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'The Usual Suspects': Knife Crime Prevention Orders and the 'Difficult' Regulatory Subject

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Knife Crime Prevention Orders (KCPOs) were introduced by the Offensive Weapons Act 2019 with the stated aim of providing additional tools for police to use in combatting increasing rates of knife crime in England and Wales. This article situates KCPOs within a continuous policy trend of procedural hybridization, and highlights the worrying manner in which such criminalization, underpinned by a preventive logic and facilitated by this hybrid procedure, enables new forms of 'othering'. Drawing a threefold distinction within the concept of the regulatory subject—the responsible, the rational/virtuous and the difficult/other—it argues that preventive hybrids generate a self-fulfilling category of 'difficult' subjects, while simultaneously denying them the procedural protections normally afforded to the responsible subject of classical criminal law.

Key Words : knife crime prevention orders, hybrid procedures, regulation, preventive hybrids, security

'Punish the children of the poor, and prevent the wrongdoer..'
Misquote of the inscription on the Old Bailey

INTRODUCTION

The Knife Crime Prevention Order (KCPO) was introduced in January 2019, ostensibly in response to the high and rising[1] rates of knife crime in England and Wales.[2] Intended as an

1 The Office for National Statistics has published the following rates of recorded knife crime offences for the past two years: 2019—45,627 (not including Greater Manchester); 2018—44,443.
2 Offensive Weapons Act 2019, chapter 7 part 2.

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'additional preventive tool' for use by police, KCPOs will—according to published Home Office guidance—'help to divert those who may be carrying knives, or who are at greatest risk of being drawn into serious violence, away from being involved in knife crime' (Home Office 2019). Already being referred to as the 'knife ASBO',[3] the KCPO is the latest in an increasingly long line of hybridized civil/criminal procedures[4] aimed at preventing 'deviant' or undesirable activity in circumstances where existing criminal justice provisions are seen as insufficient to do so. It is—as this paper will argue—a paradigmatic case within the broader category of pre-emptive hybrid measures known as civil preventive orders (CPOs); paradigmatic in the sense that it is one of the latest in an iterative progression of this regulatory technique and the criminology of the self (Garland 2001). The hybridity of such procedures lies in how, and despite their purportedly civil character, such orders carry criminal sanctions if violated. They proceed in stages: the court first identifies the objectionable behaviour, imposes restrictions aimed at its prevention and accompanies these with a warning of punishment in the event of a breach (Simester and von Hirsch 2006: 175).

This article critically analyses the introduction of KCPOs in England and Wales, considering the motivations behind their 11th-hour addition to the Offensive Weapons Bill, and the goals underlying the use of this particular hybrid procedure. It highlights KCPOs as a classic iteration of civil/criminal hybrid procedures and presents the argument that KCPOs represent an ideologically driven policy (Garland 2001: 135) that is instrumentally and disproportionately employed to regulate the behaviour of 'difficult' populations—in this instance, predominantly Black children in urban environments who carry knives. The article further argues that KCPOs explicitly target these 'usual suspect' regulatory actors (Lacey 2012), denying them the procedural protections of the criminal law with a view to controlling their behaviour and fast-tracking their criminalization. It concludes by placing KCPOs within the broader trend of Westminster governmental reliance on explicitly *preventative* procedurally hybrid forms, arguing that not only are they illiberal but also contrary to the rule of law.

This argument proceeds in four parts. The article will first contextualize KCPOs, charting the grounds for their development and introduction and outlining core criticisms from civil society actors. It will then situate KCPOs within criminal law's preventive turn, connecting the use of such measures with the pre-emptive logic of security (Cohen 2005) and the worrying legislative tendency to employ so-called regulatory offences (Picinali 2016) to circumvent the procedural protections of the criminal law.[5] It will also draw attention to the manner in which KCPOs enable the anticipatory regulation of individuals whose wrongdoing is merely potential. Third, it will introduce, *contra* John Braithwaite's archetypal 'virtuous' and 'rational' regulatory subjects (2002), the 'difficult' regulatory suspect that is *both created and designated* by offences like KCPOs. It will lead to the argument that KCPOs are a form of status criminalization that facilitates differential treatment of individuals under the law, contrary to the liberal tenets of classic criminal law, liberal criminology (Loader 2007), and the egalitarian values of the rule of law. Finally, this article will argue that it is the very hybridity of KCPOs that facilitates the operation of these problematic features, which gives good reason to interrogate other instances of

3 The Guardian 2019 (February 1). The Anti-Social Behaviour Order (ASBO) was available between 1998–2014 in England and Wales to anyone aged 10 or over; they were imposed by courts who deemed them necessary to achieve the stated goal of protecting the public from conduct 'which caused or was likely to cause further harm, harassment, alarm, or distress', employing the criminal standard of proof, and stipulating negative prohibitions only. As will become apparent, KCPOs differ, notably in their use of the civil standard and in their capacity to impose positive as well as negative requirements, although they are also applicable to children (in the case of KCPOs, individuals aged 12 and over).

4 Examples of preventive hybrids include *inter alia* the aforementioned ASBO, Football Banning Orders, Domestic Violence Protection Orders and Public Space Protection Orders.

5 Regulatory offences can be understood as a quasi-criminal offence employed to deter actors from dangerous or undesirable behaviour, and where no fault (*mens rea*) element is required.

preventive civil/criminal procedural hybridity whenever they are introduced and implemented. In terms of the iterative progression of this regulatory technique, therefore, my focus on KCPOs presents them not as a novelty but rather an illustration of this approach's recursiveness.

CONTEXTUALIZING KNIFE CRIME PREVENTION ORDERS

There is a serious knife crime problem in England and Wales; in 2019 the Office for National Statistics (ONS) published the worst knife crime statistics in a decade (ONS 2019).[6] Indeed, although this article criticizes the 'sacrifice of values resulting from [the KCPO's] particular legal form' (Ashworth and Zedner 2011: 299, in respect of the ASBO), it is still possible to concede that it has been devised to combat 'a genuine and significant social problem' (Ashworth and Zedner 2011: 299). ONS figures for 2019 put the number of offences involving knives or sharp instruments recorded by police at 45,627, up 7% from the year before and 49% from 2011 when comparable records began. Even controlling for relative population density, the problem is most intense in cities, with London alone accounting for a third of recorded offences; this appears to be the justification for London's selection as the location of the 14-month long KCPO pilot trial, initially scheduled to commence on 6 April 2020 but delayed due to the COVID-19 pandemic.

