

Children's moral rights and UK school exclusions

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Abstract

This article argues that uses of exclusion by schools in the United Kingdom (UK) often violate children's moral rights. It contends that while exclusion is not inherently incompatible with children's moral rights, current practice must be reformed to align with them. It concludes that as a non-punitive preventive measure, there may be certain circumstances in schools where it is necessary to exclude a child in order to safeguard the weighty interests of others in the school community. However, reform is needed to ensure that exclusion is a measure of last resort, unjust discrimination is eliminated, appropriate and timely alternative provision is available, cultures of listening are developed, and blanket policies are removed. The argument is framed in terms of children's weighty interests as identified in the United Nations Convention on the Rights of the Child. The moral bearing of these interests on UK schools is defended, and an overview of exclusion practices commonly used in UK schools is provided. Finally, the extent to which the use of exclusion in UK schools might violate the moral rights of the child is considered by evaluating empirically informed arguments for and against such policies couched in terms of interests identified in the Convention.

Keywords

Children's rights, discipline, punishment, school exclusions, United Nations Convention on the Rights of the Child

Introduction

Outside of involving the criminal law, exclusion is often regarded as the most serious response to children's behaviour available to schools in the United Kingdom (UK). The practice of exclusion is endorsed by the Department for Education (DfE) and by

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Ofsted.¹ In the UK, children can be excluded from school on a temporary or permanent basis. Both types of school exclusion have been on a rising trend in the UK since 2013 (DfE, 2019a). The UK was chosen as a focus for this discussion, in part, due to the authors' familiarity with this context. It is also important to note that the UK has a school exclusion rate that is 10 times greater than that of any other country in Europe (Kupchik et al., 2015). However, similar concerns about exclusion can be identified in other countries, most prominently the United States (US) (Kupchik et al., 2015). Therefore, the reader should be made aware that school exclusion is an issue of wider concern, and much of the discussion in this article may also be applicable in other contexts.

This article considers whether children have any interests weighty enough to generate duties constraining current uses of exclusion, for reasons of behaviour, in UK schools. The section 'What weighty interests do children have?' frames the discussion in terms of interests identified in the United Nations (UN) Convention on the Rights of the Child (CRC). The section, 'Why should UK disciplinary policy makers and influencers care?' explores the reasons why UK policy makers and influencers should care about these interests in regard to schools' use of exclusion. The section, 'How are exclusion practices currently used in UK schools?' gives an overview of how exclusion practices are currently used in UK schools. The section, 'Interest-protection-based arguments for the use of exclusion' considers positive arguments for the use of exclusion framed in terms of interests identified in the CRC. The section 'Interest-violation-based arguments against the use of exclusion' then considers arguments against such policies also framed in these terms. In conclusion, we argue that exclusion is not inherently incompatible with the moral rights of children. However, substantial reform is needed to current exclusion practices in UK schools in order to ensure that these practices uphold children's moral rights.

What weighty interests do children have?

It is important to clarify that this article is concerned with children's moral rights, rather than with the legal rights that children happen to be afforded in the UK. This is because moral rights are more fundamental and ought to constrain and motivate the content of legal rights.² To help identify these rights, we draw on the CRC. In brief, the CRC is a human rights treaty and, at this time in 2020, is the most widely ratified treaty in the world, having been signed by every country except for the US. It sets out 54 articles outlining children's rights and the way that governments should work towards achieving these. Partly because of its international recognition and ratification by the UK, it is an especially valuable resource with which to assess children's moral rights in relation to UK school exclusions. Moreover, it identifies a wide range of plausible weighty interests (educational, economic, civil, social, cultural and health) that bear on their justice. For discussion of the connection between weighty interests and rights, see the section, 'Why should UK disciplinary policy makers and influencers care?'.

While the CRC has legal force in the UK, it is in respect of its moral acuity that we draw on it. Weighty interests of children identified in the CRC which seem especially

relevant to evaluating exclusionary policies of UK schools, may usefully be divided into interests in educational goods, self-direction, being unharmed, and having access to valuable experiences and integration. Before taking stock of these, we introduce four central principles that permeate the CRC: Inherent dignity, Non-discrimination, Best interests and Evolving capacities. It is to be borne in mind that these weighty claims of individual children are expected to be balanced against other interests such as ‘public order (ordre public), public health or morals’ and ‘the rights and freedoms of others’ (Article 10.2), and constrained by ‘the maximum extent of [states parties’] resources’ (Article 4 and others).

