in practice, reducible to the rule that an unnamed defendant can be sued if the court order can be enforced, and if the claimant's description is sufficiently clear that it is possible to work out who falls within the identified class.

Perhaps there are good reasons to welcome that outcome. If so, the question then becomes: is there some normative weight to the notion that the third party's notice should be a conduit to that

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[59] *CMOC Sales and Marketing Ltd v Persons Unknown* and *World Proteins Kft v Persons Unknown* [2019] 4 WLUK 35.
[60] *GYH v Persons Unknown* [2018] EWHC 121.
[61] *Brett Wilson LLP v Person(s) Unknown* [2015] EWHC 2628.
[62] *Middleton v Persons Unknown* [2016] EWHC 2354.
[63] *Clarkson Plc v Person or Persons Unknown* [2018] EWHC 417.
[64] *CMOC Sales and Marketing Ltd v Persons Unknown* and *World Proteins Kft v Persons Unknown* [2019] 4 WLUK 35 at [188] (Waksman J).
[65] *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6 at [15].
[66] *Cameron* [2019] UKSC 6 at [15].
[67] If it did, the test would be altogether self-defeating – not only because enforcement depends upon the information that the process putatively reveals, but also because a third party with notice of an injunction that carries the threat of contempt is considerably less likely to allow the wrongful act to go ahead; to this extent, making the award would make the probability of discovering that information much lower.
[68] Publishing information, accessing bank funds etc.
[69] *Bloomsbury Publishing Group plc and another v News Group Newspapers Ltd and others* [2003] 1 WLR 1633 at [20].

of the defendant, or is it preferable to dispense with the general rule in favour of an explicit jurisdiction to proceed by description? If the procedural hurdle is, in fact, intended to provide a more robust check on the court's jurisdiction than that which emerges from *Cameron*, it may be necessary to revisit the scope of Lord Sumption's judicial exception. Either way, it is long past time to articulate the justification for requiring the claimant to identify her defendant – by name, by description, or otherwise in such a way as to ensure that the claim is brought to the defendant's attention.

4. Identity and Procedural Justice

The justificatory question has not been ignored by the courts; nor has it been dealt with systematically. At least three considerations compete for prominence, and courts in different cases (and at different levels in the same case) have reached opposing conclusions about what the CPR require on a particular set of facts. It is very difficult indeed to discern a single principle, or set of principles, that justify the demand for identification; it is harder to predict how the relevant test will play out in any given case.

The first and most obvious consideration goes to whether the order sought can in fact be enforced; the claim is that the procedural threshold is part of a category of rules which ensure that the judicial process is used for proper purposes, and to fruitful ends. Thus, an interim award will only be made if there is a serious issue to be tried;[70] so too, a claimant cannot proceed against an unnamed defendant if and because there is no way of enforcing the court order. In *Bloomsbury,* enforceability appeared both as a negative threshold and as a positive reason for making the award sought. Sir Andrew Morritt VC identified two reasons for Stamp J's decision in *In re Wykeham Terrace*: first, there was no defendant; second, the order sought "would have no effect".[71] In the instant case, by contrast, both the defendant and third party publishers could in principle be held liable for contempt.[72] Thus, "ubi jus ibi remedium",[73] the court could and ought to respond to a clear instance of wrongdoing. No consensus has yet emerged regarding whether access to an alternative remedy is a reason for precluding a suit against an unnamed defendant.[74]

The second, related, consideration goes to the nature and seriousness of the alleged wrong. *CMOC Sales Marketing Ltd v Persons Unknown*,[75] decided shortly before *Cameron*, concerned a claim for a worldwide freezing order against persons unknown in respect of an email compromise fraud.[76] Granting the order sought, Waksman J considered that relief against persons unknown was "particularly apposite where the reason they are unknown is because of their activities as hackers".[77] Two factors appear to have informed this conclusion: first, there was something particularly egregious about the wrong perpetrated in that case;[78] second, the court ought to be equipped to respond to modern forms of wrongdoing.[79] The first factor has appeared elsewhere in cases of hacking;[80] neither appeared (at all or decisively) in any level in *Cameron*.

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[70] Or (where the claim is for a freezing order, or where service will be made outside of the jurisdiction), good arguable case.

[71] It "would not bind any one to do or abstain from doing anything": *Bloomsbury* [2003] 1 WLR 1633 at [10]; [20].

[72] On the facts of *Bloomsbury*, "A person falling within the description of the defendant could be liable for contempt of court if he acted inconsistently with [the injunction and] any other person who knowing of the order assists in its breach or nullifies the purpose of a trial may also be liable for contempt": *Bloomsbury* [2003] 1 WLR 1633 at [20].

[73] *Bloomsbury* [2003] 1 WLR 1633 at [14]. It has also been emphasised that the relevant order might be a "springboard for the grant of ancillary relief in respect of third parties": *CMOC Sales and Marketing Ltd v Persons Unknown* [2018] EWHC 2230 at [183] (Waksman J).

[74] In the Court of Appeal in *Cameron*, Gloster LJ thought it irrelevant that the claimant would have been entitled to recover from the MIB, but the same fact weighed against recovery in the Supreme Court.

[75] *CMOC Sales and Marketing Ltd v Persons Unknown* [2018] EWHC 2230.