While the Government, police, activists, charities and communities are united in recognizing the need to tackle these continual increases in knife crime, KCPOs are far from being a well-received measure. Indeed, civil society actors such as the Standing Committee for Youth Justice (SCYJ), although welcoming the Government's commitment to tackling knife violence, have expressed disappointment that its response 'falls short of constituting a public health approach' (SCYJ Submission to Consultation 2019); UK Parliamentary debates on the Offensive Weapons Bill had specifically acknowledged the importance of a holistic public health approach to knife crime (Hansard 2018, 2019*a*,*b*).[7]

In spite of the opposition from activists and charities over both the form and approach of KCPOs to this problem of knife crime, their introduction has been generally welcomed by the police. The Head of Crime at the College of Policing, David Tucker, has remarked that the London pilot is 'a positive step towards understanding how police can divert those who may be carrying knives, or who are at greatest risk of being drawn into serious violence, without having an adverse effect on their lives' (College of Policing 2020). The additional powers that KCPOs give to the police were, in fact, a core motivation for both their design and introduction. As the then-Parliamentary Under-Secretary of State for the Home Department, Victoria Atkins MP, explained during the Parliamentary debate on the Bill that introduced these orders, the Government

> wanted to give the police the power, through the Bill, to seek an order from the court, on a civil standard of proof, so that the state can wrap its arms around children if schools and local police officers think they are at risk of carrying knives frequently' (Hansard 2019*b*: 5/29).

For anyone sceptical as to what such 'arm-wrapping' on the part of the state might involve, Atkins MP clarified that KCPOs mirror similar prevention orders already in existence, by 'placing negative and positive requirements on children who do not necessarily have a criminal conviction' (Hansard 2019*b*: 5/29).

6 BBC website 2020 (23 April).

7 In line with the World Health Organization position that 'violence acts and spreads like a disease', (WHO 1996: 24), a public health approach employs multisectoral cooperation to address the social, structural and environmental causes of violence with a view to breaking the cycle and thus improving both health and safety.

Section 14 of Part 2 of the Offensive Weapons Act 2019 provides that courts can make such orders in respect of a person aged 12 or over *without a conviction* if that court is satisfied, on the balance of probabilities, that this person has 'had a bladed article with them without good reason or lawful authority' in a public place, school, or college on at least two occasions within the preceding two years.[8] An additional condition is that the court thinks that such an order is necessary to protect the public, or specific members of the public, from the risk of harm involving a bladed article, or to prevent the defendant from committing a crime with a said bladed article. The positive and negative requirements to which Atkins MP refers are found in section 21 of the Act, and include geographical, associational and online restrictions, a curfew (the negative requirements), and attendance at educational courses and/or counselling (the positive requirements), for a time period ranging from 6 to 24 months. Punitive criminal sanctions, such as a custodial sentence of up to two years, a fine, or both, can be imposed on breach.[9]

KCPOs are a clear point of continuity in an established policy trend of using preventive hybrid procedures to control undesirable potential behaviour—a policy trend, it should be emphasized, that has exhibited no sign of learning from past experience and has, instead, appeared to proceed counterfactually. While similar in form to other civil preventive orders (CPOs) (see, *inter alia*, Simester and von Hirsch 2006; Ashworth and Zedner 2010; Shute 2018), KCPOs are specifically concerning for several interconnected contextual, procedural and principled reasons. First, as the quote from Atkins MP highlights, these orders are largely intended to marshal the behaviour of *children*. Patrick Green, Chief Executive of knife crime prevention charity the Ben Kinsella Trust, has commented that, while his organization supports 'all approaches that aim to lead to a reduction in knife crime … we are concerned that young people as young as 12 may well be criminalized for breaching these orders'.[10] Moreover, and although the stated aim of KCPOs is prevention, the likely age of individuals subject to them and the comparative ease of *inadvertent* breach can only contribute to the stealth criminalization of disadvantaged children.

A second issue with KCPOs is that the personalized positive and negative requirements they impose upon an individual combine to comprise severe and lengthy restrictions upon that individual's movements and activity, both online and offline. These pre-conviction restrictions sit uncomfortably alongside the civil standard of proof being employed by the court, neatly severing the classic criminal law connection between criminal activity and responsibility, and undermining certain fundamental criminal law principles such as the presumption of innocence. Furthermore, with no specification in the legislation as to the evidence base required for the triggering offence, it is unclear, for example, the extent to which contextual considerations can be employed, or how some evidence could underpin a KCPO application while other evidence could constitute a criminal offence (SCYJ 2019: para 2.3).

Third, Atkins MP's 'arm-wrapping' metaphor itself begs some additional attention. Coming as it does from a Government largely responsible for austerity measures and cuts that impact directly upon the very category of children and young people likely to be made subject to KCPOs, such an emphasis on 'wraparound care'[11] and services seems palpably insincere.

8 A KCPO can be made on conviction under section 19 OWA 2019 where the prosecution applies for one in addition to either the sentence imposed in respect of the offence (7a) or a conditional discharge order (7b). This is barely less problematic, however, as under sub-section 9 there is no admissibility requirement for the relevant evidence; according to the published Home Office Guidance on Knife Crime Prevention Orders, 'That evidence does not need to be provided according to the strict rules of criminal evidence and the application may rely on the facts of the case for which the defendant has been convicted' (2019: 6).

9 S29(2) OWA 2019.

10 BBC website (2020).

11 Atkins MP: 'We do not pretend that [KCPOs] will solve all knife crime, but they are about preventing young people from getting ensnared in criminal gangs or getting into a situation where they think that carrying a knife will protect them. *This is about trying to wrap services around those children before they become criminalized*' (Hansard 2019*a*: 231, emphasis added).

