Children at Risk of School Dropout

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Abstract
This chapter begins by outlining the routes through which children 'drop out' of school. It then draws on the failings of the English system to suggest six key 'lessons' for other jurisdictions. The first centres on how academic results-driven accountability measures push schools and decision-makers into unjustifiably excluding children. The second demonstrates the vulnerability of discretionary frameworks to perverse incentives and unintended negative consequences for children at risk of 'drop out'. The third highlights the difficulties created by increased autonomy for teachers and schools. The fourth reveals how additional protections for particularly vulnerable children are constrained by the broader exclusion regime. The fifth and sixth demonstrate the need for jurisdictions to revisit the conceptual and empirical basis of their legal frameworks for exclusion, whether grounded in 'best interests', competing 'interests', or 'children's rights'. It concludes by emphasising the need to develop empirical evidence to underpin decisions around 'drop out'.

Keywords
School dropout; permanent exclusion; expulsion; education law; children's rights; right to education; best interests; school accountability; discretion; autonomy

1 Introduction

Children 'drop out' from school if they become disengaged from the education system. This may involve being excluded from school, whether legally or illegally; being 'internally

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excluded' from mainstream regular classes while remaining in the school; undergoing a 'managed move'[1] to another school or 'alternative provision'; or otherwise 'missing education' by not being on a school roll and not being educated other than at school, including not receiving full-time provision when able to do so.[2] Understood more broadly, 'drop out' also includes being in full-time education but disengaged from the education offered regardless of the precise cause.[3] This chapter focuses on permanent exclusion and on interference with a pupil's education that has the same disruptive effect as permanent exclusion.

The legal regulation and practice of exclusion from English schools is in crisis. In a recent report, the House of Commons' Education Committee commented that "[m]ainstream schools should be bastions of inclusion, and intentionally or not, this is not true of all mainstream schools".[4] This chapter's account of the role of law in contributing to that crisis offers lessons for other jurisdictions in addressing the number and rate of children who 'drop out' from school.

I begin by outlining the current legal framework and the regulation of permanent and fixed period exclusion, as well as the various other routes to 'drop out', namely 'managed moves', internal exclusions and part-time timetables, and 'missing education' through other means such as attending unregistered providers and being excluded illegally. I then draw on the

[1] Discussed at (n 58) et seq and corresponding main text, below.
[2] Education Act 1996, c 56 (as amended), s436A.
[3] Eleni Stamou, Anne Edwards, Harry Daniels, and Lucinda Ferguson, *Young People At Risk of Drop-Out from Education: Recognising and Responding to Their Needs* (University of Oxford 2014) 5.
[4] House of Commons' Education Committee, *Forgotten children: alternative provision and the scandal of ever increasing exclusions*, Fifth Report of Session 2017-19, HC 342 (HMSO 2018) Summary.

failings of the English system to suggest six key 'lessons' for other jurisdictions. The first centres on the importance of the legal regime being able to prevent unjustifiable exclusion and 'drop out' as a response to accountability measures, and the second highlights the need to prevent or redress the vulnerability of a discretionary decision-making regime to the same. The third lesson highlights the difficulties created by increased autonomy for teachers and schools. The fourth reveals that additional protections for particularly vulnerable children are constrained by the broader exclusion regime. The fifth and sixth lessons demonstrate the need for jurisdictions to revisit the conceptual basis of their legal frameworks for exclusion, whether grounded in 'best interests', competing 'interests', or 'children's rights', and develop a body of empirical evidence that can be drawn upon when considering which particular outcome is best for all affected parties when a child is at risk of 'drop out'.

In what follows, references to 'permanent exclusion' are interchangeable with discussion of 'expulsion' and being 'kicked out' of school in other jurisdictions; 'fixed period exclusion' is interchangeable with 'suspension'. The focus is on state schools, not independent or private[5] schools, exclusion from which is governed by contract.[6]

The current crisis

A statistical overview reveals the depth of the English crisis. Firstly, the sheer extent of permanent exclusion is staggering. Whilst the number and rate of permanent exclusions

[5] To avoid confusion, it is worth noting that in the UK context 'public' schools are in fact private schools.
[6] For discussion, see J Richard McManus QC, *Education and the Courts*, 3rd ed (Jordan publishing 2012) [6.173]-[6.174].

from English schools had been slowly declining and then stabilised for a number of years,[7] it has recently started to significantly increase.[8] In 2016/17, the rate of permanent exclusion was 0.10 percent, an increase from 0.08 in 2015/16.[9] Notably, the rate of permanent exclusion from primary school (5-11 year olds) increased from 0.02 to 0.03 in 2016/17, marking the first rise since 2005/06.[10]

Second, the English exclusion rate vastly exceeds that of other UK countries. In 2016/17, Scotland had a permanent exclusion rate of 0.0, which comprised five incidences.[11] The 0.04 rate for Wales in 2016/17, whilst less than half that for England, marked an increase for the first time since 2011/12.[12] There were a total of 33 permanent exclusions (expulsions) in Northern Ireland for 2016/17.[13] Moreover, there is evidence that the English data does not account for children who have dropped out through informal or 'illegal exclusion',[14] 'gone missing' from statutory schooling without any records,[15] or been "functionally

[7] Department for Education, *Statistical First Release: Permanent and fixed-period exclusions in England: 2010 to 2011 (SFR 17/2012)* (HMSO 2012) 1.
[8] See, for example, Department for Education, *Statistical First Release: Permanent and fixed-period exclusions in England: 2015 to 2016 (SFR 35/2017)* (HMSO 2017) 1.
[9] Department for Education, *Statistical First Release: Permanent and fixed-period exclusions in England: 2016 to 2017* (HMSO 2018) 1.
[10] Excluding a drop to 0.01 for 2010/11. This rise marks a return to the pre-2005/06 rate of 0.03. See Department for Education, *Statistical First Release: Permanent and fixed-period exclusions in England: 2011 to 2012 (SFR 28/2013)* (HMSO 2013) National tables: Table 1.
[11] Scottish Government, *Summary Statistics for schools in Scotland, No 8: 2017* (most recent correction: 5 Dec 2018) (Scottish government 2018) 27 and Table 8.1.
[12] Statistics for Wales, *Permanent and fixed-term exclusions from schools in Wales, 2016/17 (SFR 87/2018)* (Welsh Government 2018) 1.
[13] Department of Education, Northern Ireland, *Pupil expulsions 2016_2017*, online: < https://www.education-ni.gov.uk/sites/default/files/publications/education/Pupil-expulsions-2016-17.pdf> (15 December 2018)
[14] See Office of the Children's Commissioner, *They never give up on you: Office of the Children's Commissioner School Exclusions Inquiry – Full report* (Office of the Children's Commissioner 2012); Office of the Children's Commissioner, *Always Someone Else's Problem – Office of the Children's Commissioner's Report on illegal exclusions* (Office of the Children's Commissioner 2013); Office of the Children's Commissioner, *They Go the Extra Mile – Reducing inequality in school exclusions* (Office of the Children's Commissioner 2013); Christy Kulz, *Mapping the Exclusion Process: Inequality, Justice and the Business of Education* (Communities Empowerment Network, 2015) 6.
[15] Ofsted, *Pupils Missing Out on Education* (Ofsted 2013).

excluded from mainstream school" by measures such as internal exclusion away from mainstream classes.[16]

Third, as in the United States,[17] children with particular characteristics are disproportionately likely to be permanently excluded in England--namely, White Irish traveller, Roma / Gypsy, and Black Caribbean children, as well as children with special educational needs and disabilities, those who have been or are 'looked after' in the child protection system, and those who are or have been in the past six years eligible for free school meals.[18]

Fourth, permanent exclusion rates are persistently inconsistent between English local authorities.[19] Multi-level analysis suggests that school and local authority culture probably plays a role in determining the likelihood of exclusion for particular children.[20] The evident inconsistency in exclusion rates between school and local authority populations with similar student-level "risk factors"[21] suggests an unjustifiable postcode lottery regarding the likelihood of any particular child being permanently excluded and that these rates are attributable at least in part to local authorities and schools.

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[16] Kiran Gill, with Harry Quilter-Pinner and Danny Swift, *Making the Difference: Breaking the Link between School Exclusion and Social Exclusion* Institute for Public Policy Research 2017) 21. On the representation of permanently excluded pupils in the criminal justice system, also see Department for Education, *Creating opportunity for all: Our vision for alternative provision*, DFE-00072-2018 (HMSO 2018) 7.

[17] See Richard O Welsh and Shafiqua Little, 'The School Discipline Dilemma: A Comprehensive Review of Disparities and Alternative Approaches' (2018) 88(5) Review of Educational Research 752-794.