[76] Those "persons unknown" were described by reference to their participation in the relevant fraud, or receipt of monies in consequence of it.

[77] *CMOC Sales and Marketing Ltd v Persons Unknown* [2018] EWHC 2230 at [187].

[78] Waksman J cited *PML v Persons Unknown* [2018] EWHC 838, in which the judge emphasised that the nature of the wrongdoing entailed by hacking imposed an "obligation of confidence".

[79] In Waksman J's words, the award "reflects the need for the procedural armoury of the court to be sufficient to meet the challenges posed by the modern electronic methods of communication and of doing business".

[80] See e.g. *PML v Persons Unknown* [2018] EWHC 838.

The final consideration concerns the statutory context. In *Cameron*, Gloster LJ considered that the overall purpose of the statutory regime was to place the burden of risk of a lack of recourse upon the insurer,[81] which risk insurers were able to manage at the stage of issuing a policy. By contrast, the district judge,[82] Sir Ross Cranston on appeal,[83] and Lord Sumption in the Supreme Court,[84] each thought that the statutory regime encouraged the claimant to pursue remediation from the MIB.

Each of these considerations – enforceability, the nature of the wrong and of the statutory context – goes to the strength of the argument from the claimants' interests. Little attention was paid in the majority of these cases to the question of whether and how the decision could be reconciled with (individual or systemic) reasons that might exist for wishing to ensure that the defendants can participate in the relevant proceedings. The older cases are less reticent in this regard; here, it is instructive to return to the decision in *In re Wykeham Terrace*.[85]

We saw above that in *Bloomsbury*, Sir Andrew Morritt VC extracted two reasons from Stamp J's judgment in *In re Wykeham Terrace* for denying the claim: first, there was no defendant; second, the court order could not be enforced. Yet, that does not quite tally what the judge said. Stamp J *did* claim that the order would "bind nobody",[86] but went on expound what he saw as a crucial distinction between the order and its execution: the order might well cause the trespassors to be evicted, but as a "matter of law", a court order "binds only the parties to the proceedings" – which, he emphasised "these trespassors are not".[87] Thus, the judge's concern was clearly not (or not merely) one of enforceability; rather, the procedural omission was fatal to the assignment of a particular (mandatory) legal status. And the principle guiding that assessment was clear. According to Stamp J, it was in the nature of what he called the "accusatorial process" that a party could not obtain a court order "except in proceedings to which that other person is a party and after that other person has had the opportunity of appearing before this court and putting forward his answer to the claim".[88] Lord Sumption echoed this point in *Cameron*: it was, he said, a "fundamental principle of justice" that "a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard".[89]

This provides a crucial step towards a justification for the procedural threshold. As Stamp J saw it, the logic of the adversarial process is that setting two self-interested parties against one another best equips the judge to discover information that is relevant to disposing of the case; the scales of justice are, then, irreparably off-kilter wherever the defendant is not a party to the claim.[90] That claim reveals an important difference between access to the court's remedial jurisdiction on one hand, and access to justice on the other. The former appears as a singular concern for the claimant's ability to bring her case before a judge; it encourages, therefore, the widest possible concept of procedural identity. By contrast, where access to justice is understood as part of a demand for open, fair and accountable decision-making, it asks that we consider the position of each party; if there are reasons for allowing the claimant to bring her case, there may be reasons for insisting that the defendant have the means to answer it.

Concerns of procedural fairness are often presented via a dichotomy: on one hand, the absence of bias, the demand for reasons and for participation are each ingredients that – in the right quantities

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[81] *Cameron v Hussain, Liverpool Victoria Insurance Co Ltd* [2017] EWCA Civ 366 at [44]: "Thus the effect of the statutory regime is clear. Like its predecessors, the 1988 Act gives insurers rights of recourse against the insured or other culpable third party where they must pay out without contractual obligation to do so".

[82] The judgment is set out in *Cameron v Hussain, Liverpool Victoria Insurance Co Ltd* [2017] EWCA Civ 366 at [13].

[83] *Cameron v Hussain, Liverpool Victoria Insurance Co Ltd* [2017] EWCA Civ 366 at [111].

[84] *Cameron v Hussain, Liverpool Victoria Insurance Co Ltd* [2017] EWCA Civ 366 at [22].

[85] *In re Wykeham Terrace, Brighton, Sussex, Ex p Territorial Auxiliary and Volunteer Reserve Association for the South East* [1971] Ch. 204.

[86] *In re Wykeham Terrace* [1971] Ch. 204 at 209.

[87] *In re Wykeham Terrace* [1971] Ch. 204 at 209.

[88] *In re Wykeham Terrace* [1971] Ch. 204 at 208.

[89] *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6 at [17].

[90] Similar concerns appear to have informed Lord Sumption's decision in *Cameron*: there was, he said, a "fundamental principle of justice" that "no person can be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard": *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6 at [17].