Unease with this was voiced in the very same Commons debate, no less, with Louise Haigh MP (Labour) telling the House of her concern that, 'in trying to establish so-called wraparound care for young people, *these orders will inevitably end up focusing on the restrictive elements* such as curfews, social media bans and prohibitions, rather than the potential for positive, rehabilitative action' (Hansard 2019*a*: 239). What, then, are the reasons for this specific emphasis on care and services? It is submitted that there are two clear animating motivations: not only did it allow the Government to cleave to the 'public health approach' spin that accompanied the legislation, despite being barely evident within it, but it also provides an additional shield against those who would point out that there are *already in existence* criminal justice measures applicable to knife crime offences where there is reasonable suspicion of criminal conduct, notably the conditional caution (importantly, available only to person ages 18 or over)[12] or the reintroduced youth caution (ages 10–17).[13]

Finally, and as has been demonstrated by the controversy surrounding the Home Office's 2019 chicken shop food box anti-knife campaign[14]—represented on social media by the hashtag #knifefree—there are significant issues of race introduced by KCPOs. Linda Logan, chair of the Magistrates Association's Youth Court Committee, has voiced specific unease in this regard, noting that her organization is 'particularly concerned that [the] use [of these orders] may worsen existing overrepresentation of black, Asian and minority ethnic young people in the justice system and [that] this issue must therefore be at the heart of the evaluation of the pilot' (Logan 2020). Not only are KCPOs likely to contribute further to the over-policing of Black, Asian and minority ethnic communities through, for example, the use of alleged compliance-ensuring techniques such as surveillance and heightened stop and search, but such measures are also liable to result in more Black children subject to a KCPO being disproportionately found to be in breach. While the ill-judged #knifefree chicken shop box campaign was rightly met with outrage and opprobrium on social media and beyond, with many commentators expressing incredulity at what appeared to be blatant racial profiling, such allegedly precautionary behaviour on the part of law enforcement officials feeds into a public consciousness in which 'non-white people are disproportionately engaged with and predisposed to criminality' (Gilroy 1982; Williams and Clarke 2018: 235). As Alpa Parmar notes (2016: 64), 'there is now greater awareness that what we see in the court setting are the cumulative consequence of the intersection of various forms of disadvantage that disproportionately impact on black and minority ethnic groups', and so considerations of intersectionality should also be borne in mind here (see also Crenshaw 1989): age, gender, class and poverty can all combine with race to create a clear picture of social disadvantage.

The specific issues with KCPOs outlined here—that they explicitly target children, unduly affect Black children, and are disproportionate, stigmatizing, and restrictive—can be situated more broadly within what has come to be known as criminal law's 'preventive turn' (Carvalho 2017). Two further critical points are worth noting in this regard. First, the preventive nature of KCPOs means they operate proactively, anticipatorily and in advance of activity or behaviour that would usually attract the label 'criminal'. This pre-emptive logic of security (Zedner 2009: 73; also generally Ramsay 2012) is what paves the way for earlier and earlier intervention on the part of the state in the name of the greater good, insofar as that means for the benefit of the 'virtuous' majority. In their orientation towards first anticipating and then pre-emptively combatting risky behaviour, therefore, KCPOs—like ASBOs before them—can be said to represent a blatant form of criminalization, albeit 'an *ex ante* criminal prohibition, not an *ex post facto*

12 Criminal Justice Act 2003 s22–27.
13 Crime and Disorder Act 1998 s66A, as inserted by Criminal Justice and Immigration Act 2008.
14 BBC website (2019, Baker).

criminal verdict' (Simester and von Hirsch 2006: 178). The semantic mislabelling as a 'civil process' here should leave us in no doubt of the ultimate destination at the sharp end of this particular regulatory pyramid (Ayers and Braithwaite 2002; Braithwaite 2002).[15]

Continuing in the vein of security's pre-emptive logic, the second point of note here is that the justification for the use of KCPOs comes in the form of normatively motivated political expediency, often in impatient or reflex response to 'mass-mediated, emotionally charged and urgently pressed public concerns about crime and disorder' (Loader 2006: 581). The difficulty with this, however, is that in real or perceived situations of crisis or uncertainty, the precautionary approach facilitated by the aforementioned impetus of prevention prompts 'decision-makers…to err on the side of caution' (Crawford 2009: 819), and caution invites prejudice: 'any individual who is potentially dangerous has to be contained before s/he can put the community at risk' (Carvalho 2017: 182). Accompanying this 'reassurance rhetoric' (Erikson 2007: 213) of 'tough on crime' and 'restoring public confidence', therefore, comes a counterfactual focus on an 'archaic criminology of the criminal type, the alien other' (Garland 2001: 135; Lacey 2011; Neocleous 2016: 7), commonly for an overtly political end—as in this example, the preventive reduction of youth knife crime. But prejudice is even more insidious in this particular context as, layered upon this 'criminology of the other' (Garland 1996), is the 'myth of black criminality' (Gilroy 1982). Without needing to be told, without needing proof, the public *already believes* that in the context of knife crime the offenders are young Black men, benefit dependent, and involved in drugs, other anti-social behaviour, and low-level criminality (Williams and Clarke 2018). So the refrain goes: these 'deviants' are found in *that* part of town, they dress in *those* clothes, they hang around in an intimidating manner… And well, if normal criminal justice processes are insufficient in tackling these issues, then more powers are simply necessary so that something can be done (about *Them*).

While the reactionary aspects of this inherent procedural instrumentality are troubling in themselves, this is even more so in light of the fact that such expediency on questionable grounds of security is *de facto* privileged over considerations of human rights, civil liberties and due process (Hendry and King 2017: 733). The important pivot to note here is that KCPOs allow for the regulation, not just of undesirable behaviour, but of the (categories of) individuals *suspected* of such behaviour. The next section will explore this point in more depth.

THE USUAL SUSPECTS

It is generally accepted that reliance on both the language and techniques of regulation has underpinned an instrumentalized interventionism on the part of the state. Indeed, Adam Crawford (2009: 811) has noted that 'ideas of "better regulation" [have been] used to circumvent and undermine established criminal justice principles, notably those of due process, proportionality and special protections traditionally afforded to young people'. KCPOs certainly fit within this description, with the then-Chair of the All-Party Parliamentary Group (APPG) on Knife Crime and Violence Reduction, Sarah Jones MP, commenting on these very considerations: 'imprisoning a young person—as young as 12 years old—for two years for breaching this order is completely disproportionate' (Grierson 2019). In effect, what are presented as regulatory offences are backed up by 'real crime' measures (Lacey 2011; Norrie 2014) and justified by a preventive logic.

15 Adam Crawford has observed that 'Government interpretation of the "regulatory pyramid" [… is] an incremental tiered approach [that] conforms more closely to a ladder (or escalator!), where each subsequent intervention is more serious than the first' (2009: 825).