[18] DfE, *Creating opportunity* (n 16) [46].

[19] See, for example, DfE, *SFR 2016-17* (n 9) Local authority tables: Table 16.

[20] Steve Strand and John Fletcher, *A Quantitative Analysis of Exclusions from English Secondary Schools* (University of Oxford 2014) 1.

[21] Lucinda Ferguson and Naomi Webber, *School Exclusion and the Law: A Literature Review and Scoping Survey* (University of Oxford 2015) section 4.9.

The English position highlights the significance of school 'drop out' for affected children, their families, and broader society, as well as the attendant "cycle of social immobility".[22] For each cohort of permanently excluded children in England, it is estimated that it costs the individual and the state at least £2.1 billion.[23] Being in alternative provision "too often… leads [children] straight from school exclusion to social exclusion",[24] with excluded children being "the most vulnerable".[25] At an international level, children's right to education has been framed in terms of having "become a security issue".[26] Yet, there remains too little direct focus on permanent exclusion and 'drop out'; instead, they tend to be seen as contributing factors or a mere gateway to other social problems that are the subject of moral panic,[27] such as child sexual exploitation,[28] drugs gangs,[29] and youth knife crime.[30]

2 Outline of the legal framework

[22] Gill et al (n 16) 21. On the representation of permanently excluded pupils in the criminal justice system, also see DfE, *Creating opportunity for all* (n 16) [16].
[23] Gill et al, ibid 23.
[24] Gill et al (n 16) 7.
[25] Gill et al (n 16) 7.
[26] Irina Bokova, 'The Right to Education for all Children' (November 2014) online: <https://www.unicef.org/crc/files/Irina_Bokova.pdf> (15 December 2018)
[27] For a concise summary of the issues, see Viviene E Cree, Gary Clapton, and Mark Smith, 'Moral panics and beyond' in Viviene E Cree, Gary Clapton, and Mark Smith (eds), *Revisiting Moral Panics* (Policy Press 2016) 261-269, 264.
[28] See, for example, Nicola Sharp-Jeffs, Maddy Coy, and Liz Kelly, *Key messages from research on child sexual exploitation: Professionals in school settings* (Centre of expertise on child sexual abuse 2017) 5.
[29] See, for example, Barnardo's evidence to the All-Party Parliamentary Group on Knife Crime, discussed: 'Children excluded from school 'are at risk of knife crime' (30 October 2018): <https://www.barnardos.org.uk/news/Children_excluded_from_school_are_at_risk_of_knife_crime/latest-news.htm?ref=130695> (15 December 2018). On the educational background of youth offenders serving custodial sentences, see Ministry of Justice and Department for Education, *Understanding the educational background of young offenders: summary report* (HMSO 2016) 2-3.
[30] See, for example, Barnardo's, ibid.

Inadequate direct focus on 'drop out' from school in the policy sphere mirrors the lack of attention to its legal regulation. In this section, I outline the various routes, formal and informal, legal and illegal, through which children 'drop out' of school.

Formal permanent exclusion

Section 51A(10) of the Education Act 2002, the governing statutory provision on permanent exclusion, defines 'exclude' as meaning "exclude on disciplinary grounds".[31] Whilst this limited coverage in legislation is supplemented by Regulations[32] and statutory guidance, it provides a *discretionary* regime within which decision-makers exercise "supported autonomy".[33] It is the statutory guidance to which schools turn for their understanding of the legal framework. The most recent 2017 statutory guidance provides a *two-limb test* to govern a head teacher's decision to permanently exclude a pupil: the decision "should only be taken…", *firstly*, "in response to a serious breach or persistent breaches of the school's behaviour policy";[34] and, *second*, "where allowing the pupil to remain in school would seriously harm the education or welfare of the pupil or others in the school".[35]

The 2017 guidance is also clear that permanent exclusion "should only be used as a last resort"[36] and, in particular, "should, as far as possible" be avoided in the case of a child with an EHC plan or a 'looked after' child.[37] Neither permanent nor fixed period exclusion is

[31] Education Act 2002, c 32, s 51A(10) (inserted by the Education Act 2011, c 21, s 4).
[32] See, for example, School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012.
[33] Department for Education, *Educational Excellence Everywhere*, Cm 9230 (HMSO 2016) [1.13].
[34] Department for Education, *Exclusion from maintained schools, Academies and pupil referral units in England*, DFE-00184-2017 (HMSO 2017) [16].
[35] DfE, *2017 statutory guidance*, ibid.
[36] DfE, *2017 statutory guidance* (n 34) 3.
[37] DfE, *2017 statutory guidance* (n 34) [23]. 'Looked after' is defined in Children Act 1989, c 41, s 22.

justifiable if it is discriminatory within the terms of the Equality Act 2010.[38] Following the recent Upper Tribunal decision in *C & C v The Governing Body of a School, Secretary of State for Education (First Interested Party) and The National Autistic Society (Second Interested Party) (SEN)*,[39] for example, a head teacher can no longer exclude a child with a condition who has "a tendency to physical abuse"[40] unless the school has already sought to make reasonable adjustments and the exclusion is a proportionate response.[41] The head teacher's decision to permanently exclude is subject to standard public law restraints, namely that it must be lawful, rational, reasonable, fair, and proportionate.[42] The governing board of the school is required to consider whether to reinstate any excluded pupil,[43] rather than whether the head teacher's decision was justifiable in law.

Since the "substantial" reforms in 2012,[44] no right of *appeal* exists in relation to permanent exclusion.[45] If the pupil's parents take the exclusion to an independent review panel (IRP), it can only *review* the governing board's decision not to reinstate the child,[46] which means that there are no circumstances in which it can "direct" that the excluded child is reinstated. Instead, the IRP can either: uphold the governing board's decision, "recommend" that the governing board reconsiders reinstatement; or, if and only if one or more of the grounds for

[38] c 15.
[39] *C & C v The Governing Body of a School, Secretary of State for Education (First Interested Party) and The National Autistic Society (Second Interested Party) (SEN)* [2018] UKUT 269 (AAC).
[40] *C & C*, ibid [3] (Judge Rowley).
[41] *C & C* (n 39) [89]-[90] (Judge Rowley).
[42] DfE, *2017 statutory guidance* (n 34) 6, [6].
[43] DfE, *2017 statutory guidance* (n 34) [61], [63]; Exclusions and Reviews Regulations (n 32), Reg 6(2)-(3).
[44] *R (CR) v Independent Review Panel of the London Borough of Lambeth* [2014] EWHC 241 (Admin) [16] (Collins J).
[45] Though note that the position is different in both Wales and Scotland. See Neville Harris, 'Playing Catch-up in the Schoolyard? Children and Young People's "Voice" and Education Rights in the United Kingdom' (2009) 23(3) International Journal of Law, Policy and the Family 331-366, 350.
[46] DfE, *2017 statutory guidance* (n 34) [136].

judicial review is made out,[47] quash the decision and "direct" that the governing board reconsiders.[48] Only the parents, and not the child have the right to ask for a review.[49] Regardless whether the child has recognised special educational needs, the parents can request that a SEN expert be appointed to the panel.[50]

If the IRP directs reconsideration and the governing board does not reinstate the pupil, the IRP "may … order" that the school pays £4,000 towards the continuing education of the excluded pupil.[51] Only one application for judicial review[52] has been heard since the 2012 reforms to the IRP process. The House of Commons' Education Committee, the Office of the Children's Commissioner, and the United Nations' Committee on the Rights of the Child have recommended reforming the law to reintroduce IRPs' power to direct reinstatement.[53]

In addition, and if relevant, the parents may also bring discrimination claims under the Equality Act 2010 – to the First-tier Tribunal (FtT) if it is disability-related and to the County Court for other types of discrimination.[54]

Other routes to 'drop out'

[47] DfE, *2017 statutory guidance* (n 34) [141].
[48] DfE, *2017 statutory guidance* (n 34) [138].
[49] DfE, *2017 statutory guidance* (n 34) [67].
[50] Exclusions and Reviews Regulations 2012 (n 32) Regs 7(1)(b), 24(6)(b)(iii), 25(1)(b); DfE, *2017 statutory guidance* (n 34) [76].
[51] Education Act 2002 (n 31), s51A(6)-(7); Exclusions and Reviews Regulations 2012 (n 32), Regs 7(5)(b), 21(4), 25(5)(b); DfE, *2017 statutory guidance* (n 33) [147], [173].
[52] *Lambeth* (n 44).
[53] HoCEdCee (n 4) [45]; OCC, *They never give up on you* (n 23) [16]; United Nations' Committee on the Rights of the Child, *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland* (3 June 2016) [72(c)].
[54] DfE, *2017 statutory guidance* (n 34) 6, [74].