Inherent dignity

(Preamble, Articles 28.2, 37.c, 39, 40.1.) The CRC attributes inherent dignity to the human person. The *inherence* of that dignity suggests that it cannot be destroyed without destroying the person, and hence survives in any form that a human person does, including as a child. The child’s dignity is understood to constrain what may be done to them (e.g. ‘school discipline [must be] administered in a manner consistent with the child’s human dignity and in conformity with the present convention’) (Article 28.2). To understand how *inherent dignity* might constrain the treatment of children, its content must first be specified. One plausible interpretation is associated with the *means principle*, owed to Immanuel Kant’s Formula of Humanity.³ A plausible version of the *means principle* holds that adequate respect for people’s capacity to form and pursue a conception of the good requires obtaining consent ahead of using them in certain ways (to be specified in the following section). Tadros (2011) clarifies the content of the principle as constraining actions that

1. Are commissioned with an intention to harm a person in order to achieve a goal (as distinct from commissioned to achieve a goal that will, incidentally, harm someone) (Tadros, 2011: 14)
2. And that provide insufficient opportunity to avoid the harm (Tadros, 2011)
3. Except in cases where people have an enforceable duty pursue the goal in question.⁴

For instance, if a child has no duty to sacrifice their education to save the education of two others, school authorities have no permission to sacrifice that child’s education for that of two others, by expelling a well-behaved child to improve the staff–student ratio for those remaining. Respect for the same capacity can also motivate a principle of *non-paternalism*, permitting people to pursue conceptions of the good that cause them harm and risks they would not be permitted to visit on others. Respect for children’s evolving capacities (see ‘Evolving capacities’) complicates both *non-paternalism* and the *means principle*. On the one hand, it may temper what harm children are permitted to subject themselves to; on the other hand, it may grant us increased freedom to use them as means the less evolved are their rational capacities. This second thought could be resisted by suggesting young children’s *potential* to evolve capacities to form and pursue a conception of the good limits their liability for harmful use to

serve the greater good.⁵ For instance, school authorities may not be permitted to intentionally harm their education even if it were somehow to enhance other children's educations. However, school authorities might be permitted to harm their education as a by-product of enhancing the greater educational good in cases of forced choices. Whether exclusion can ever be understood in this way is considered in the following section. Another plausible interpretation of *Inherent dignity* is the requirement for due consideration, that is, the requirement that the *real interests* of children are given *due consideration* (see 'Best interests').

Non-discrimination

Article 2 states that 'the Convention applies to every child without discrimination, whatever their ethnicity, gender, religion, language, abilities or any other status, whatever they think or say, whatever their family background'.

Best interests

The CRC's explicit principle for resolving trade-offs between competing interests of adults and children is that 'the best interests of the child shall be a primary consideration', 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies' (Article 3.1). Article 18.1 extends the principle to parental decision making; 'the best interests of the child will be [parents'] basic concern'. To say that a consideration is *primary* need not mean that it trumps all other considerations, but that other things equal, it will win out.⁶

Evolving capacities

Article 5 suggests that children should exercise their rights, but that they should do so with 'appropriate direction and guidance' from their family in accord with their 'evolving capacities'. The capacities in question are perhaps well interpreted as those required to form and rationally pursue a conception of the good.⁷ This would seem to imply a diminishment of family (duties and permissions of) direction, and perhaps guidance, in line with the evolution of the child's capacities. An interest in exercising *one's own* rights in line with the evolution of their capacities is perhaps implicit in Article 5. A weighty interest that families have in providing appropriate guidance and direction is explicit. That interest would seem to grant families scope for discretion and freedom to err plausibly constrained by the child's interests specified in the convention. It should be noted that immaturity is not mere incapacity, and how children are treated affects the development of their capacities. Given this, direction and guidance which shows respect for evolving capacities must less easily override the self-regarding choices of children with more evolved capacities and must not damage the evolution of capacities. As to whether majority is reached on the attainment of capacities or after a fixed period, the CRC definition of childhood effectively says, no later than 18, but earlier depending on States Parties' existing decisions.⁸

Weighty interests

According to the CRC Preamble, the child has weighty interests in ‘the full and harmonious development of his or her personality’, ‘an atmosphere of happiness, love and understanding’ (in family contexts, at least), and in being ‘brought up in the spirit of the ideals of . . . peace, dignity, tolerance, freedom, equality and solidarity’. Relevant weighty interests may be divided into Educational goods, Self-direction, being Harm-free, access to Valuable experiences and Integration.