While KCPOs are a paradigmatic example in this regard, they are far from unique. In relation to the problem of rough sleeping, for example, Public Space Protection Orders (PSPOs)[16] provide local councils with a purportedly civil law alternative to criminalization under the controversial Vagrancy Act 1824, but breach of such an order will result in a fine which, if left unpaid, can result in a summary conviction and a £1,000 penalty. Similarly, the Domestic Abuse Act 2021 has just this April introduced the Domestic Abuse Protection Order (DAPO), which continues the trend away from victim-led civil measures addressing domestic abuse and towards more explicit civil/criminal hybridization. Similar in structure and operation to the prior Domestic *Violence* Protection Order (DVPO)[17]—also a hybrid procedure—the DAPO is of broader application, more flexible duration, and includes alongside negative requirements *positive* requirements such as electronic monitoring. Similar in structure to the KCPOS, violation of DAPO requirements constitutes a breach, a *criminal* offence subject to a maximum penalty of five years' imprisonment. In terms of regulating undesirable behaviour, therefore, such hybrid procedures, namely civil orders with criminal consequences, appear—increasingly—to be the first port of call.

So far, this article has argued that KCPOs are not only targeted towards preventing particular anti-social or undesirable behaviours but also employed instrumentally to control 'difficult' regulatory subjects, that is to say, the dangerous other introduced by criminal law's preventive turn.[18] This section will pursue this point further. It will argue that instead of being treated either as the responsible 'punishable subject' of classical criminal law (Farmer 2016: 188–92; Garland 2001: 124–7) or either the 'virtuous' or 'rational' subjects of responsive regulation (Braithwaite 2002: 32, ch2 generally), individuals made subject to KCPOs are *pre-emptively designated as deviant or difficult to control*. It makes the case that this categorization as a 'difficult' regulatory subject is enabled by 'status criminalization' (Lacey 2016: 148–60), which is not premised upon actual behaviour—at the point a KCPO is issued, any wrongdoing remains merely *potential*—but rather 'bad character' (Redmayne 2002, 2015), itself underwritten by a combination of 'populist punitivism' (Loader 2006: 578–1) and racialized othering.

FROM THE PUNISHABLE SUBJECT TO THE REGULATORY SUBJECT

Criminal law gives 'institutional form to…the underlying moral structure of responsibility practices', which in turn provides the community with the means of responding to 'properly recognized public wrongs' (Farmer 2016: 188–92; Garland 2001: 190). By holding an individual responsible for their actions, criminal law demonstrates an innate respect for that individual as a rational agent, that is, as a reasonable person. In this sense, the punishable individual is 'both the source and the subject of the criminal law' (Farmer 2016: 190) insofar as criminalization results from this congruence of wrongful behaviour *and* responsibility for that behaviour. Criminal law is an instrument used to govern subjects, and it does this by means of *responsibilization*.

The yoking of individual rationality to individual responsibility thus performs an important legitimizing function for the criminal law, which derives considerable authority from the premise that limitations have been adequately communicated by the state to its citizens, and that each recognizes the boundaries of reasonable behaviour (Naffine 2009: 71–2). In addition to a citizen knowing these parameters, however, they must possess the capacity to act in accordance with them: as Nicola Lacey notes, 'a legitimate contemporary criminal justice system criminalises only when "an offender's capacities of understanding and self-control were

16 Antisocial Behaviour Act 2014, s59–75.
17 Crime and Security Act 2010 s24–33.
18 This article employs Michal Krumer-Nevo and Mirit Sidi's sociological definition of othering, which indicates 'the process of attaching moral codes of inferiority to difference' (2012: 300).

properly engaged at the time of the alleged offence' (2010: 117). This relationship is complicated, however, by its embeddedness within civil society: social life is managed, and civil order maintained, by not just the criminal law but also other forms of social control. Situated within social networks, therefore, the individual becomes subject to what Farmer calls a 'systematization of responsibility'—not only are they accountable for specific actions as the punishable subject, but they are also subject to control in the form of general societal expectations (Farmer 2016: 193–4). Responsibility, according to this understanding, is a mechanism of standard-setting for the purpose of maintaining social order (Farmer 2016 50–2 and 193–4; Brown and Baker 2012: 9–26).

Contemporary techniques of control draw on regulatory ideas as much as on classic criminal justice ones, particularly in terms of managing *individual* behaviour (Crawford 2009: 812). Indeed, in terms of controlling people's behaviour, the developing regimes of regulation exist in parallel—sometimes connected, sometimes separate—with criminal justice. Whether criminal law and regulation are viewed as separate regimes or as points on a continuum of behavioural governance, individual responsibility plays a different role in each. Relevant here is the responsive regulation regime, which 'responds' to non-compliance with the established rule or standard with an escalation of sanctions. The (dis)incentive structure within the 'dynamic model' regulatory pyramid is intended to 'solve the puzzle of when to punish and when to persuade' (Braithwaite 2002: 30), with the idea being that, as progress is made up the pyramid, so the interventions increase in their punitiveness. The subject of responsive regulation is trifurcated correspondent to three different stages of responsive regulation: there is the virtuous actor—for whom techniques of restorative justice will be employed; there is the rational actor, whose behaviour will be met with techniques of deterrence; and there is the incompetent or irrational actor, for whom the remaining strategy is incapacitation or removal, (and who does not feature relative to criminal justice applications for similar capacity reasons as those discussed for the punishable subject of criminal justice) (Braithwaite 2002: 32).

In terms of controlling a subject's behaviour, however, the respective regimes of criminal justice and responsive regulation operate according to fundamentally different values: 'criminal justice is founded on principles of independence and impartiality, while regulation promotes pluralistic and flexible pragmatism' (Quirk *et al.* 2010: 20). Prominent in terms of responsive regulation's efficient and dynamic-model pragmatism,[19] therefore, is its ability to pivot from the maintenance of an established, publicly promulgated, general standard into differential—often individualized—treatment of a regulatory subject. As Crawford has observed with reference to anti-social behaviour provisions,

> many (though not all) of the powers seek *to individualize control* by tailoring the response and regulatory regime … to the circumstances of those who are the subjects of regulation. […] They permit the micro-regulation of individual lifestyles, governing the intimacies of personal activities, dress and behaviour. These orders that do not 'personalize control' focus instead on regulating *places*… or *premises*' (2009: 820, emphasis in original).