In addition to the formal permanent exclusion process, there are other legal and illegal means through which children may 'drop out' of school. At least some schools employ these alternative routes to avoid the procedural safeguards, local authority oversight and scrutiny, and accountability measures attached to the formal process.

Fixed period exclusions. A child may miss up to 45 school days in an academic year[55] as a result of fixed period exclusions. The fixed period exclusion rate in England has been steadily increasing for the past few years to 4.76 in 2016/17.[56] In addition to being the "predominant predictor" of permanent exclusion,[57] such periods may contribute to 'drop out' in the broader sense of being disengaged from the education offered, but that is beyond the focus of this chapter. Given the need for schools to report fixed period exclusions, there is more oversight here than over other forms of 'drop out'.

'Managed moves'. This signifies the process by which a child is 'off-rolled' from one school and moved to another school; it requires the consent of both the parents and the admitting school.[58] It is the most common alternative to permanent exclusion.[59] Though a 'managed move' is a legal strategy that might be employed to avoid formal permanent exclusion, it is unclear how often it is used out of consideration for the affected child rather than to protect the interests of the 'off-rolling' school. It would be to the pupil's benefit, for example, to avoid formal permanent exclusion given that an admission authority may refuse to admit a

[55] DfE, *2017 statutory guidance* (n 34) [1].
[56] DfE, *SFR 2016-17* (n 9), National tables, Table 1.
[57] Strand and Fletcher (n 20) 1.
[58] DfE, *2017 statutory guidance* (n 34) [15].
[59] Louise Gazeley, Tish Marrable, Chris Brown, and Janet Boddy, 'Contextualising Inequalities in Rates of School Exclusion in English Schools: Beneath the "Tip of the Ice-Berg"' (2015) 63(4) British Journal of Educational Studies 487-504, 493.

child who has been excluded twice.[60] Yet, for children who do not wish to move schools, the threat of permanent exclusion might be unjustifiably used to secure consent to the benefit of 'off-rolling' schools.

Internal exclusions and part-time timetables. The House of Commons' Education Committee noted an "alarming increase in 'hidden' exclusions",[61] which includes both internal exclusion and part-time timetables. If a child is 'internally excluded', they are 'referred' or otherwise removed from mainstream classrooms to an 'internal-exclusion' or intervention classroom.[62] Whilst internal exclusion could be beneficial to children if it enabled them to stay in school and better access mainstream education than otherwise, it could also be used as a means of removing 'problem children' from the classroom without having to officially record that absence. The same concerns arise in respect of reduced or part-time timetables.[63] The only interaction with the legislative framework is with the requirement that, if a child is placed on such a timetable, any affected required sessions (ie. am, pm) need to be marked as authorised absences.[64] Otherwise, there is no official statutory basis upon which to establish a reduced timetable.[65] The child's right to a full-time education[66] means that the parent or guardian has to agree to any reduced timetable or it cannot be imposed. There are limited circumstances in which, due to pre-existing

[60] DfE, *2017 statutory guidance* (n 34) [174].
[61] HoCEdCee (n 4) 3.
[62] Alex Stanforth and Jo Rose, 'You kind of don't want them in the room': tensions in the discourse of inclusion and exclusion for students displaying challenging behaviour in an English secondary school' (2018) International Journal of Inclusive Education 1-15, 3 (advance online version).
[63] Neither is a technical legal term.
[64] Department for Education, *School attendance: Guidance for maintained schools, academies, independent schools and local authorities*, DFE-00257-2013 (HMSO 2016) 16.
[65] As the matter relates to absence, it may be said to fall within the terms of the Education Act 1996 (n 2), c 56, s 551, though the *School attendance guidance*, ibid, does not list that provision in the section that addresses registers.
[66] DfE, *School attendance guidance* (n 64) 16.

involvement, the local authority will be aware of reduced timetables: reintegration after permanent or fixed period exclusion and medical reasons for absence. Otherwise, schools are not required to notify the local authority when they place a child on a reduced timetable.[67] This creates an invisible group of children missing education who have not officially 'dropped out'.

There is neither any oversight built into the discretionary regime nor any national data published on the use of managed moves, internal exclusions,[68] or reduced timetables. This highlights the need to be cautious about apparently-inclusive schools with either no, or a low rate of permanent exclusions.[69] The avoidance of the formal exclusion process' accountability mechanism casts doubt over the positive value of managed moves for children.

'Missing education', unregistered providers, and illegal exclusions. If a child is not on a school roll, and not educated other than at school, they are 'missing education' within the terms of the Education Act 1996.[70] This includes the child being moved to an unregistered provider, such as a religious school, for 'full time' education.[71] Whilst the quality of such alternative provision may be excellent, there is scant oversight. For a child to be 'off-roll' but not 'missing education', they must either be in alternative provision or home educated. As with internal exclusions and reduced timetables, off-rolling is open to misuse as part of a

[67] Rebekah Ryder, Amy Edwards, Katie Rix, *Children Missing Education: Families' Experiences* (National Children's Bureau 2017) 69.
[68] Gazeley et al (n 59).
[69] Sally Power and Chris Thomas, 'Not in the classroom, but still on the register: hidden forms of school exclusion' (2018) International Journal of Inclusive Education 1-5 (advance online version).
[70] (n 2) s 19.
[71] HoCEdCee (n 4) [105]-[110].

strategy of reducing permanent exclusion figures. In Wales, for example, whilst permanent and fixed period exclusion rates have fallen in recent years, the number of children 'off-roll' is at best unchanged.[72]

In England, the Association of Directors of Children's Services has expressed concern over schools encouraging parents to agree to home educate not for the child's benefit but to serve the school's interest in avoiding the formal exclusion process and accountability measures.[73] If parental consent is not genuine, this form of 'off-rolling' is illegal.[74] The private context in which the 'off-rolling' school's parental encouragement operates makes it very difficult to prevent illegal exclusion. In addition to inappropriate elective home education, exclusion other than in accordance with the statutory guidance is also illegal.[75]

This outline of other routes to 'drop out' beyond formal permanent exclusion paints a complex picture in which there is both little empirical evidence regarding use in practice and little oversight of the quality of provision for children and their outcomes. There are two lessons for other jurisdictions: firstly, the broader context for any accountability measures, such as the autonomy afforded to decision-makers and the discretionary nature of the English regime, needs to be carefully considered so as to not to incentivise the unjustifiable use of illegal and informal exclusion; second, there should be oversight, at least in terms of reporting and recording, of all forms of children missing out on mainstream classes in order

[72] Gillean McCluskey, Sheila Riddell, and Elisabet Weedon, 'Children's rights, school exclusion and alternative education provision' (2015) 19(6) International Journal of Inclusive Education 595-607, 599.
[73] Association of Directors of Children's Services, 'A review of school exclusion: call for evidence' (27 April 2018), online: <http://adcs.org.uk/assets/documentation/ADCS_evidence_review_of_school_exclusion.pdf> [11]-[12] (15 December 2018).
[74] Gill et al (n 16) 11.
[75] Kulz found evidence of such exclusions in practice. Kulz (n 14) 6.

to monitor, enable school-level intervention with, and prevent illegal and informal exclusion.

3 English 'lessons'

The negative consequences of permanent exclusion mean that it is critical that children are permanently excluded only for the right reasons. This is especially so, given that an admission authority may refuse to admit a child who has been twice excluded.[76] Despite these concerns, the government's annual Statistical First Releases highlight significantly inconsistent exclusion rates between local authority areas,[77] which "probably have significant socio-cultural and school policy dimensions"[78] and, I suggest, are the product of the culture of individual schools, local authorities, and the interaction between the two.

I argue that there are six key 'lessons' to be learnt from the experience of children's exclusion from school in the English context. Firstly, academic results-driven accountability measures push schools and exclusion decision-makers into inappropriate and unnecessary decisions to exclude. Second, discretionary decision-making frameworks are open to perverse incentives and unintended consequences that are harmful for children at risk of 'drop out'. Third, successfully empowering and supporting teachers and schools through

[76] DfE, *2017 statutory guidance* (n 34) [174].
[77] In the North West region, for example, Bury had a permanent exclusion rate of 0.28 whilst St Helen's was suppressed as it would have been based on permanently excluding one or two children: see DfE, *SFR 2016-17* (n 9) Local authority tables: Table 16.
[78] Strand and Fletcher (n 20) 1.

greater autonomy requires oversight, collaboration between decision-makers, and education to inform its exercise. Fourth, enhanced protection for especially vulnerable children, including those with special educational needs, is only as effective as the broader context in which it operates. Fifth, despite its successful role in other contexts, children's 'best interests' is theoretically unworkable in this context, and there is no sound evidence base upon which to weigh competing 'interests'. Sixth and finally, 'children's rights' are currently insufficiently developed, at least in this context, to be of much assistance to children at risk of exclusion, though this suggests direction for future development.