*Educational goods.*⁹ Children have weighty interests concerning the content of their education, which include, ‘the development of [their] personality, talents and mental and physical abilities to their fullest potential’ (Article 29.1a), ‘physical, mental, spiritual moral and social development’ (and ‘a standard of living adequate’ for that) (Article 27.1). These are to be delivered through ‘compulsory free primary education’ (Article 28.1).

Self-direction. Tempered by the principle of *evolving capacities* and compulsory educational requirements, the CRC states children have weighty interests to direct their own lives that include freedom from ‘arbitrary or unlawful interference with his or her privacy . . . correspondence . . . honour or reputation’ (Article 16.1); the opportunity to express views in ‘matters affecting’ them, where they are ‘capable of forming’ views (Article 12.1); and freedom from deprivation of liberty (except as a measure of last resort and for the shortest period appropriate) (Article 37, b).

Harm-free. Children have weighty interests in well-being (Article 9.4); ‘the highest attainable standards of health’ (Article 24.1); the abolition ‘of traditional, practices prejudicial to the health of children’ (Article 24.3); freedom from ‘all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation’ (Article 19.1.); protection from ‘forms of exploitation prejudicial to any aspects of the child’s welfare’ (Article 36); and freedom from ‘torture or other cruel, inhuman or degrading treatment or punishment’.

Valuable experiences. Children have weighty interests in the following goods (and therefore in having opportunities for them): ‘rest and leisure’, age-appropriate ‘play and recreational activities’, and participation in ‘cultural life and the arts’ (Article 31.1).

Integration. The CRC asserts ‘the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society’ (Article 40.1).

Why should UK disciplinary policy makers and influencers care?

Political philosophers distinguish between substantive and procedural justice. An example that makes the difference clear while also showing how the two can diverge is this: a jury might arrive at the wrong verdict (a substantive injustice) while following all the

correct protocols designed to help ensure that they reach the right verdict (procedural justice). Similar examples can be given regarding the legislative or political process and actual law and policy.¹⁰ Bearing this distinction in mind, it can be asked whether UK schools' compliance with CRC is or would be *substantively just* and whether it is *procedurally just*: that is, whether the CRC's content is just, and whether just procedures have been followed in the creation and enforcement of laws that flow from it. Having signed and ratified the CRC, plausibly the UK's enforcement of the CRC is consistent with requirements of procedural justice.¹¹ However, it is the substantive justice of the CRC that shall concern us and whether the current uses of exclusion in UK schools contravene this. If they do, that will constitute a profound moral fault with schools' practices.

Following Raz (1986), it seems that matters of substantive justice are to be determined in the following way: first, it is asked what interests people can be said to have; second, it is asked how weighty these are; and third, it is decided whether the relative weights of these interests generate any rights.¹² Following Wenar (2015), we understand moral rights as either '[moral] entitlements (not) to perform certain actions, or (not) to be in certain states' on the one hand, or '[moral] entitlements that others (not) perform certain actions or (not) be in certain states' on the other. Some weighty interests can be vulnerable to the actions or inactions of others, and can generate compelling reasons for others to act, or refrain from action, so as not to violate them (i.e. can generate duties). Some interests are so weighty that they can generate compelling reasons for third parties, or the community, to protect them through the (proportionate) use of force and coercion or to compensate victims of violations.

Article 4 of the CRC requires that 'States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention . . . to the maximum extent of their available resources'. Signatories make a commitment to this, and the commitment may add extra reason to do it. The US – the sole non-signatory – lacks this reason. However, given that the interests involved are so weighty, the commitment may add little to the equation. For instance, it doesn't add much to Bob's reasons not to disrupt Bill's education that he said he wouldn't – Bob just shouldn't in the first place. It may add some extra persuasive force for those wavering, though. The US then, would not be much less remiss than the UK in failing to comply with moral rights content despite only the UK being a signatory.

How are exclusion practices currently used in UK schools?