– will generate "accurate and proper decisions";[91] on the other, procedural fairness is part of a concern for individual autonomy, manifesting an "implicit connection between participation and respect".[92] Yet, that characterisation belies a more fundamental interdependence:[93] a defendant might think it "good" to avoid an award of damages of a term of imprisonment; an impartial observer might think the decision "good" on account of some sympathy for the sector of society to which the defendant belongs, abhorrence for institutionalised punishment etc; but assessing whether processes generate "accurate and proper decisions" requires us to consider whether they are good on the basis of considerations that pertain to the legitimacy of the system as a whole. The case may be made that a decision is "accurate and proper" if it is taken by reference to reasons set out in advance; that prompts the question of *why* decisions should be made by in this way – perhaps because citizens are thereby equipped to pursue their objectives. Thus, enquiry regresses to normative claims of this sort: a legal system must (to exist at all, or to be effective) embed respect for autonomy, as a function of due respect for dignity.[94]

This points to a deeper theoretical distinction, borne of different approaches to the nature of law and legitimate authority. For some, the rule of law expresses a peculiar concern for law's capacity to guide action; one's dignity is compromised by unpredictable law-making, which frustrates the reasons for which the law seeks to encourage autonomous action.[95] Participation may then matter in two general ways: it should be possible for individuals to comprehend the rules that apply to them, and those rules must be subject to constant oversight.[96] It matters at an individual level, where the adversarial process is geared towards a particular form of decision-making, because parties' expectations about *how* a particular dispute is to be resolved are as important as the substantive rules. It is true then both that "he said, she said" is permissible only if "he" and "she" are both heard, and that the judge must not forgo the adversarial method for a different one.[97] For others, participation ensures that individuals are able to influence decisions that concern them; it is "when procedures allow genuine participation, in the sense that questions of justice can be raised an answered, and where every rule is ultimately open to challenge" that "the citizen is treated with the respect which his dignity deserves".[98] This is not just a concern for equality before the law,[99] nor is it purely the domain of the adversarial hearing (though exclusion may be "especially odious" in that context);[100] it is a claim that the defendant should have the opportunity to be heard in respect of a decision-making process through which her rights and duties will be settled.

Whichever view of procedural fairness one prefers, it ought to be clear that advance warning of the case is one of the most basic preconditions for effective participation: the defendant must know that the proceedings are to occur, so that she may take all the other steps necessary to ensure that she can be heard. There are then three reasons for insisting that the claimant should discharge the burden of that demand.[101] The first is a claim from efficiency: the claimant is (usually) well-positioned to give

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[91] D.J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Oxford: Oxford University Press 1997), at p.132.

[92] T.R.S. Allan, "Procedural Fairness and the Duty of Respect" (1998) 18 O.J.L.S 497, 509.

[93] That is not a second order concern; the claim is not that individuals should be equipped with the information necessary to *check* that the decision is correct. It is that the decision may be correct only be dint of certain procedural steps. For Raz, "litigants can be guided by law only if the judges apply the law correctly" – where "correctly" means without bias, in an open and fair hearing: J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press 1979), at p.217.

[94] That is true on both positivist and natural law accounts. See e.g. J. Waldron, "The Rule of Law in Contemporary Liberal Theory" (1989) 2 Ratio Juris 79, 84: "why is it important that law be predictable? The liberal answer takes us back to premises about the nature of the state and individual autonomy; [it is] a necessary condition of respect for autonomy that individuals should know or be in a position to know how state power will affect their decision-making".

[95] See e.g. J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press 1979), at p.222.

[96] Lest "enlightened law" should become a "dead letter": J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press 1979), at p 217.

[97] E.g. investigative.

[98] T.R.S. Allan, "Procedural Fairness and the Duty of Respect" (1998) 18 O.J.L.S 497, 510.

[99] Embedded in Rule 1.1.

[100] T.R.S. Allan, "Procedural Fairness and the Duty of Respect" (1998) 18 O.J.L.S 497, 505.

[101] Though none of them preclude an alternative approach.

notice. Second, the claimant stands to benefit both from the allocation of resources towards the administration of justice on her behalf, and (ultimately) from the award sought. This raises the third point, which is that she is properly incentivised. As a condition of access to the court, the claimant must therefore provide such information regarding the defendant's identity as will enable her to convey notice of the proceedings, and must act on that information in the appropriate way. Thus, the concept of procedural identity is not merely a demand for proof that the court order will be effective, nor is it a uni-directional wish to allow the claimant access to the remedial jurisdiction of the court. Rather, it is a product of procedural fairness, which demands that *both* parties have access to the court: the claimant should be able to bring her case, and the defendant should be able to answer it.

None of this has been to doubt that the naming rule plays an important role in ensuring that any court order sought can be made effective; in this respect, it does indeed belong to a broader collection of rules which aim to ensure that judicial resources are directed toward fruitful ends. Rather, it has been to argue that any account of procedural identification that is *limited* to effectiveness ignores the crucial role of that threshold, identified by Stamp J in *In re Wykeham Terrace* and reiterated by Lord Sumption in *Cameron*, in ensuring that the procedure by which the claimant seeks redress is one in which the defendant can participate. There being a clear route to enforcement of the damages award sought, it was this second role that formed the subject of the dispute in *Cameron*.

Thus, that threshold ought to be understood as operating in service of two goals. The first is a distributive goal, and it concerns enforceability: the judicial resources of the State are limited, and ought to be allocated to cases in which there is a serious prospect that – if the court were to grant the order sought – it could in fact be enforced. The second is a corrective goal, to which the majority of this section has been devoted: it is a central concern of due process both that the claimant should have access to the court's remedial jurisdiction, and that the defendant should have a platform (should she choose to use it) to answer the case against her. The platform is made more crucial, not less, by the seriousness of the allegation made.