Accountability measures

As Sir Al Aynsley-Green notes, "[t]here is good evidence that other countries are concerned about the target-driven approach and are rejecting the momentum for teacher and school accountability in this way".[79] Whilst much of the criticism relates to the impact on children's mental wellbeing and happiness, such accountability measures also result in inappropriate and unnecessary exclusions. Permanent exclusion is intended to be a last resort, yet Kulz found "numerous grey areas" in which it was "questionable" whether head teachers had made the decision to exclude on that basis.[80]

[79] Al Aynsley-Green, *The Betrayal of British Childhood: Challenging Uncomfortable Truths and Bringing about Change* (Routledge 2019) 37.
[80] Kulz (n 14) 6.

In relation to drug-related incidents, the formal position is that "exclusion should not be the automatic response … and permanent exclusion should only be used in serious cases".[81] But head teachers and schools regularly publicly state they will permanently exclude in broader circumstances. In 2018, one head teacher, for example, responded to claims about drug use or dealing on school premises by stating that "[the school] has a zero tolerance policy on drugs. Any student found to have inappropriate substances is permanently excluded from the academy".[82] Such unlawful, yet unchallenged school policies highlight both the lack of understanding of the legal framework and lack of legal and government oversight experienced by individual schools; the policy's existence is no doubt not helped by the fact that the elucidation of the "last resort" approach in the drugs context is contained in the non-statutory advice on drugs, rather than in the exclusion-specific statutory guidance.

The drive to improve academic standards combines with the lack of adequate oversight to lead to unlawful and unjustifiable exclusions. The House of Commons' Education Committee cites the new Progress 8 measure of tracking a pupil's academic 'distance' travelled, together with the accountability system, as "a major factor" in contributing to 'off-rolling'[83] and the Committee heard evidence that it incentivised exclusion.[84] These incentives have the unintended consequence of particularly affecting children with complex needs since severe under-attainment has a disproportionately damaging impact on an individual school's performance indicators.[85] Gill et al also note that funding cuts to budgets

[81] Department for Education and Association of Chief Police Officers, *DfE and ACPO drug advice for schools: Advice for local authorities, headteachers, school staff, and governing bodies*, DFE-00001-2012 (HMSO 2012) 7.
[82] Jamie Waller, 'Tollbar Academy reassures parents after mum finds "drug buying" texts on phone of son, 12' (Grimsby Telegraph, 12 July 2018), online: <https://www.grimsbytelegraph.co.uk/news/grimsby-news/tollbar-academy-reassures-parents-after-1772414> (15 December 2018).
[83] HoCEdCee (n 4) [29].
[84] HoCEdCee, ibid [30].
[85] Gill et al (n 16) 26.

used to raise attainment and support children means that, for under-pressure schools, exclusion has become a critical means to improve key metrics.[86] Whilst this may improve as a result of schools becoming responsible for commissioning alternative provision and retaining accountability for children who do not then enrol at another mainstream school,[87] it is unclear how such reform will interact with the incentives that operate around fair access panels, discussed below.

There is some limited countervailing evidence in respect of the increased rate of permanent exclusion from (sponsor) Academies compared to maintained schools. 'Academies' are schools in relation to which the local authority has no statutory power of intervention. Machin and Sandi found that, whilst performance was improved by the permanent exclusions, this was not "being used as a strategic means of manipulation to boost measured school performance" and was instead "a feature of rigorously enforced discipline procedures".[88] But this conclusion should be approached with caution. Given that 'zero tolerance' behaviour policies marginalise vulnerable groups, making their exclusion "almost inevitable",[89] such disciplinary procedures may be indirectly responsible for unjustifiably high rates of permanent exclusion in any event.

Discretion, perverse incentives, and unintended consequences

[86] Gill et al, ibid 26.
[87] DfE, *Educational Excellence Everywhere* (n 33) [6.76]-[6.77].
[88] Stephen Machin and Matteo Sandi, *Autonomous Schools and Strategic Pupil Exclusion, CEP Discussion Paper No 1527* (Centre for Economic Performance 2018) Abstract.
[89] ADCS (n 73) [6].

The English system highlights how discretionary decision-making frameworks are open to perverse incentives and unintended consequences that are harmful for children at risk of exclusion. Accountability measures and funding cutbacks operate to unjustifiably and inconsistently increase permanent exclusions.

Firstly, the 'disciplinary' basis on which children may be permanently excluded acts as a smokescreen for underlying, potentially unjustifiable reasons. In 2016/17, the most common reason reported by local authorities and Academies via the annual School Census was 'persistent disruptive behaviour', which represented 35.7% of all permanent exclusions.[90] As the rate of permanent exclusions has risen, the proportion attributed to 'persistent disruptive behaviour' has similarly steadily increased.[91] Unlike the other 'reasons', which require evidence of a serious incident or incidents, the threshold for this category of 'reason' is necessarily lower. The vagueness of what satisfies that lower threshold can be exploited by individual school management teams to permanently exclude children other than in genuine situations of "last resort".

Second, a justifiable discretionary decision-making regime relies on adequate scrutiny as to whether exclusion is "the most appropriate and reasonable sanction".[92] Kulz found:

[90] DfE, *SFR 2016-17* (n 9) National tables: Table 4.

[91] 2015/16: 34.6%; 2014/15: 32.8%; 2013/14: 32.7%; 2012/13: 30.8%. See DfE, *SFR 2015-16* (n 8), National tables: Table 4; Department for Education, *Statistical First Release: Permanent and fixed-period exclusions in England: 2014 to 2015 (SFR 26/2016)* (HMSO, 2016) National tables: Table 4; Department for Education, *Statistical First Release: Permanent and fixed-period exclusions in England: 2013 to 2014 (SFR 28/2015)* (HMSO, 2015) National tables: Table 4; Department for Education, *Statistical First Release: Permanent and fixed-period exclusions in England: 2012 to 2013 (SFR 28/2014)* (HMSO, 2014) National tables: Table 4 respectively.

[92] Head teachers are to ask: "Is exclusion the most appropriate and reasonable sanction, and consistent with the school's behaviour policy?". See DfE, *2017 statutory guidance* (n 33) 51.

> The majority of exclusion officers, parents and some heads questioned the ability of the governing body to robustly critique a head teacher's decision to permanently exclude. Rubber-stamping of decisions and poor training were key areas of concern.[93]

Moreover, children and their parents lack recourse to legal advice or representation, and it is only in seven percent of cases that parents lodge an application for independent review of the decision to permanently exclude their child.[94] Moreover, IRP panel members may also not understand the complexity of the applicable legal principles of judicial review.[95] Without adequate scrutiny, the justifiability of the exclusion regime is undermined.

Third, a justifiable discretionary regime relies on those decision-makers understanding the legal regime within which they exercise their judgment. In order to make the statutory guidance more understandable as a text by non-lawyers tasked with its application, detail has been removed. However, that also made it harder for non-lawyers to consistently and justifiably exercise their legally-bounded decision-making, such as determining what qualifies as a 'serious breach' or 'persistent breaches' of the school's behaviour policy.

This difficulty is worsened by inconsistency within the statutory guidance. In respect of IRPs, for example, the secondary legislation provides that they cannot direct reinstatement of an excluded pupil but have a power to order £4,000 additional payment by an excluding school if it does reinstate upon reconsideration.[96] The detailed aspects of the 2017

[93] Kulz (n 14) 6.
[94] DfE, *SFR 2016-17* (n 9) National tables: Table 13.
[95] Elaine Maxwell, 'Armageddon and the Development of Education Law: The Impact of Legal Aid Reform' [2013] Education Law Journal 15, 16.
[96] Exclusions and Reviews Regulations 2012 (n 32), Regs 7(5)(b), 21(4), 25(5)(b).

statutory guidance are clear that this is a power that may or may not be exercised,[97] but the summary suggests that "[t]he panel will then be expected to order…"[98] the additional payment. Further, in response to the recent Government consultation, the DfE posited that panels "*should* use this power".[99] In response to Freedom of Information requests, it is clear that, whilst IRPs operating within some local authority areas appear to decide on a case-by-case basis whether to order the payment as part of a direction for reconsideration, some always include it, and others never do.[100] The unjustifiably inconsistent approach taken by IRPs across England highlights that a successful discretionary regime depends on decision-makers having clear guidance and a similar understanding of the purpose of that discretion as it applies to any particular issue before them.