As briefly mentioned in the introduction to this article, in the UK, exclusion from school can be on a temporary or permanent basis. Permanent exclusion from a school means that a child is not allowed to attend that school anymore and must be allocated a place at another school. Permanent exclusion is intended to be used as a last resort by schools. If a child is subject to a temporary external exclusion, they are not allowed to attend their school for a fixed period of time. This is usually between 1 and 5 days. A child can only be excluded externally on a fixed term basis for up to 45 days in total during each academic year. Temporary exclusions may also be internal. Common practice for internal

exclusions includes having children sit in a booth in an 'inclusion unit' working in silence without mixing with their peers. There is no limit to the number of days of internal exclusion a school can impose in an academic year.

External exclusions from schools in England have been on a rising trend since 2013. For illustrative purposes, the number of permanent exclusions from primary, secondary and special schools has risen steadily from 4630 in 2012–2013 to 7900 in 2017–2018 (DfE, 2019b).¹³ The most common reason for exclusion from school in England is 'persistent disruptive behaviour' (DfE, 2016). This has been the most common cause of exclusion, both temporary and permanent, for a number of years, suggesting a pattern of undesirable behaviour and punishment which is not resolving the issue. Almost 125,000 state secondary school students in England received at least one period of exclusion from school in a single academic year (DfE, 2016). This is just under 4% of the entire secondary school population. A significant proportion of this group (37.9%) received more than one period of exclusion from school in the same academic year (DfE, 2016).

If a temporary exclusion lasts for longer than 5 days or if a child is excluded permanently (also known as expulsion), alternative provision is put in place for the child to access education. Examples of alternative provision include attending another mainstream school, attending a Pupil Referral Unit or accessing online tuition. In the majority of counties across the UK, it is the responsibility of the Local Authority to provide alternative education. In some counties, for example, Cambridgeshire, this responsibility has been devolved to the schools themselves. Along with the responsibility, the Local Authority also devolves the funding for alternative provision to the schools. This allows the schools greater autonomy in deciding how best to meet the needs of excluded pupils. However, if a school does not provide alternative education in a timely manner, or the provision offered is below the expected standard, the Local Authority can reclaim some of the funding from the schools. This would then be used to put appropriate provisions in place.

Interest-protection-based arguments for the use of exclusion

Exclusion, as mentioned earlier in this article, is often regarded as one of the most serious responses to children's behaviour available to UK schools. However, it need not be a punitive response. Central cases of punishment are best understood as cases in which some hard treatment, intended to cause them a negative experience, is intentionally inflicted on one party as a response to a perceived offence of theirs (usually by another party). To be a *veritable* case of punishment rather than a mere *attempted* punishment, they must (a) have a negative experience and (b) have committed the perceived wrong. Justifications for punitive responses are typically consequential, retributive or some combination, that is, it is thought that the inflicted suffering will conduce to fewer wrongs or that the suffering is deserved (as distinct from being rendered permissible through liability-incurring action). For exclusion to be punitive, it would need to aim to produce suffering in response to some perceived wrong. For exclusion to be non-punitive, it might produce negative experiences only as a side effect, if at all. While non-punitive exclusion might be perceived as a punishment by the excluded party, it would not be one – such

cases receive further consideration in the following section. In this section, two punitive rationales for exclusion (moral education and general deterrence) and one non-punitive rationale, all motivated by the aim of protecting the weighty interests of children in the wider school community, are considered.

Punitive exclusion

Moral education. An argument could be put forward that exclusion from school is in the best interests of the child as it is a way of teaching them what behaviour is required of them. Ensuring that a child is educated in morality and prosocial cooperative behaviour is a long-term gain that could be argued to outweigh the short-term discomfort of being temporarily excluded from school (Article 27.1). The motivating thoughts driving this kind of argument can be that children who cannot yet understand reasons for acting within the requirements of morality, might in the meantime act in accordance with their interests. Another thought is that education through exclusion as a form of punishment is effective in communicating the significance and the seriousness with which they are taken through proportionate consequences. Moral education might be thought a weak rationale if successive and escalating negative experiences simply fail to deter students or bring them to *comply* rather than *merely* conform with the rules (i.e. to act within the rules for the reasons that motivate having those rules, rather than for prudential reasons).