III. Applying the Concept of Procedural Identity

1. Introduction

We are now in a position to turn to the question of whether and how the law as it stands can be reconciled with the goals of procedural identification. In particular, two features of the decision in *Cameron* bear closer consideration. First, Lord Sumption remained wedded to the "general rule" that "proceedings may not be brought against unnamed parties"; he either regarded that rule as juridically-unassailable, or assumed that the provision of a name would necessarily facilitate notice.[102] Second, Lord Sumption thought the question of timing largely irrelevant: it was enough to show that the defendant would be likely to acquire notice when the court order was enforced against her.[103] For Lord Sumption, these steps – a general naming rule, with a broad exception for cases in which the defendant would be likely to acquire notice at some point – were enough to ensure that defendant could be heard.

In what follows, I reject these claims. I argue that the naming rule is *not* the best way of ensuring that the defendant will receive notice, and – if notice is to play a meaningful role in ensuring participation – timing *does* matter. I argue that the general rule ought to be revised to reflect the twin goals of procedural identification. If the practical efficacy of the award sought depends upon provision of the defendant's name, the claimant cannot proceed against an unnamed defendant; the naming rule (amongst others) ensures that the court's resources are not directed wastefully. If the practical efficacy of the award sought does not depend upon provision of the defendant's name, the claimant may proceed (*ceteris paribus*, and whether or not she can name her defendant) if she can demonstrate that

[102] *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6 at [9]. He did not consider whether his "principle of justice" was compatible with that rule or whether it demanded any broader effort to redesign the procedural framework.
[103] Ibid, [15].

she is able to give her advance notice of the claim; the notice rule ensures (amongst others) that the defendant is able to participate in proceedings that concern her.

2. The General Rule

We have seen that the CPR do not codify any explicit naming requirement. PD 7A, para 4.1 provides that a claim form must be headed with the title of the proceedings, which "should state", among other things, the "full name of each party". In *Cameron*, Lord Sumption noted that the format of the prescribed forms was consistent with designation "by name or by description".[104] That procedural hurdle, we have seen, arises from the pre-CPR cases; it was the thrust of Sir Ross Cranston's dissent in the Court of Appeal in *Cameron*, and Lord Sumption's judgment on appeal, that the CPR did not warrant disapplication of that general rule.

According to Sir Ross Cranston, the naming rule is the natural counterpart to a demand for notice; it is "a means of enabling defendants to know about proceedings and to put their case in response".[105] Yet, there are two reasons to doubt that claim – to doubt, at least, the claim that names are the *best* way of securing notice. First, it may be very difficult to extrapolate from a name to information that will facilitate notice;[106] thus, courts have acknowledged the tension between the demand for the defendant's full (given and family) legal name and the vary many social "aliases" use for on and off-line interpersonal communication.[107] This point prompts a second: if the goal is notice, other data will almost always be more instrumental to that end. A residential or email address, landline or mobile phone number, or social media handle will be far better proof that one can make contact with a particular defendant than their legal name.

Courts have been aware of these points in defining permissible modes of service. The goal of procedural identification and service align: the first is a demand that the claimant prove that she can notify her defendant of the claim; the second is a demand that she act on that capacity. As Lord Clarke put it in *Abela v Baadarani*, the "the whole purpose of service is to inform the defendant of the contents of the claim form and the nature of the claimant's case".[108] That purpose may be discharged through service by email to public or private addresses,[109] by Facebook post or link to a data room,[110] and service by WhatsApp.[111] Indeed, in *CMOC*, Waksman J noted that WhatsApp (like other services) offered the "particular virtue" of allowing the sender to see if and when the message is read by its recipient.[112]

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[104] Ibid, [12].

[105] *Cameron v Hussain, Liverpool Victoria Insurance Co Ltd* [2017] EWCA Civ 366 at [93]; Echoing both sentiment and phrasing, Ahmed argues that "The naming of the parties in court proceedings is consistent with the principle of open justice. It enables the parties to know about proceedings, respond to allegations, and to conduct any necessary investigations into the claim."https://www.lawgazette.co.uk/features/claims-against-unnamed-defendants/5061696.article

[106] E.g. residential or email address, phone number etc. This will be particularly so where the defendant's name is common: a "David Smith" would share his name with 6,000 others in the UK alone

[107] See further *UK Oil and Gas Investments plc v Persons Unknown* [2018] EWHC 2252 at [136] (Mr John Male QC): "some protestors use aliases and so, even if they were named as defendants, they might not have been truly and properly identified".

[108] *Abela v Baadarani* [2013] 1 WLR 2043 , [37]. In *Cameron*, Lord Sumption cited this claim in support of his conclusion that "it is an essential requirement for any form of alternative service that the mode of service should be such as can reasonably be expected to bring the proceedings to the attention of the defendant": *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6 at [21]. In achieving that purpose, the courts have been prepared to "consider proactively different forms of alternative service": see further Waksman J in *CMOC Sales and Marketing Ltd v Persons Unknown* [2018] EWHC 2230 at [190].

[109] *Brett Wilson LLP v Person(s) Unknown* [2015] EWHC 2628: Warby J noted that whilst "The relevant procedural safeguards must of course be applied" ([11]), alternative service had been made by way of e-mails to an "info@" address of the website, in circumstances in which it was reasonable to infer that the domain owners would in fact be altered to their presence.