Beyond creating space within which illegal and informal school exclusion and 'drop out' can operate, even well-meaning exclusion decision-makers may inappropriately exclude as a result of misapplication of the discretionary regime. As Ryder et al reported, local authorities found the current statutory guidance to be "unclear, unhelpful and subject to interpretation"[101] and one even continued to refer to old guidance on matters of detail.[102] We might compare this difficulty to the privatisation of the justice system more generally, via cuts to legal aid and the encouragement of non-legal methods of resolving disputes.[103]

[97] DfE, *2017 statutory guidance* (n 34) [147], [173].
[98] DfE, *2017 statutory guidance* (n 34) 7.
[99] Department for Education, *Exclusions from maintained schools, academies and pupils referral units in England: Government consultation response*, DFE-00183-2017 (HMSO 2017) 19.
[100] Responses received to requests I submitted in July 2015 and July 2016.
[101] Ryder et al (n 67) 74.
[102] Ryder et al, ibid.
[103] For discussion, see, for example, Ferguson and Webber (n 21) section 3.3.2.

Safeguards, cross-checks, and enlarged autonomy for exclusion decision-makers

In addition to the creation of Academies, the applicable statutory guidance has been stripped of detail since its 2012 iteration in order to enable decision-makers' autonomy.[104] Such autonomy can benefit all children in a school, as well as the staff, by providing the space for best practices to flourish, both within individual schools, Multi-Academy Trusts, and between local clusters of schools. The Organisation for Economic Co-operation and Development has found that students perform better in schools that have more autonomy resource allocation.[105] But unjustifiable excessive and inconsistent permanent exclusion in the English context demonstrates that successfully empowering and supporting teachers and schools through greater autonomy requires oversight, collaboration between decision-makers, and education to inform its exercise.

Firstly, enlarged autonomy requires effective oversight. The Academisation of education in England, however, highlights the risk that the drive to increase autonomy gives rise to a structural deficit in oversight. Until 2016, Academies were accountable to central government's Education Funding Agency for financial matters only. Regional Schools Commissioners – overseen by the National Schools Commissioner – were then created to intervene in underperforming Academies,[106] though their role does not explicitly extend to exclusion. Without any clear understanding as to the drivers behind increasing permanent exclusion rates and 'drop out' more generally, it is impossible to know if there are specific

[104] Department for Education and Skills, *The Importance of Teaching, The Schools White Paper 2010*, White Paper, Cm 7980 (HMSO 2010) [3.4].
[105] Organisation for Economic Co-operation and Development, *PISA in Focus No 9: School Autonomy and Accountability: Are They Related to Student Performance?* (OECD Publishing 2011) 1.
[106] To implement Education and Adoption Act 2016, c 6, s 14.

safeguards that need to be implemented in the context of Academies' extensive autonomy in decision-making. In the meantime, local authorities remain accountable to central government for permanent exclusions in their area whilst they have no official role in overseeing and moderating decision-making in Academies.[107] Inadequate scrutiny is further evidenced in the inconsistent practices of independent review panels, as highlighted in the previous section.

There is a lack of effective response to illegal exclusions, which further incentivises such conduct. In its report into illegal exclusions, the Office of the Children's Commissioner reasoned that:

> A school may be named and shamed if this practice is identified, or may lose a judicial review if a family is successful in bringing one in the absence of a legally binding appeals process that would not necessitate a court case. However, there is no financial penalty should such practice be uncovered unless a case goes to law, the school lose the case, and court costs be awarded against the school. The school's league table place is also unaffected. Indeed, the removal of the affected children may actually improve a school's academic performance. We are encouraged by Ofsted's statement that it would probably award an inadequate rating to any school it finds to be excluding illegally. However, we do not consider this to be sufficient… The interaction between these factors gives cause for concern that some illegal exclusions may be an unconscious response to incentives present in the system.[108]

[107] See, for example, the regulation of local authority attendance at Academy governing board meetings to consider permanent exclusions: DfE, *2017 statutory guidance* (n 34) note 21.
[108] Office of the Children's Commissioner, *Always Someone Else's Problem* (n 14) 47.

This further highlights how the lack of effective enforcement of adherence to the formal exclusion process harms children at risk of 'drop out'.

Second, successful expansive autonomy requires effective collaboration between decision-makers and satisfactory cross-checks on inadequate collaboration. Consider the operation of In-Year Fair Access Panels. Each local authority must have a Fair Access Protocol to govern in-year admissions, which is itself binding on all schools.[109] This generally entails one or more regional fair access panels, with school and local authority representatives meeting to confirm admission of permanently excluded children as well as 'managed moves'. This in-year admissions regime incentivises permanent exclusions since local authorities often do not require excluding schools to admit a corresponding number of children permanently excluded from elsewhere. Whilst peer pressure is sometimes effective, the House of Commons' Education Committee heard evidence that

> [w]here those protocols are set up, which they are in some cases, to protect schools and enable them to put up barriers to taking children back, it becomes a way of keeping children in alternative provision.[110]

If an Academy refuses a local authority's request to admit a pupil, the local authority can request that the Secretary of State direct the Academy to admit the pupil.[111] In practice, however, this would risk significantly delaying the provision of education to the excluded

[109] Department for Education, *Fair Access Protocols: Principles and Process, Departmental Advice*, DFE-57507-2012 (HMSO 2012) 3.
[110] HoCEdCee (n 4) [68].
[111] DfE, *Fair Access Protocols* (n 109) 4.

child so the local authority often encourages another school to admit the pupil. This accords with Bennett's independent review of behaviour in schools:

> Several schools reported that, while they attempted to [make every effort to retain and amend students' behaviour before permanently excluding them], other schools did not. These schools excluded too quickly in order to improve their examination results and remove the need to deal with the challenging behaviour. But this benefit to them came at the expense of other schools that had to admit disproportionate numbers of very challenging students. It also failed to support the excluded pupil.[112]

This makes a perplexing case study for game theory since cooperation is generally understood to require strict and intense enforcement of the compliance behaviour,[113] and a "successful punishment regime"[114] more generally in order for the behaviour to be self-sustaining. One explanation might be that cooperating schools have adopted a moral position and are unwilling to force compliance through the Secretary of State's direction at the expense of affected pupil's short-term and long-term interests in education. The discretionary nature of the legal framework for permanent exclusion incentivises this behaviour: subject to regional anomalies, the excluding head teacher can be confident that they will not be simply exchanging one 'problem pupil' for another.

Third, a successful space for expansive school and decision-maker autonomy requires that those exercising that autonomy make evidence-based decisions. In England, for example,

[112] Tom Bennett, *Creating a Culture: How school leaders can optimise behaviour*, DFE-00059-2017 (HMSO 2017) 46.
[113] See Avinash K Dixit and Barry J Nalebuff, *The Art of Strategy: A Game Theorist's Guide to Success in Business and Life* (W W Norton 2008) 284-285; see also infra, 84-90.
[114] Dixit and Nalebuff, ibid 84.

there are both school-level and local area 'zero exclusion' policies,[115] though they are not always publicised. Yet these zones are premised on the untested and arguably-incorrect assumption that permanent exclusion is never beneficial. Moreover, such a rule does not accord with the individualised intention of the current discretionary regime. The Department for Education criticised blanket 'zero exclusion' policies in its repealed 2015 statutory guidance on the basis that they might undermine a school's ability to maintain discipline.[116] Unchecked autonomy thus leads to both unjustifiable permanent exclusion and unjustifiable failure to permanently exclude though, perhaps ironically, a local 'zero exclusion' policy shared between schools might serve as an effective response to the lack of punishment for individual schools that 'cheat' the collaborative In-Year Fair Access Panel system.[117]

Enhanced protection of vulnerable children only as effective as broader context

The English experience highlights that any enhanced protection for especially vulnerable children, especially those with special educational needs, depends on the broader context for its effectiveness. In particular, the discretionary regime enables only inadequate accommodation by schools and head teachers of vulnerable children's characteristics ahead

[115] See, for example, Leicester, which permits permanent exclusion only in exceptional circumstances, online: <http://www.madani.leicester.sch.uk/policies/Exclusion%20Policy.pdf> (15 December 2018), and Lincolnshire's pastoral support plan, which is aimed at achieving zero exclusion, online: <http://microsites.lincolnshire.gov.uk/children/schools/inclusive-lincolnshire/pastoral-support-plan/130027.article> (15 December 2018).
[116] Department for Education, *Exclusion from maintained schools, Academies and pupil referral units in England*, DFE-00001-2015 (HMSO 2015) [14].
[117] Respondent view provided to Gazeley et al (n 59) 497.

of the decision to permanently exclude.[118] Kulz found insufficient detail in the statutory guidance on how to take account of children's complex circumstances.[119] This is not to suggest that it is for this reason alone that children with SEN, for example, are overrepresented amongst those who 'drop out', but that that overrepresentation may be increased to an uncertain extent by decision-makers working within the discretionary regime.