This *personalized* control option facilitates targeted interventions by the state into the life of the regulated subject, with their behaviour subject to bespoke restrictions. Indeed, the KCPO, with its individualized positive and negative requirements, is a paradigmatic example of this (Simester and von Hirsch 2006: 181–2).

19 See the final section of this paper for a rejection of a pragmatism-based justification of preventive hybrids.

While the contrast here with the abstract, universal, moral, *punishable* subject of the criminal law could not be starker, that is not to say that this disjunction is *necessarily* problematic. Were the distinction between compliance and punitive approaches within crime control to be robustly maintained then there would arguably be no issue: 'real crime' would receive punishment, while those committing 'victimless' regulatory offences would be held to account through compliance mechanisms. The difficulty here is that the very dynamism of the regulatory pyramid precludes this separation, with each approach instead of being seen to comprise part of a crime control 'toolkit' (Sanders 2010: 57). Andrew Sanders has observed that this is integral to Braithwaite's 2002 argument:

> At a normative level … we should integrate compliance and punitive approaches in respect of all crime, both in our theoretical thinking and in policy-making. 'Neither compliance nor punishment' should, in themselves, be seen as goals of criminal justice; rather, they should both be seen as means of achieving broader crime control goals. Further, this thinking should be applied to all crimes, without an artificial separation of 'normal' from 'regulatory' crime' (Sanders 2010: 57).

The next section will lead the argument that KCPOs—and other civil/criminal hybrid procedural forms requiring (two-step) escalation from compliance to sanction—similarly and deliberately short-circuit this distinction.

COMPLIANCE AND PUNISHMENT

Unlike the punishable subject, as discussed, an individual targeted by or made subject to a KCPO is not afforded the respect of the criminal law in its recognition of their wrongdoing and rationality, and thus their responsibility; such recognition necessarily fails without (evidence of) wrongdoing. Similarly, as a regulatory subject, an individual exposed to *ad hominem* or differential treatment (without reason) under the law is not afforded the respect of equal consideration as a citizen. A core element of the rule of law is that it does not permit fundamental differentiations in status amongst members of the relevant polity. Indeed, the rule of law can be understood as 'equality before the law', in the sense that:

> government must govern under a set of principles in principle *applicable to all*. Arbitrary coercion or punishment violates that crucial dimension of political equality, even if, from time to time, it does make government more efficient' (Dworkin 2004: 29, my emphasis).

Society is not only reliant on citizens respecting the authority of the government to set the rules, as demonstrated by behaviour compliant with these rules; rather, this needs to be a relationship of *reciprocal* respect (Finnis 2011: 272–3, my emphasis). Governments are reciprocally *required* to respect their citizens *as* self-determining rational agents, capable of comprehending and conforming to rules. This right to respectful consideration is compromized in the event that the basic equal status of citizens is differentiated *without sufficient and provable justification* (Green and Hendry 2019: 275–6), whether that differentiation concerns either an individual or a (sub)group.

This section leads the argument that KCPOs, via the very form of the two-step civil/criminal hybrid procedure, violate this basic egalitarian precept by eliding the classic distinction between compliance and punishment. The problematic result of this elision is that the regulatory subject is here escalated into becoming the punishable subject *without having committed a crime for which another citizen would be held similarly liable*. Here the much-vaunted flexibility of

responsive regulation becomes more of a concern than a boon, as the dynamic relationship between prevention and sanction, understood as existing within a toolkit of crime control measures, fast-tracks the 'difficult' regulatory subject into this self-fulfilling category.

At this juncture, there are no citable cases that can be drawn from the delayed April 2020 London pilot study, but a hypothetical instance of a KCPO is a useful illustration:

> *Damon's Case:* On two occasions within one academic year, Damon was suspected of having a knife on his person while at school, 'without good reason or lawful authority'. In a Magistrates' Youth Court, he is made subject to a KCPO under OWA 2019 s14, that is, without a conviction. A negative requirement of this order is to be at his place of residence between the hours of 8 pm and 8 am every night of the week (i.e. a curfew, under s21(2)(a)), while a positive requirement is to attend a counselling appointment once per week (under s21(2)(d)). The curfew and the counselling appointment thereby constitute two separate micro-regulations particular to Damon and his circumstances. Damon returns home one Friday evening at 9 pm, and is subsequently held to be in breach of the order. The excuse provided for this breach is deemed not to be a reasonable one, and so Damon is held summarily to be guilty of an offence under s29(1) and, under s29(2), is liable to imprisonment for six months.[20]

Several issues are raised by Damon's case, not least that of due process, whereby a child under the age of 18 is *imprisoned* on the strength of—to be clear—what could be police *surmisal* of routine knife possession, accepted by the Youth Court on the balance of probabilities; and proportionality, whereby Damon's punishment—potentially in the form of a six-month custodial sentence—is out of kilter with the infraction of breaching the order. Importantly, here, the triggering event of the order's breach is the curfew violation, itself an *ex ante* prohibition and an individualized behavioural control to which Damon and Damon alone is subject (Simester and von Hirsch 2006: 178–80). This non-compliance with the order serves to propel Damon expeditiously and directly from *suspected* knife carrier and *potential* knife crime offender to *ex post* criminalization, where the triggering activity is not only itself legitimate but also very remote from the potential offence targeted by the order. It should also be noted here that, while the 'Damon's case' hypothetical has concerned KCPOs, this argument is generally applicable to two-step prohibitions, notably CPOs (for example, Public Space Prevention Orders (PSPOs), Domestic Violence Protection Orders (DVPOs), and Super Football Banning Orders (SFBOs)).

So far, this section has raised three core points. To reiterate: first, KCPOs facilitate the pre-emptive regulation of the behaviour of individuals whose wrongdoing remains merely *potential*. Second, whilst prima facie geared towards the prevention of undesirable behaviour—that is, the carrying of a knife—KCPOs instrumentally and disproportionately target specific categories of individual, the 'usual suspects' of knife crime. Third, and whilst it is acknowledged that future governance requires the making of risk calculations, the problematic inclusion of subjective perceptions within such calculations (Crawford 2009: 819, in the context of anti-social behaviour measures) opens the door to *othering* within the holistic operation (within which is included the targeting, application, making, enforcing and prosecuting in the event of a breach) of KCPOs. The final part of this section will lead to two further connected points: this othering is both obscured and justified by means of reliance on, not *actual* individualized conduct but, rather, *perceived* and taxonomical 'bad character',[21] and that this reliance is, in itself, unjustifiable.