[110] *CMOC Sales and Marketing Ltd v Persons Unknown* [2018] EWHC 2230.

[111] Ibid.

[112] Ibid, [190].

If the goal of service is to convey notice, and if the claimant may achieve that goal by means of a communication channel that does *not* rely upon the defendant's name, the prior demand for a name is both over and underinclusive. It is overinclusive where it permits an action in which notice cannot be conveyed. It is underinclusive where it precludes an action in which notice can be conveyed by some other means. Thus, the central claim of this part is that the general rule ought to be revised. If the practical efficacy of any interim or final award depends upon provision of the defendant's name, the claimant cannot sue an unnamed defendant. If, however, the practical efficacy of any interim or final award does *not* depend upon provision of the defendant's name, the claimant must meet a single, straightforward demand: whether or not she can name her defendant, she must prove that she can give notice. To the question "what counts as notice?", the answer is "whatever may reasonably be expected to bring the proceedings to the attention of the defendant".[113]

Finally, there is a question of timing. We saw above that Lord Sumption endorsed a particularly broad notice rule: the claimant might be permitted to proceed against an unnamed defendant who would be likely to discover the proceedings in the course of attempting to perform the prohibited act.[114] Thus, according to Lord Sumption, the award in *Bloomsbury* was justified on the basis that the defendants could only have performed the prohibited act with the participation of media organisations who were aware of the injunction; at that stage, they would have revealed their identity, facilitating both enforcement and notice of the relevant court order.[115]

That claim is at odds with standard practice for without notice claims, and cannot easily be reconciled with the demands of procedural fairness. Given certain exceptional circumstances,[116] a claimant may be permitted to proceed without notifying her defendant.[117] In these cases, steps are taken to secure the defendant's ability to challenge the award: the court sets a mandatory return date, of which the claimant must notify her defendant post-hearing. Lord Sumption's argument is not that the claimant should be permitted to proceed without notice, but with proper procedural safeguards; it is that the claimant should be permitted to proceed *even though she cannot give notice* – pre-trial (for the purpose of participation) or post-trial (for the purpose of setting up an immediate challenge to the decision). In such a case, whilst the defendant may eventually acquire notice of the court's exercise of jurisdiction, she may – depending upon when the defendant happens to trigger the injunctive prohibition – be ill-equipped to prevent, challenge or otherwise affect the result.[118] Thus, if the procedural hurdle is to secure effective participation, it must demand more than mere proof that the defendant will receive notice of the claim; it must demand that she will have it in good time to present her defence to the action against her, or (exceptionally) to challenge an interim award immediately *ex post*.

3. Proxy Actions

There remains a crucial explanatory gap: if the claimant must prove that she can notify her defendant (and must in fact do so), what of the cases – of which *Bloomsbury* is one example – in which the claimant has been permitted to proceed without that information? In what follows, I argue that what matters in these cases is not that the defendant is likely to discover the proceedings post-hearing; rather, it is that the proceedings have already been brought to the attention of an individual who is equipped and concerned to present the defendant's case.

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[113] *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6 at [21]. That notice rule is at once broader and narrower than its predecessor: the claimant cannot *merely* provide her defendant's name, but she may provide: a current residential address or other place of regular attendance; an email address; (mobile or landline) phone number; or social-media handle. That list should be treated as an open one, permitted to evolve alongside methods of communication.

[114] Ibid, [15].

[115] Ibid.

[116] Where e.g. notice would aggravate the harm, or otherwise defeat the purpose of the court order.

[117] The claimant need only prove that she has an "arguable case". She need not prove that she has at least a 50% chance of success: see further *World Proteins Kft v Persons Unknown*.

[118] It is no answer to that objection that proceedings for civil contempt may only follow from notice (see further *UK Oil and Gas Investments plc v Persons Unknown* [2018] EWHC 2252).

The first exception to the general rule involves claims against groups of wrongdoers, in which one person stands as "proxy" for others connected by dint of their alleged participation in the same wrong.[119] At their inception, these awards extended tortious liability to organisations that – in certain important respects – resembled corporations. In *The Taff Vale Railway Co v Amalgamated Society of Railway Servants*,[120] the claimant sought an injunction against the defendant trade union, alleging that two of its managerial secretaries had induced the claimant's employees to participate in an unlawful strike. A unanimous House of Lords held that it was possible to sue the union:[121] having conferred the ability to own property (through trustees) and to act (through agents), Parliament must be taken "to have impliedly given the power to make it suable in a Court of Law for injuries purposely done by its authority and procurement".[122] The proper method was to sue the union "in a representative action by persons who fairly and properly represent it".[123]

This exception has provided fertile ground for further derogation from the general rule. In *EMI Records Ltd v Kudhail*,[124] the claimants sued two named defendants on their own behalf and as representing all other persons engaged in the wrongful distribution of certain cassette tapes.[125] The judge concluded that there was a sufficient "identity of interest"[126] between the wrongdoers to ground the conclusion that "*prima facie* there is here a group, and *prima facie* there is a sufficient common interest" to justify *ex parte* relief. That "common interest" included the mutual goal of disguising the tapes' provenance, and shared communication channels.[127] Thus, the exception is no longer limited to formal associations; it also includes claims against groups of wrongdoers who share a sufficient "identity of interest". Precisely what will count as "identity of interest" for that purpose in another case (and why) remains to be determined.