Further, combined with the disproportionately negative impact of under-performance on a school's performance indicators, the enhanced protection offered to children recognised to have SEN incentivises head teachers to permanently exclude such children before the formal recognition of any complex needs. The 2017 statutory guidance states that head teachers should consider whether there is appropriate support for children with SEN when intervening early in the causes of disruptive behaviour, as well as whether a multi-agency assessment is necessary, which might identify any undiagnosed SEN.[120] If children have recognised SEN, additional statutory duties apply to head teachers and governing boards.[121] That parents have a right to request a SEN expert to advise the IRP regardless whether the child has recognised SEN[122] in part ameliorates the operation of this perverse incentive.

This concern over enhanced protection for children with particular characteristics incentivising permanent exclusion extends beyond SEN to children with other vulnerabilities, including disabilities. The guidance is clear that "disruptive behaviour can be

[118] Kulz (n 14) 7.
[119] Kulz, ibid.
[120] DfE, *2017 statutory guidance* (n 34) [19].
[121] DfE, *2017 statutory guidance*, ibid [12].
[122] ibid [76(d)].

an indication of unmet needs"[123] yet, as discussed above, the percentage of permanent exclusions based on 'persistent disruptive behaviour' continues to increase, and it is consistently the most common reason for permanent exclusion. The over-representation of vulnerable children further highlights the incentivising nature of complex needs in the current financially-straightened new public management education system. As disenfranchised parents seldom challenge schools' decision-making, the lack of an effective punishment regime, as discussed above, means there is no disincentive to permanently excluding these vulnerable children outside situations of "last resort".

The critical lesson for other jurisdictions is that any steps taken to ensure that children's particular vulnerabilities are adequately accommodated within the exclusion regime requires attention to be paid to the larger framework. Does it actively support such accommodation? Or does it simply create space for paying attention to matters such as children's disabilities and special educational needs, including enabling decision-makers to act on perverse incentives to exclude in the very circumstances in which retention and inclusive education should be valued?

Difficulties with focus on children's 'best interests' or competing 'interests'

The current framework for decision-making about exclusion from English schools centres on the 'interests' of affected parties. The English experience demonstrates that the 'best interests' concept, successfully employed in other contexts, is theoretically unworkable here

[123] ibid 6.

and that competing 'interests' can be weighed only if we develop a sound evidence base upon which to give them content.

Firstly, the English approach highlights that other jurisdictions cannot seek to ground an approach in children's 'best interests'. The notion of children's 'best interests' is not relied on in the English regime because, as a concept, it is only able to focus on one child's position,[124] whether understood contextually[125] or otherwise. Whilst there are situations in which the balancing of different children's competing 'interests' has been required, such as in relation to a decision whether to separate conjoined twins,[126] no framework for evaluation has been developed. Despite that absence of a framework, the 2017 statutory guidance suggests a balancing of competing 'interests' at various stages of the exclusion process. The second limb of the test for permanent exclusion[127] requires the balancing of the 'interests' of the child at risk of exclusion against the 'interests' of all others in the school. Rather than a direct balancing, however, it imposes a 'serious harm' threshold to justify infringing on the interests of the child at risk of exclusion. Further, both the governing board and the IRP, should any particular exclusion go to review, "must consider the interests and circumstances of the excluded pupil, including the circumstances in which

[124] See, for example, Children Act 1989 (n 37), s 1(1).
[125] For discussion of this approach, see, for example Lucinda Ferguson and Elizabeth Brake, 'Introduction: The Importance of Theory to Children's and Family Law' in Elizabeth Brake and Lucinda Ferguson (eds), *Philosophical Foundations of Children's and Family Law* (OUP 2018) 1-37, 116-117.
[126] *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147 (EWCA). For analysis, see Lucinda Ferguson, 'The Jurisprudence of Making Decisions Affecting Children: An Argument to Prefer Duty to Children's Rights and Welfare' in Alison Diduck, Noam Peleg, and Helen Reece (eds), *Law in Society: Reflections on Children, Family, Culture and Philosophy – Essays in Honour of Michael Freeman* (Brill 2015) 141-189, 175-179.
[127] Set out at (n 34)-(n 35) and corresponding main text, above.

the child was excluded, and have regard to the interests of other children and people working at the school".[128]

The school context in which these conflicts of 'interests' arise is unique in three respects. Firstly, rather than the usual conflict between a child and their parents, it is between, on the one hand, a child's interests in not being excluded and, on the other hand, that child's education or welfare interests in being excluded and the education or welfare interests of others (children and staff).[129] Second, unlike in other threshold contexts, there is no second stage of the analysis that may conclude the status quo is preferable to intervention: once the decision to exclude is taken, the child is excluded regardless of the availability and/or quality of alternative provision. Third, every decision about whether or not to exclude a particular child necessarily involves considering the position of other children. Consequently, just outcomes in this context depend on both the framework and content thereof. Without the theoretical grounding in children's 'best interests,' however, there is no ready mechanism for weighing competing interests. This is more troubling because head teachers tasked with applying the framework purport to have 'best interests' at the heart of their decisions,[130] even when excluding illegally.[131]

The second lesson of the English experience of relying on children's 'interests' is that a justifiable exclusion regime must have both a sound conceptual basis and an evidence-

[128] Governing board: Exclusions and Reviews Regulations 2012 (n 32), Regs 6(3)(a), 24(3)(a); DfE, *2017 statutory guidance* (n 34) [63]. Independent Review Panel: Exclusions and Reviews Regulations 2012, infra Reg 7(4); DfE, *2017 statutory guidance*, infra [136].
[129] (n 35) and corresponding main text.
[130] Dr Alison Ekins, 'Annex E: Final report submitted by Canterbury Christ Church University, Inquiry into School Exclusions' (Canterbury Christ Church University 2011) 29, 33.
[131] OCC, *Always Someone Else's Problem* (n 14) 38.

based approach to its application. The English 'serious harm' threshold for balancing the interests of the child at risk of exclusion against others' interests requires an understanding of 'serious harm' that is entirely absent from the statutory guidance. 'Persistent disruptive behaviour', for example, causes frequent loss of learning time,[132] which is detrimental for a large number of children. Whilst future risks arising from 'physical assault against a pupil' straightforwardly qualify as "serious harm," for example, it is unclear how to determine how much and what nature of low-level 'persistent disruptive behaviour' would qualify. Moreover, what of drug offences or other risky behaviour where the child is only harming and at risk of further harming themselves? This exercise is made all the more difficult by the fact that it is non-lawyers tasked with applying this framework.

Yet, it would be no better if the test was one of straight balancing of competing interests since it also requires an understanding of how each interest is affected by each possible outcome. There is no solid evidence regarding matters such as, for example, the circumstances in which permanent exclusion, 'managed moves', or 'drop out' might benefit the excluded child, including reducing the risk of social exclusion, and what factors might make such benefit more or less likely. Moreover, as currently constructed, the posited balancing misses the fact that all children arguably benefit from being educated in an inclusive school since other children's interests are available only to be weighed against those of the child at risk of exclusion. Our inability to outline how this balancing exercise should be carried out should be set against the knowledge that children are being continuously and inconsistently excluded from English schools. Any jurisdiction that seeks

[132] Ofsted, *Below the radar: low-level disruption in the country's classrooms*, 140157 (Ofsted 2014) 1.

to adopt an exclusion regime grounded in children's and others' 'interests' needs to do better and produce evidence-based guidance for non-lawyers tasked with administering the exclusion regime so that they can determine how much weight to place on particular considerations.

Resort to underdeveloped 'children's rights'

The final lesson from the English experience is also both conceptual and practical. 'Children's rights' are currently insufficiently developed to protect children from unjustified exclusion. There is weak recognition of children's rights in this context in general; and there has been no conceptual consideration of the intersectional position of many children at risk of exclusion. Moreover, because the balancing of competing qualified rights turns on the justifications for infringing those rights, the absence of sound empirical evidence regarding how to weigh those interests undermines the potential for children's rights to better underpin just outcomes for children at risk of exclusion than an approach grounded in competing interests.