20 According to Home Office Guidance on KCPOs (2019: 18), the alternative options to a custodial sentence for those convicted of a breach include: unpaid work (community payback), rehabilitation activity requirements, undertaking particular programme/s geared towards behavioural changes, mental health treatment (with the defendant's consent), drug rehabilitation and/or a drug testing order (with consent), drug and/or alcohol treatment (with consent) and alcohol abstinence and monitoring (again, with consent).

21 '"His guilt and his descent appear by your account to be the same", said Elizabeth angrily' (Austen 1813: 66).

STATUS CRIMINALIZATION AS 'OTHERING'

Nicola Lacey has argued that the contemporary criminal law in England and Wales has been moving steadily towards a renewed—or rather, a more overt—reliance on *character*-based attribution of criminal responsibility (2011: 12–3; also Redmayne 2015; Lacey 2016). She observes that character-based principles are (re-)emerging in terms of both the substantive and the procedural law, and warns that 'character-facilitated criminal responsibility-attribution' is most likely to be employed against those members of society 'who form easily identifiable objects of anger, fear or resentment'—that is, where the usual suspects are today's '*symbols of "otherness"* relative to contemporary anxieties and technologies' (Lacey 2011: 39). These usual suspects, these 'new others', include, according to Barbara Hudson, '[f]undamentalists, false asylum seekers, promiscuous women, indigenous persons with pre-modern lives, [and] migrants who do not subscribe to the values of the host country' (2008: 277).

Much like the reliance on the character, such criminalization of status is not a new legal development; at least, not in the sense that status offences targeted at dangerous categories—the vagrant, the prostitute, the inebriate—existed in the past (Lacey 2016: 157). Nevertheless, the recent reappearance of this type of assumed-criminality status criminalization is a real concern, not least because of the manner in which it is being *operationalized* via civil/criminal hybrid procedures, of which KCPOs are a paradigmatic example of a pathologizing mechanism. Lacey articulates these 'doctrinally explicit character shortcuts to responsibility' as emblematic of 'enemy criminal law', that is, 'essentially a police power which treats its objects as dangers to be managed, as distinct from citizen criminal law, which responds to subjects invested with rights' (2016: 158).

These points are thrown into particularly sharp relief when the focus is shifted back to the concrete issue of KCPOs. Here the juxtaposition between the professed public health motivations and 'wraparound care' assurances, with the marginalizing and stigmatizing operation of a preventive measure *so aggressive* as to have picked up the moniker of *enemy criminal law* (Ohan 2010), is a particularly stark one. To be clear on this point: in England and Wales in 2019, under a stated public health banner, under-scrutinized legislation was passed that not only perpetuated the problematic idea that either being a particular *sort* of person or having a particular status *in itself* can ground criminal responsibility, but which also targeted this instrumentally at the country's disadvantaged children. This is made yet *extra* sinister when viewed through the prism of race: as Patrick Williams and Becky Clarke note, 'there has long existed a "special" social category attributed to young black men, which serves to legitimize the development and application of increasingly complex and punishing penal apparatus' (2018: 235).

Status criminalization trades on abstractions and stereotypes, more 'projected image than [...] individuated person' (Garland 2001: 179), and as such contributes to insidious generalizations concerning (sub)cultures—the injudicious #knifefree chicken shop box campaign mentioned earlier being a classic case in point (Baker 2019). This vicious cycle is driven by the fiction of 'official crime figures' (Parmar 2016: 57; on the fiction of official statistics production processes, see Merry 2016), where processes of status criminalization combined with general community over-policing serve to perpetuate 'folk devil' type ideas of, for example, Black violence and criminality. Indeed, 'the stereotyping of young black men as "dangerous, violent and volatile" is a longstanding trope that is ingrained in the minds of many in our society' (Williams and Clarke 2018: 235).

While this broad-brush othering approach of status criminalization appears, on the face of it, to sit at odds with the heavily personalized *ad hominem* control experienced by an individual made subject to a KCPO, these can arguably be understood merely as escalating steps of the same preventive control mechanism. Risky or undesirable behaviour is *presumed* to be under-

taken by risky or undesirable people, and so these difficult regulatory subjects—difficult because of their status as the *potentially dangerous other*—need to be controlled *before* they commit crime.[22] Indeed, the two-step progression of the KCPO is premised upon this presumed inevitability of criminal behaviour, which needs to be controlled *pre-emptively* by means of individualized restrictions and requirements. Moreover, while status criminalization involves the differential treatment of a group of citizens, and the requirements of a KCPO constitute the personalized micro-regulation of individual behaviour, both are—as argued above—evidently contrary to the egalitarian foundations of the rule of law by virtue of each comprising a fundamental differentiation in status amongst citizens. Ongoing intersectionality considerations, as mentioned above, should also be borne in mind here: while the race is disproportionately influential in designating the potentially dangerous other, other stigma-attracting factors such as disrupted education or truancy, unemployment, benefit dependency, and general poverty—themselves not race-neutral—all generate compounding effects.

By designating both individuals and whole groups of people as potentially deviant *on grounds of risk mitigation and crime prevention* they are reduced to being mere *means* to that securitized end (Korsgard 1998: xxi; Kant 1785). The wrongness of this move pertains on two counts. First, whereby the ends in question are improved public security and reduced crime rates, the regulatory differentiation on the basis of group membership serves to treat members of that group (or groups) as *lesser* in status *qua* citizen than members of the 'virtuous' or non-difficult majority. Second, and through these pre-emptive techniques of control, certain individuals and groups are deliberately exploited as means towards the stated ends of public security, with the result that these other rational beings are—both practically and symbolically—placed *outwith.* That is to say, outwith the (rest of) the society allegedly being protected by such securitized measures, and outwith the number of individuals aggregated to form 'the public', whose safety and 'right to security' are apparently paramount (see Ramsay 2012).

Our concern here should be in the deliberateness of this social division, and the manner in which the rights and procedural protections of one part of society are jettisoned to privilege the security of another.[23] Moreover, it should be a source of genuine worry in our society that the terminology of 'enemy criminal law' discussed earlier is more fitting than that of civil prevention. The next section will rely on the insights gleaned from the foregoing analysis of the paradigmatic case of KCPOs to argue that the politicized and instrumentalized use of civil/criminal procedural hybrids as a 'pragmatic' alternative to existing criminal law measures constitutes a problematic new regulatory technique used to control the behaviour of *socially demonized* 'usual suspects'.