The second type of action concerns the indirect consequences of claims to protect confidential information. Often, the goal of proceeding against an unnamed defendant is to prevent third-party media organisations from publishing certain information obtained by the defendant. In these cases, the claimant typically seeks an interim injunction, which is served upon any media organisations whom the defendant is likely to approach. The success of such schemes lies in the so-called "Spycatcher doctrine":[128] publication by a party who is on notice of an interim injunction designed to protect confidentiality will be in contempt of court if they act so as to undermine that injunction. In these cases, the media groups are not parties to the litigation, but are "just as effectively restrained by the terms of the order served on them"[129].

Above, I rejected Lord Sumption's explanation of these cases; it is not enough to show that the defendant is likely to acquire notice in the course of attempting to act (unwittingly) contrary to the injunction. The better explanation of these cases has nothing to do with the defendant's state of mind; what matters is that the proceedings can be (and have been) brought to the attention of someone who is equipped and concerned to put the defendant's case to the court in a representative capacity. This is an explanation, not yet a justification: in what follows I consider whether such an extension is compatible with the logic of the notice rule. If that rule exists to ensure effective participation, the first question is whether procedural justice demands that the defendant have the opportunity to represent

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[119] In these cases, the court allows the claimant to sue the named defendant "on his own behalf and as representing all other persons engaged in the activity of which complaint is made" *Bloomsbury Publishing Group plc and another v News Group Newspapers Ltd and others* [2003] 1 WLR 1633 at [10].

[120] *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] AC 426.

[121] *Taff Vale Railway* [1901] AC 426 at 349. The idea that the claimant must seek to "pounce upon the individual offenders" was dismissed out of hand as a "reduction to absurdity" (Earl of Halsbury LC).

[122] *Taff Vale Railway Co* [1901] AC 426 at 436.

[123] *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] AC 426 at 439 (Lord Macnaghten). In its registered name at its place of business.

[124] *EMI Records Ltd v Kudhail* [1985] FSR 35.

[125] The claimant alleged that the defendants' distribution of certain cassette tapes involved both copyright infringement and passing off.

[126] *EMI Records Ltd v Kudhail* [1985] FSR 35 at [37].

[127] *EMI Records Ltd v Kudhail* [1985] FSR 35 at [37]. There was, he said, a "common interest in preventing anybody finding out where the cassettes come from", and that "each must know some of the other members of the group".

[128] See further *GYH v Persons Unknown* [2018] EWHC 121.

[129] *X & Y v Persons Unknown* [2006] EWHC 2783 at [4].

herself, as well as (or instead of) representation by a person who is equipped and incentivised to make her case.

In *Faretta v California,*[130] the US Supreme Court considered whether the Sixth Amendment granted the criminal accused the right to self-represent.[131] The court gave three reasons for concluding that it did, two of which are of general application: first, the accused (and only the accused) would suffer the consequences of failure;[132] second, counsel should not be "an organ of the State interposed between an unwilling defendant and his right to defend himself personally", for such an interposition must "lead him to believe that the law contrives against him".[133] The points are connected by a single, anti-paternalist claim: there is no justification for interfering with a person's freedom of action in that "part of a person's life which concerns only himself", which is not concerned with preventing harm to others.[134]

For some, the opposition to paternalism is absolute: the freedom to make (self)harmful choices is entailed by respect for the rational agency of persons.[135] Some less absolute anti-paternalist claims stem from a utilitarian commitment (albeit one that may be "empirically contestable"),[136] insisting that individuals are best placed to determine what will secure their maximum overall good;[137] these often accommodate some intervention to preserve "the liberty of the person to make future choices".[138] Others are framed in contractualist terms: conditions may exceptionally obtain that make it "plausible to suppose that rational men could reach agreement to limit their liberty even when other men's interests are not affected".[139] These conditions include actions that bring about significant and irreversible changes,[140] and those involving dangers "which are either not sufficiently understood or appreciated correctly" by the decision-maker.[141]

If it is accepted that some forms of paternalist intervention may be justified, it is possible to set out a plausible case for counting mandatory representation amongst them. Self-representation may well cause one's "whole lifestyle to be jeopardised" in an extreme and irreversible way; this will more often be true in criminal cases, where liberty is directly at stake. Moreover, the defendant may often fail to understand the magnitude of the risks involved. But that case is not unanswerable.[142] The

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[130] (1975) 422 U.S. 806 (1975).

[131] The right to a fast and fair trial.

[132] *Faretta v California* (1975) 422 US 806 at 819-820.

[133] *Faretta v California* (1975) 422 US 806 at 834. Thus, the State must not coerce, and the subject must not perceive the State to act coercively.

[134] To put this in Mill's well-known phrasing: "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others": J.S. Mill, *Utilitarianism and On Liberty* (Los Angeles: Fontana Library 1962), at p.135. Various examples of apparently paternalist State intervention include laws that require a motorcyclist to wear a helmet, which ban certain potent drugs or suicide, or compel blood transfusions.

Paternalism is broadly understood as any interference with a person's freedom of action that is justified by reasons that refer (exclusively) to the interests (happiness, wellbeing or values) of the person being coerced. More roughly, "interference with a person's liberty for his own good": G. Dworkin, 'Paternalism' (1972) 56 The Monist 64, 65.