The right to education is a complex "multiplier right"[133] and "both a human right in itself and an indispensable means of realizing other human rights".[134] The United Nations' Committee

[133] Office of the High Commissioner for Human Rights, *Background Paper on Attacks against Girls Seeking to Access Education* (OCHCR, 2015) online: <http://www.ohchr.org/Documents/HRBodies/CEDAW/Report_attacks_on_girls_Feb2015.pdf> (15 December 2018), citing Katarina Tomasevski, *Education Denied: Costs and Remedies* (Zed Books 2003).
[134] United Nations' Committee on Economic, Social and Cultural Rights, *General Comment No. 13: The right to education (article 13 of the Covenant)* (E/C.12/1999/10, 8 December 1999) [1].

on the Rights of the Child thus comments on the "indispensable interconnected[ness]" of a number of United Nations' Convention on the Rights of the Child[135] provisions in relation to education[136] beyond Articles 28 (education) and 29 (aims of education), including: Article 2 (non-discrimination); Article 3 (the 'best interests' of the child); Article 6 (life, survival, and development); Article 12 (right to express one's views and have them taken into account); Articles 5 and 18 (parents' rights and responsibilities); Article 13 (freedom of expression); Article 14 (freedom of thought); Article 17 (right to information); Article 23 (children with disabilities); Article 24 (education for health); and Article 30 (linguistic and cultural rights of children belonging to minority groups).[137]

The right to education is also more directly recognised in Article 2 of Protocol 1 to the European Convention on Human Rights (education);[138] Article 24 of the United Nations' Convention on the Rights of Persons with Disabilities (education);[139] Article 14 of the Charter of Fundamental Rights of the European Union (education);[140] various Articles of the European Social Charter,[141] such as Article 17 (social, legal and economic protection for children and young people); and Articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights (education, access to education).[142]

[135] United Nations' Convention on the Rights of the Child (20 November 1989), 1577 U.N.T.S. 3.
[136] United Nations' Committee on the Rights of the Child, *General Comment No 1 (2001) – Article 29(1): The Aims of Education* (CRC/GC/2001/1) [6].
[137] UNCeeRC, *General Comment No 1*, ibid [6].
[138] European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 4 XI 1950.
[139] United Nations' Convention on the Rights of Persons with Disabilities and its Optional Protocol (A/RES/61/106) (24 January 2007).
[140] Charter of Fundamental Rights of the European Union (2000/C 364/1) (18.12.2000).
[141] European Social Charter (Revised) (ETS No 163) (3.V.1996).
[142] International Covenant on Economic, Social and Cultural Rights (2200A (XXI)) (16 December 1966).

The CRC adopts a "novel" approach[143] to the right to education by setting it out in two Articles. The first, Article 28, focuses on *access to* education; the second, Article 29, centres on the *goals of* education. Article 28(2) explicitly requires States Parties to both "[t]ake measures to encourage regular attendance at schools and the reduction of drop-out rates" and "take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention".

Both of these provisions arguably militate against the current English discretionary regime to the extent that it incentivises excessive and illegal permanent exclusions. The failure to address the pupil's rights in the formal exclusion process is arguably key evidence of the infringement of Article 29, which highlights the need for the child's lived experience of education in school to be rights-protecting, rights-enhancing, and rights-developing. As the Committee on the Rights of the Child expounds, "the education to which every child has a right is one designed … to promote a culture which is infused by appropriate human rights values".[144] The other CRC rights set out above comprise rights *in* and *through* education.[145]

The English experience makes clear, however, that all these rights are only weakly recognised, hence provide only limited protection in the context of children at risk of 'drop out' from schools in England. As Quennerstedt notes, "… in comparison with other areas of

[143] Laura Lundy, Karen Orr, and Harry Shier, 'Children's Education Rights: Global Perspectives' in Martin D Ruck, Michele Petersen-Badali, and Michael Freeman (eds), *Handbook of Children's Rights: Global and Multidisciplinary Perspectives* (Routledge 2017) 364-380, 365.
[144] UnCeeRC, *General Comment No 1* (n 136) [2].
[145] Katherine Covell, R Brian Howe, and Anne McGillivray, 'Implementing Children's Education Rights in Schools' in Martin D Ruck, Michele Peterson-Badali, and Michael Freeman (eds) Handbook of Children's Rights: Global and Multidisciplinary Perspectives (Routledge 2017) 296-311, 297 (citing Verhellen).

society, education seems to be particularly unreceptive to children's rights".[146] In *Ali v Headteacher and Governors of Lord Grey School*,[147] a case concerned with the application of Article 2 of the First Protocol to provision after permanent exclusion ('day six' provision), Lord Hoffmann reasoned that A2P1 is infringed only if there was "a systemic failure of the educational system which resulted in the respondent not having access to a minimal level of education".[148] Further, Lord Bingham stated that A2P1 was "a weak [right], and deliberately so", which provided "no Convention guarantee of compliance with domestic law" and "no guarantee of education at or by a particular institution".[149]

Such weak protection is part of a larger context in which there is significant confusion regarding the type of education to which children (and parents) have a right.[150] The right to education "has been under-theorized as compared to other [economic, social, and cultural rights]"[151] with some legal scholars mistakenly positing it as a 'C-right', held by children exclusively, rather than an 'A-C right' that does not cease with the end of childhood.[152] Inadequate recognition and protection may lie in an assumed weakness to rights held by children.

[146] Ann Quennerstedt, 'The construction of children's rights in education – a research synthesis' (2011) 19 International Journal of Children's Rights 661-678, 675.
[147] [2006] UKHL 14.
[148] *Lord Grey School*, ibid: [61] (L'Hoffmann).
[149] *Lord Grey School* (n 147): [24] (L'Bingham).
[150] Ann Quennerstedt, 'Education and children's rights' in Wouter Vandenhole, Ellen Desmet, Didier Reynaert, and Sara Lembrechts (eds), *Routledge International Handbook of Children's Rights Studies* (Routledge 2015) 201-215, 206.
[151] Sital Kalantry, Jocelyn Getgen, and Steven A Koh, 'Measuring State Compliance with the Right to Education Using Indicators: a Case Study of Colombia's Obligations under the ICESCR' (Cornell Law Faculty Working Paper, 3-4-2009) 8-9. See also Quennerstedt, 'The construction' (n 146) 669.
[152] For discussion, see Ferguson and Brake (n 125) 28-29.

In *A v Essex County Council*,[153] the Supreme Court was faced with a boy who had been out of school for 18 months. He had special educational needs, was severely autistic, suffered from epilepsy, and had a number of other issues. His school, which was for children with severe learning difficulties, was concerned that his behaviour meant he posed a risk to himself and other children, hence asked his parents to remove him; the local authority then took 18 months to find him a place at a suitable residential school. The delay was caused by both the lack of a suitable place and the local authority's inadequate resources to carry out the medical testing required.

Lord Clarke constructed the A2P1 right as requiring "effective access to such educational facilities as the State provides for such pupils", in respect of which the child "was only denied effective access if he was deprived of the very essence of the right".[154] Lord Kerr rejected an argument that the child was entitled to any particular form of education specified in the child's statement of special needs.[155] As a consequence, the Court unanimously dismissed the child's appeal against striking out his claim under A2P1. Further, whilst Lord Clarke saw the interim efforts as arguably being in breach of duty under domestic law,[156] he emphasised that the local authority had spent considerable funds and gone to considerable efforts to try to provide interim solutions pending a longer-term solution becoming available.[157] This highlights the weak and pragmatic protection of children's right to education, which has regard to all the circumstances, including resources.

[153] [2010] UKSC 33.
[154] *A v Essex*, ibid [20] (Lord Clarke) (following Lord Bingham in *Lord Grey School* (n 147)).
[155] *A v Essex* (n 153) [157] (Lord Kerr).
[156] *A v Essex* (n 153) [55] (Lord Clarke).
[157] *A v Essex* (n 153) [57] (Lord Clarke).

At least part of the reason for this marginalisation of children's rights in the English context may lie in the unique centrality of parents' rights and obligations.[158] This is evident in both the removal of the right to appeal permanent exclusion, as well as the fact that, despite Articles 3, 12, and 28 of the CRC, only the pupil's parents,[159] and not the excluded child herself, are seen as rightsholders in respect of reviews. England, the highest-excluding country in the UK, is isolated in its position on this: in Wales, children and their parents both have the right to appeal when the child is between 11 and 16 years of age;[160] in Scotland, children have the right to appeal once they are adjudged to have legal capacity, which is presumed from the age of 12.[161] Other jurisdictions should learn from the English experience and focus directly on children's, and not parents' rights in order to improve outcomes for children at risk of exclusion.