HYBRID PROCEDURALISM AS A REGULATORY TECHNIQUE

As Hendry and King have argued (2017: 734), civil/criminal procedural hybrids are those 'blended processes in either civil or criminal law that rely upon mechanisms normally associated with the other type, or those that omit procedural dimensions normally required by their own sort'. They blur the lines between the civil law and the criminal law, both in terms of their stated purposes—compensation or punishment—and the processes to be followed and standards to be met. Known alternatively as *inter alia* 'middleground sanctions' (Mann 1992), 'two-step

22 Garland's (2001: 185) discussion of the overlap between the two new criminologies—of, respectively, 'everyday life' and 'the other'—notes this as being 'a shared focus on *control* [and] an acknowledgement that *crime has become a normal social fact*'.

23 The connected issues of privilege and complicity lies outwith the scope of this article, but preventive orders are certainly reliant upon this social division. As Daniel Ohan notes, 'the preventive order acts to bolster the trust of the public in the power of the criminal law to command authority by manifesting distrust in members of the polity whose conduct is suggestive of a deficient capacity and commitment to conform to its norms' (2010: 723).

prohibitions' (Simester and von Hirsch 2006), 'civil penalties' (White 2010), 'quasi-criminal measures' and 'civil for criminal processes' (Young 2017), the use of hybrid procedures is driven by two recognized prosecutorial inconveniences with traditional criminal law. First, the procedural and evidential requirements of the criminal law are stricter than for civil processes, with certain procedural safeguards—such as the presumption of innocence, the burden of proof resting with the prosecution, and the heightened standard of proof beyond reasonable doubt (Langbein 2003; Jackson and Summers 2012; Roberts and Hunter 2012)—in place for the specific protection of a suspect or an accused. These enhanced procedural safeguards operate against abuses of the power asymmetry inherent to the relationship between the individual and the state, not least the imbalance of their respective resources, and in acknowledgement of the potentially deleterious consequences of a guilty verdict (Hendry and King 2015). Second, where the behaviour is merely undesirable but not criminal, the criminal law is inapplicable, even if such behaviour were to occur repeatedly or on an ongoing basis, such as, for example, recurring knife possession. Civil/criminal hybrid procedures thus provide means by which not only can elevated safeguards be circumvented, but undesirable conduct—whatever that may comprise—can be regulated. As Simester and Hirsch have noted in terms of what they call 'two-step prohibitions', procedural hybrids have been employed as a technique that effectively extends the criminal law to encompass behaviour that is minor wrongful activity, conduct adjacent to wrongful activity, or conduct sufficient to constitute wrongful activity only when done repeatedly (Simester and Hirsch 2006: 176–7).

This can clearly be seen in the types of activity regulated by such hybrid procedures: although this article has focused on the comparatively recent example of KCPOs, there was the first Football Banning Order back in 1987,[24] 1998's controversial and now-defunct ASBO,[25] Domestic Abuse Protection Order in 2021[26] and Public Space Protection Orders in 2014,[27] to mention but a few. Such measures are ostensibly intended to curtail or otherwise restrict behaviour deemed contrary to public safety and security (Zedner 2009), but they do so by privileging ideologically driven expediency over considerations of due process (Hendry and King 2017) and facilitating differential treatment that serves to escalate the individual from regulatory subject to punishable subject. While KCPOs are arguably an extreme iteration of this regulatory technique, they are neither the latest hybrid order nor do they show any sign of being among the last.

In these legislative moves towards the proactive forestalling of potential harms, the pre-emptive logic of security underpinning these orders is, once more, clearly evident. Also evident, as Ashworth and Zedner have noted, is 'the fact is that the British Government [… has] seized on the civil preventive order as a model for increasing social control without the need to abide by the protections accorded to defendants in criminal cases' (Ashworth and Zedner 2011: 302). To these observations can be added a third: under the guise of flexibility and pragmatism, the British Government relies on hybridized civil/criminal procedures to manage and control[28] undesirable populations, who are subjected to marginalization, stigmatization, denigration and experimentation. This article contends that this observable pattern introduces hybrid proceduralism as a distinct regulatory technique, one deployed disproportionately and speculatively against so-called 'risk communities' (Rose 1996: 331).

24 Public Order Act 1986 s30, in force 1 April 1987.
25 Crime and Disorder Act 1998 s1.
26 Domestic Abuse Act 2021 ss27-49.
27 Anti-Social Behaviour Crime and Policing Act 2014 ss59-61.
28 For more on the distinctions between the inclination to manage, the urge to punish and further fundamental ambiguities around control, see D. Garland, *The Culture of Control* (OUP 2001).

Thus far this article has led to the argument that the 'usual suspects' of knife crime, and those likely to be made subject to KCPOs, are children drawn disproportionately from minority ethnic groups. In terms of the procedurally hybrid preventive orders just mentioned, football hooligans (James and Pearson 2018: 44), domestic abusers, the homeless[29] and immigrants[30] can all be added to the list of undesirable or 'deviant' groups targeted. Just as with the foregoing example of suspected knife crime offenders, such 'risk communities' are pre-emptively identified as potentially deviant for the purpose of *mitigating* that risk to the rest of society. This is classic risk management: the potential danger is identified, and steps are taken to contain it before that risk either increases or manifests. What is noticeable here, however, is the slippage between risk assessment premised upon individual conduct and that premised upon a group or population membership. While the earlier discussion of status criminalization has already highlighted this catch-all form of othering, it is worth reiterating here that what this facilitates is the establishment of allegedly 'dangerous' subjectivity premised not upon individual agency but, rather, on association or categorization. In this regard, preventive strategies fail to uphold the premise that 'assessments of risk [are] based on individual agency, and not on any political prejudice towards any specific population' (Carvalho 2017: 183, my emphasis). Indeed, it is easy to doubt the plausibility of broad and general applicability when actual application is narrow and targeted, and correspond to the ease by which an individual can be categorized as belonging to one or more risk communities.

While this inherently discriminatory dimension of preventive measures is concerning in itself, it is in its combination with the procedurally hybrid form—which, to reiterate, specifically enables the evasion of criminal law's fundamental protections—that it becomes troubling. For these are not measures that maintain the initial distinction between 'real crime' and 'regulatory offences where the latter historically constitutes, as Alan Norrie has explained, a method of regulation free of moral implications (Norrie 2014, chapter 5 generally). On the contrary, and as has been argued throughout this article in terms of the paradigmatic case of KCPOs: civil/criminal procedural hybrids can be disproportionate, restrictive, stigmatizing and criminalizing (Squires and Stephen 2005: 525). The operative elision of civil and criminal procedure for the achievement of, if not explicitly criminal law objectives, then certainly *security* ones, is exposed here.