[135] The idea is that to deny a particular choice is to treat an individual as a means to a particular end – even if that end concerns their own welfare.

[136] T.R.S. Allan, "Procedural Fairness and the Duty of Respect" (1998) 18 O.J.L.S 497, 509.

[137] Individuals have a means of knowledge and interest "immeasurably surpassing" that of anyone else with respect to their own well-being: J.S. Mill, *Utilitarianism and On Liberty* (Los Angeles: Fontana Library 1962), at p.207.

[138] G. Dworkin, "Paternalism" (1972) 56 The Monist 64, 76. Mill gives the example of selling oneself into slavery: J.S. Mill, *Utilitarianism and On Liberty* (Los Angeles: Fontana Library 1962), at p.235-236.

[139] G. Dworkin, "Paternalism""(1972) 56 The Monist 64, 76.

[140] Changes that "make it impossible to continue to make reasoned choices in the future", where paternalism operates as a form of "insurance policy which we take out against decisions which are far-reaching, potentially dangerous and irreversible": G. Dworkin, "Paternalism" (1972) 56 The Monist 64, 80.

[141] G. Dworkin, "Paternalism" (1972) 56 The Monist 64, 82–83.

[142] Assy attempts to dodge the paternalist objection altogether; he claims that the individual who "chooses" to self-represent is not really exercising a choice at all. See further R. Assy, *Injustice in Person: The Right to Self-Representation* (Oxford: Oxford University Press 2015), at p.145: "Even if individuals need not be fully informed of every aspect of the options available to them, some understanding is a precondition for calling a choice a 'choice'.". That argument fails. An individual who chooses to ride a motorcycle without a helmet is not deluding herself that she is exercising a

decision to ride a motorcycle without a helmet, to engage in autosadistic behaviour, or to use heroin involves a general (non-idiosyncratic) increase in risk; however skilled the actor, she is more likely to come to harm in consequence of the action taken. By contrast, some well-informed claimants may not be at greater risk of harm – may even be better off – as a result of the choice to self-represent. It is far harder to make the case for a general paternalist intervention to lessen the risk of harm to persons of whom there are many atypical examples.

This brings us to the final point, which sets cases like *Faretta* apart from those that I have addressed in this article. In civil cases, there are *two persons* whose rights and duties fall to be established by the court. This makes all the difference: the argument is not that the defendant's interests would be better served by mandatory representation; rather, it is that an absolute right to self-represent will make the claimant unduly worse off. Thus, the relevant question is not whether there is a justification from the defendant's interests for denying the choice to self-represent. Instead, it is whether we can make out such a justification from the claimant's interests – and whether the defendant's interests can be protected sufficiently in such a case.

We saw above the that due process is not a single demand, and each of its facets admits some derogation.[143] The justification for failing to give fullest protection to the claimant's procedural rights may stem from concerns that apply to the community as a whole, or from a direct clash between the parties' interests in access to justice – for present purposes, the claimant's corrective claim and her defendant's right to be heard. Precisely what that right to be heard entails, and how powerful it is in any given context may vary according to the vision of procedural justice; here is where those differences of theoretical approach may come to influence the practical shape of participative demands

If due process is concerned with maintaining the integrity of the law's inducements to rational action,[144] there is nothing objectionable in mandatory representation *per se*. To the contrary, representation may ensure better translation of the relevant legal principles (though this begs broader questions about the dissonance between law and ordinary ways of thinking).[145] Even so, perceived disenfranchisement may have a broader de-legitimising effect: if law's *de facto* authority is contingent upon the acceptance of those over whom it claims authority, it may fail altogether to guide behaviour if and because those individuals perceive some systemic failure to accord them proper respect.[146]

If, by contrast, a commitment to respect for autonomy necessarily entails that individuals should be able to influence decision-making processes that concern them,[147] personal participation cannot be extricated from procedural fairness;[148] it is the "distinguishing characteristic" of adjudication to "confer on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favour".[149] Thus, participation is not only a demand that the defendant should be equipped to challenge the decision *ex post*; it is a demand that the

choice; she *is*. The point is that there may be reasons for valuing that choice less than another choice that is substantively or procedurally different.

[143] Thus according to Raz "conformity to the rule of law is a matter of degree": J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press 1979), at p.215.

[144] See e.g. J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press 1979), at p.215.

[145] See further J. Waldron, "The Rule of Law in Contemporary Liberal Theory" (1989) 2 Ratio Juris 79, 92.

[146] Trust may be further eroded wherever derogating from the right to self-represent is accompanied by a failure to notify the defendant of the proceedings against her.

[147] T.R.S. Allan, "Procedural Fairness and the Duty of Respect" (1998) 18 O.J.L.S 497, 510: "When procedures allow genuine participation, in the sense that questions of justice can be raised and answered, and where every rule is ultimately open to challenge and, accordingly, modification, the citizen is treated with the respect which his dignity deserves".

[148] That participation might be quite far removed, but when we allow no scope to influence a decision – indeed, when we fail even to *notify* an individual of a decision that concerns her – we damager her capacity for self-determination. See further R. Summers, 'Evaluating and Improving Legal Processes: A Plea for Process Values' (1974) 60 Cornell L. Rev. 1, 21.