One particularly unfortunate consequence of this inattention to children's right to education is that there has been no conceptional analysis of the possible intersectional position of children in relation to 'drop out', based on additional characteristics such as disability or ethnic origin, and their status as children; the view that children cannot be discriminated against on the grounds of age[162] has been assumed correct. Empirical evidence from

[158] For discussion, see, for example, Neville Harris, 'Playing catch-up in the schoolyard? Children and young people's "voice" and education rights in the UK' (2009) 23:3 International Journal of Law, Policy, and the Family 331-366, 334-335.
[159] Exclusions and Reviews Regulations 2012 (n 32), Reg 2(a).
[160] The Education (Pupil Exclusions and Appeals) (Maintained Schools) (Wales) Regulations 2003, Reg 2.
[161] Standards in Scotland's Schools etc. Act 2000, s41 (read in conjunction with Age of Legal Capacity (Scotland) Act 1991, s1) and Scottish Executive, *Exclusion From Schools In Scotland: Guidance to Education Authorities Circular 8/03 (2003)* [25] (Scottish government 2003).
[162] Sandra Fredman, 'The Age of Equality' in Sandra Fredman and Sarah Spencer (eds), *Age as an Equality Issue: Legal and Policy Perspectives* (Hart publishing 2003) 21-69, 21. Under the Equality Act 2010 (n 38), children can only claim age discrimination in relation to employment, and not in schools or when using services. For discussion, see Simon Flacks, 'Is childhood a 'disability'? Exploring the exclusion of children from age discrimination provisions in the Equality Act 2010' (2014) 26(4) Child and Family Law Quarterly 421-438.

practice points to an intersectional explanation, yet the legal framework does not recognise this concern. In its most recent Concluding Observations on the UK, the Committee on the Rights of the Child "welcome[d] … the decreasing use of exclusion from school"[163] but was "concerned" about the "[permanent and temporary exclusion of] disproportionate number of boys, Roma, Gypsy and Traveller children, children of Caribbean descent [sic.], children living in poverty and children with disabilities".[164] In its recommendations, the Committee called on the UK to make exclusion "a means of last resort only";[165] "forbid and abolish the practice of 'informal' exclusions";[166] and reduce the number of exclusions more generally.[167] These recommendations are noteworthy because the 2017 statutory guidance already requires exclusion to be a last resort; 'informal' exclusions are already illegal; and, underlying the call to reduce numbers, is the unsupported assumption that exclusion can never be beneficial for the excluded pupil. This suggests that, even in other jurisdictions, children's international rights may have only limited potential to lead to improvements in the domestic exclusion regime and prevent unjustifiable 'drop out' from school.

In addition to the conceptual difficulties, the practical difficulties identified in relation to an interests-based approach remain. The European Court of Human Rights' jurisprudence has developed to provide a framework for resolving conflicts of rights in the form of the 'double proportionality' analysis.[168] Whilst there are some examples of balancing rights held by

[163] UNCeeRC, *Concluding observations* (n 53) [71].
[164] UNCeeRC, *Concluding observations* (n 53) [71(b)].
[165] UNCeeRC, *Concluding observations* (n 53) [72(b)].
[166] UNCeeRC, *Concluding observations* (n 53) [72(b)].
[167] UNCeeRC, *Concluding observations* (n 53) [72(b)].
[168] Though, in conflicts between children's and parents' rights, there is some debate as to the nature of the preference for children's rights. See Lucinda Ferguson, 'An Argument for Treating Children as a "Special Case"' in Elizabeth Brake and Lucinda Ferguson (eds), *Philosophical Foundations of Children's and Family Law* (OUP 2018) 227-254, 229-230.

different children,[169] none superimpose a threshold on one side of the scales. Moreover, the 'drop out' context renders the benefit of this reframing unclear: incommensurability prevents the resolution of conflict between the prima facie expression of rights; the resolution of conflicting qualified rights in fact often turns on which right can be more justifiably infringed by countervailing interests, whereas the conflict between unqualified rights remains incommensurable.[170] As discussed, however, there is no sound empirical evidence on the differential impact on children of alternative outcomes such as placement in an internal exclusion unit, a 'managed move', or permanent exclusion. This undermines the ability of a rights-based approach to underpin a just exclusions regime.

4 Conclusion

This chapter has demonstrated the importance of a more complete understanding of 'drop out' that extends beyond formal legal permanent and fixed period exclusions. It is to be hoped that the Timpson Review[171] will lead to increased focus on these issues. I began by setting out the current legal regime, which demonstrated how permanent and fixed period exclusion rates are socially constructed.[172] I then outlined the numerous other ways in

[169] See, for example: freedom of religion - *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2007] 1 AC 100; freedom of expression: *Re Roddy* [2003] EWHC 2927 (Fam), *Re Stedman* [2009] EWHC 935 (Fam).
[170] As Ward LJ reasons in *Re A* (n 126) 186H, 187H-188A.
[171] For the terms of reference, see Department for Education, *School exclusions review: terms of reference* (March 2018), online: <https://www.gov.uk/government/publications/school-exclusions-review-terms-of-reference> (15 December 2018)
[172] Graham Vulliamy and Rosemary Webb, 'The Social Construction of School Exclusion Rates: Implications for evaluation methodology' (2001) 27(3) Educational Studies 357-370.

which children 'drop out', namely through 'managed moves', internal exclusions and part-time timetables, and 'missing education' through other means such as attending unregistered providers and being excluded illegally.

I suggested six key 'lessons' for other jurisdictions from the English experience of exclusion from school. Firstly, academic results-driven accountability measures, which underpin partial comparisons between schools, incentivise schools and exclusion decision-makers to make unjustifiable and unnecessary decisions to exclude. Second, discretionary decision-making frameworks are vulnerable to perverse incentives and unintended consequences that harm children at risk of exclusion. Third, greater autonomy for teachers and schools requires the implementation of significant cross-checks, collaboration between decision-makers, and education to inform its exercise in order not to worse 'drop out' from school. Fourth, the broader exclusions context in a particular jurisdiction constrains the value of any enhanced protection for especially vulnerable children, including those with special educational needs. Fifth, neither children's 'best interests' nor competing 'interests' can act as a framework here because the former is theoretically unworkable in this context and the balancing exercise required by the latter necessitates empirical evidence that is currently lacking. Sixth and finally, 'children's rights' are not yet a favourable alternative because they are only weakly recognised, undertheorised especially in the critically-relevant intersectional aspects, and in their application rely on the same absent empirical evidence of the impact of possible outcomes on children and others.

If these lessons were implemented, the rate of school 'drop out' could be significantly reduced and made more consistent across England, with the result that children would be

permanently excluded or 'drop out' for only the right reasons. Other jurisdictions might best begin by increasing recognition and respect for children's rights in this context and developing the necessary body of research on the differential impact of various outcomes for children at risk of 'drop out'. Indeed, reform has been proposed in the English context. The House of Commons' Education Committee recommended a Bill of Rights for children facing exclusion and their parents,[173] some of which constitute public accountability measures, such as schools publishing their permanent and fixed period exclusion data every term. Whilst laudable, the current discretionary framework undermines its potential by serving as served as a smokescreen for decision-making too often driven by perverse incentives. But that is not a reason of itself to abandon it. Kenneth Culp Davis reasons:

> *The strongest need and the greatest promise for improving the quality of justice to individual parties in the entire legal and governmental system are in the areas where decisions necessarily depend more upon discretion than upon rules and principles and where formal hearings and judicial review are mostly irrelevant*.[174]

Improving the discretionary regime, so that all decision-making about 'drop out' is legal and consistent between schools and results in 'drop out' only when justifiable, requires more than the imposition of rules.

Education law 'serves to construct a normative "ideal child"',[175] with the child at risk of 'drop out' as a 'troubled' child who deviates from the ideal. This construction needs to change: the child at risk of 'drop out' should be seen as part of an inclusive understanding

[173] HoCEdCee (n 4) 3-4.
[174] Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (University of Illinois Press 1969) 216 (emphasis in original).
[175] Daniel Monk, 'Children's rights in education – making sense of contradictions' (2002) 14 Child & Family Law Quarterly 45 (unpaginated).

of what it means to be a 'child'. If schools were rewarded for being inclusive,[176] the paucity of guidance to school decision-makers would positively enable schools to make decisions that respected the rights and interests of all affected children and others in the school. The English discretionary regime is only as problematic as the values and unintended consequences that incentivise its exercise. These weaknesses and failings are instructive for other jurisdictions, especially since they are, in large part, unintended consequences of a system aimed at enabling best practice. With stronger recognition of the child's right to education, as well as an evidence-based approach to consideration of the impact of 'drop out', best practice may be more readily attainable and generalisable.

[176] ADCS (n 73) [18].

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