This is not merely 'criminalization creep', however, although the fact that hybridized procedures regulate some of the most commonplace interactions between the legal system and the public makes these deserving of greater scrutiny, notably where the interface between allegedly pragmatic risk management and increased local discretion (Simester and von Hirsch 2006: 180) on the part of, for example, magistrates, is liable to be problematic. More than mere creeping criminalization, hybrid proceduralism can be identified by, among other things: its experimental quality, its imaginative use of the different levers of control and compliance, the manner in which it fast-tracks criminality via an escalatory process, the insidious way it targets populations perceived as 'other' or in some other way undeserving of the protections of the rule of law, and its reliance on the mechanics of responsive regulation, namely efficiency, flexibility and pragmatism.

Having already argued that both *ad hominem* regulation and status criminalization are contrary to the egalitarian foundations of the rule of law, this article will conclude by similarly rejecting commonly vaunted appeals to pragmatism—often presented alongside flexibility as an

29 Although PSPOs have a disproportionate effect upon homeless people, it should be noted that, unlike other individualized CPOs, these orders are spatial in nature.

30 As Ana Aliverti notes, 'The "foreign criminal" has come to embody the nation's most derided individual who combines racialized fears about the stranger and the criminal, and is the precursor of the recent foreign national agenda in criminal justice' (Aliverti 2020: 12).

advantage of responsive regulation—as insufficient to justify hybrid procedures in this respect. As discussed in relation to KCPOs, while such preventive hybrids may prima facie appear advantageous, they have been deliberately designed to 'dodge' both evidentiary and procedural requirements and, as such, to privilege ideologically-motivated political expediency over procedural legitimacy (Hendry and King 2017). This instrumentalized use of the regulatory technique of hybrid proceduralism is underpinned by a fundamentally pragmatic understanding of the law, which can be broadly understood as one where decisions are taken with a view towards best serving the *community's* future. In elevating the interests of the community or collective over the rights of the individual, however, a pragmatist will find 'the necessary justification for coercion in the justice or efficiency or some other contemporary virtue of the coercive decision itself' (Dworkin 1986:151). In the context of preventive hybrid orders, the obvious justification would be *security*, a logic that inevitably results in the protection of the 'virtuous' majority coming at the expense of the allegedly dangerous other. On this reasoning, pragmatism, as grounds for any diminution of due process protections, should be viewed with disquiet.

CONCLUSION

It is with this sense of disquiet over the preventive hybrid form that this critique will conclude. This article has undertaken an in-depth analysis of the civil/criminal procedural hybrid KCPO, with a view to providing the first comprehensive theoretical engagement with this particular preventive hybrid, as well as situating it within both the broader context of criminal law's preventive turn and the debate on procedurally hybrid forms. KCPOs have been presented as one of the latest such hybrids, and the latest in an iterative progression of this regulatory technique, one that can be characterized by its recursiveness. Having drawn a threefold distinction within the concept of the regulatory subject—the responsible, the rational/virtuous and the difficult/other—this article has made the case that preventive hybrids not only generate a category of 'difficult' subjects but also operate instrumentally to bypass the elevated procedural safeguards usually afforded to the responsible subject of classical criminal law. Importantly, this is the outcome even when, within the framework of a responsive regulatory cycle, KCPOs and other preventive hybrids *purport* to treat individuals subject to them as rational or virtuous. Such is the dynamic relationship between prevention and sanction—between compliance and punishment—that the preventive hybrid form facilitates slippage between difficult and thus potentially dangerous, and criminal. As this article has argued, in their combination of *ad hominem* regulation with the operative elision of the civil/criminal distinction aimed specifically at circumventing the elevated procedural protections of the criminal law, KCPOs have the potential for devastating effects upon disadvantaged children and young people, and for these effects to be borne disproportionately by minority ethnic children.

By presenting KCPOs as a paradigmatic example of civil/criminal procedural hybridity, and the latest in a continuous and problematic policy trend, this article has furthermore argued that it is this very hybridity that lies at the heart of its most problematic features. It has made the case that these insights provide the grounds for a fuller, broader interrogation of other instances of procedural hybridity, and the regulatory approach of hybrid proceduralism, and argued that such an interrogation is both timely and important in light of the manner in which such procedures are employed to target populations who are *already othered* within society more broadly. For the reasons already outlined, there is good cause to be wary of such developments. As a regulatory technique hybrid proceduralism arguably moves beyond mere criminalization creep by virtue of encompassing both the status of the individual *and* the potential behaviour in a quite deliberate manner. This is perhaps best illustrated by the proposed Serious Violence Reduction Order (SVRO) in the Police, Crime, Sentencing and Courts Bill 2021 currently being debated

in Parliament. Already controversial for its proposed restrictions on protest rights, this Bill contains a less well-publicized but no less worrying SVRO, a civil order that purports to extend 'stop and search' police powers to allow their exercise without reasonable suspicion against offenders previously convicted of carrying a knife. Public consultation on this Bill has brought condemnation from civil society actors, on the grounds that SVROs allow police arbitrarily to detain and to search individuals, are likely to be used disproportionately against members of Black, Asian and minority ethnic communities, and create conditions where individuals subject to them could be treated as perpetual criminals. In spite of these problems, the use of such hybrid orders appears, quite evidently, to be on the rise.

This legislative intentionality begs attention: within a responsive regulatory cycle, such procedurally hybrid forms in effect both *create* the difficult regulatory subject *and* reduce their procedural safeguards. An optimistic reading of this situation—where the allegedly 'softer' regulatory regime has ended up being harsher for certain differentiated populations than the existing criminal law alternatives—could be that the balance between securitization and due process has been inadvertently disturbed by a well-intentioned yet overblown interventionalism. A more sceptical reading, however, would point to regular and repeated use of this regulatory technique as clear evidence of a continuous and dysfunctional pattern. In this regard, those practices of othering, which this article has argued are inherent to such preventive hybrids, are exposed less as unanticipated and unintentional consequences of hybrid proceduralism and more as its ideological goals.

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