[149] Indeed, for some, this marks the difference between law and "managerial control": L. L. Fuller, *The Morality of Law*, Revised edn (New Haven: Yale University Press 1969).

decision be justified *to* her,[150] in light of the case that she has made. There is, then, an extraordinary burden associated with the justification for excluding the defendant from proceedings against her.

Let us accept, then, that there may be (individual or systemic) reasons to insist at least upon the claimant's right to know about the trial and have a representative who is accountable to her, so that in any ordinary case procedural justice cannot be done without affording the defendant both knowledge and choice. The question is then: what takes any particular case *out* of the category of "ordinary case", tipping the balance in favour of allowing the claimant to proceed against a defendant whom she cannot notify?

There are demanding, cumulative elements to the proof that the claimant's interest is such as to justify allowing her to proceed without the information necessary to notify her defendant. First and most straightforwardly, the claimant must show that the nature of the claim is such that it *can* be satisfied, even though the claimant cannot communicate with her defendant; this is the proper focus of the demand for enforceability, considered above.[151] Second, the claimant must show that she has made reasonable efforts to discover the defendant's communication details; the goal is to broaden access to the court for those who have attempted to comply with the procedural demands, not to reward the idle claimant. Third, the claimant must show either that there are no realistic prospects of discovering those details, or that the wrong (however perpetrated) is having a sufficiently serious and ongoing impact on the claimant to warrant immediate judicial intervention. It may also be relevant, in disposing of this question, that provision has been made for some alternative remedy that is sufficient to remediate the relevant harm; this will be more so where a specific legislative scheme has been instantiated to provide for the particular circumstance that precipitated the relevant claim.

Crucially, these reasons will only suffice to justify the procedural omission if the claimant is able to prove that she *is* able to notify a proxy who is equipped and disposed "fairly and properly" to answer the case on behalf of her opponent. Thus, the claimant must show that the proxy's interests align with those of the defendant,[152] and that they are or will be appraised of the facts of the case against her;[153] that includes a demand for sufficient notice of the proceedings to give them "a chance to argue the merits before any order is made".[154]

So, the general rule demands sufficient notice to facilitate procedural participation. Proxy claims ought to be treated as a permissible extension to the notice rule, in cases where the defendant has proper representation, *and* the claimant's interests are sufficient to warrant the alternative procedure. In assessing whether the first requirement is met, the court will consider whether the relevant proxy is equipped and concerned to make the defendant's case. In assessing whether the second requirement is met, the court will consider various factors that include: the impact of the wrong; whether it can be remediated; the efforts made to identify the defendant; and the likelihood that those efforts will come to fruition.

IV. Conclusion

I have argued that the procedural identification threshold exists in service of two goals – one of which is the province of distributive, the other corrective, justice. First, that threshold ensures that the court's resources are not misdirected; second, it ensures that the mechanism by which the claimant seeks redress is one that secures the defendant's participation. I have argued a general naming rule is both

[150] T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press 20303), at p.79: "Its purpose is not merely to reach the correct result, in accordance with appropriate legal standards, but more especially to *justify* that result to both parties on the basis of their joint adherence to the legal and constitutional order".

[151] This is the consideration dealt with as "enforceability" above.

[152] A sufficient "identity of interest" (*EMI Records Ltd v Kudhail* [1985] FSR 35), or an "existing interest in the information which is to be protected by an injunction" (*GYH v Persons Unknown* [2018] EWHC 121).

[153] This is how the court's emphasis on shared knowledge in *EMI* ought to be understood

[154] This brings us back to the demand for notice. This will almost always demand notice pre-hearing unless – in the manner appropriate for without-notice claims – there is a compelling reason to withhold notice; in these cases, the proxy must be notified immediately post-hearing, to enable her to challenge the decision. See *X & Y v Persons Unknown* [2006] EWHC 2783 and *GYH v Persons Unknown* [2018] EWHC 121.

over and underinclusive, and fails to meet these goals. If the practical efficacy of any interim or final award depends upon provision of the defendant's name, the claimant cannot sue an unnamed defendant; in these cases, the naming rule achieves the distributive goal. However, if the practical efficacy of any interim or final award does *not* depend upon provision of the defendant's name, the naming rule has no place; instead, the claimant should be required to prove that she can give notice.

There are exceptions to the notice rule: specifically, a claimant may proceed by naming and notifying a proxy for the defendant. I have argued that these exceptions can be reconciled with the notice rule; a derogation from the demand for personal notice may be justified by the strength of the claimant's interest, where the defendant is "fairly and properly" represented. In assessing whether the first requirement is met, the court will consider the impact of the wrong (and whether it can be remediated), the efforts made to identify the defendant and the likelihood that those efforts will come to fruition; in assessing whether the second requirement is met, the court will consider whether the relevant proxy is equipped and concerned to make the defendant's case.

This formula for procedural identity provides a mechanism for the courts to ensure that new forms of communication do not preclude access to the courts, and can be reconciled readily with the purposive mandate embedded by the CPR. That mandate is not uni-directional: it requires the courts to ensure that the parties are "on an equal footing" when it comes to matters of due process. If a notice-driven concept of procedural identity broadens access to the court, it does so for *both* parties: the claimant is able to present her case, and the defendant (or her proper proxy) is able to answer it.