General deterrence. It might be thought that exclusion could deter students from infractions that they are not permitted to commit. Special deterrence obtains where students who are subjected to exclusion, find it to be a negative experience and seek to avoid it in the future by *conforming* with the rules, if not *complying* with them. Such a rationale might be thought of as useful as a motivational backstop, were they were disinclined to comply with the rules. Like moral education, Special deterrence (conceived of as pure deterrence, rather than as some form of moral education) might be thought a weak rationale if escalating negative experiences simply fail to deter students. By contrast, General deterrence obtains where students who see others subjected to exclusion for violating a rule regard that as an undesirable outcome and obey the rule to avoid being excluded. General deterrence might seem equally ineffective just in case some students go on to break rules despite having seen others punished for breaking them. However, if some, if not all, infractions are deterred, then punishment as a means of General deterrence works somewhat. That this is so is perhaps a plausible empirical conjecture: consider how crime rates would likely be affected by the abolition of a criminal justice system threatening detection, prosecution and incarceration.¹⁴

The *means principle* states that adequate respect for persons' rational capacities for setting their own ends means that their consent must be obtained ahead of harming them in the service of an end they have no duty to be harmed to pursue, even if that is a greater good (Tadros, 2011). This can be seen to rule out purely utilitarian forms of punishment, but it may not rule out duty-based forms of punishment (Tadros, 2011). The principle of *Inherent dignity* (interpreted as the *means principle*) suggests that those with fully evolved capacities are sufficiently responsible for their actions to be held answerable for

wrongdoing. That is, where they do wrong unknowingly, they could and should have known better, and where they do wrong knowingly, they could and should have done better. In wronging other individuals or the community more generally, they become liable for damages caused (a liability they could have avoided by not doing wrong). Showing respect for the dignity of those they offend against may involve duties of apology, compensation and of fortifying themselves to avoid repeat offences.¹⁵ It is right for the community or its authoritative representatives to communicate the wrong, take steps to prevent further wrong and take steps to compensate the wrong.

Tadros argues that in the case of adults, one way in which wrongdoers may compensate others for their wrong is to protect them from similar wrongs in the future. One way to do that is to submit to whatever level of hard treatment they ought to accept in the course of protecting their victims in future in order to deter similar wrongdoing. This might justify punishment for adults, but when such an argument is applied to children, it would have to be tempered by consideration of their evolving capacities.¹⁶ Perhaps as children's moral knowledge and capacity to control their actions increase, they could become liable to use for violating significant rules. Equally, they might become liable when fair opportunity to developed moral knowledge had passed.

Non-punitive, preventive exclusion

Exclusion as prevention. The CRC refers to 'the development of the child's personality, talents and mental and physical abilities to their fullest potential' (Article 29.1a). It also refers to their 'physical, mental, spiritual, moral and social development' and a 'standard of living adequate' for that development. Children clearly have a weighty interest in attaining these developmental standards. But how can this interest be best understood? One way is to think of the interest as some adequate (rather than optimal) range of valuable knowledge, skills, dispositions and attitudes, and a claim to adequate opportunities for developing them. After all, developing talents takes effort. Arguably, children have some weighty claim to this and to be protected in their possession of it. This is so whether or not others might deprive them of it on purpose. Exclusion might be recommended not as a punitive measure but as a preventive measure. Where it is not intended as a punitive measure, due care must be taken to ensure that it does not constitute or accompany avoidable harm.

Arguably, if a child, Sandra, consistently and significantly undermines the weighty interests of others (e.g. the physical or mental well-being of other children or educational opportunities), teachers might reasonably aim to prevent this from happening, and exclusion might be a means of the last resort. This might even be to Sandra's detriment so long as

1. other strategies have been exhausted,
2. the detriment is not disproportionate to the interests others are protected in,¹⁷
3. is as minimal as affordable and
4. is not for its own sake but a by-product (e.g. of the effective protection of others' weighty interests, such as educational opportunities to some level which is fair on them).

Exclusion that meets these criteria would likely look very different from many, perhaps the majority of, actual cases. For instance, it would not mean that the excluded child has forgone their weighty interest in opportunities for educational goods and valuable experiences or being free from unnecessary harm. The community would likely have to do much better in making educational opportunities available through alternative provision and ensuring that that provision does not increase opportunities of criminal activity or vulnerability to abuse (Parsons, 2011). At present, being *temporarily* excluded from school means that young people are at home, often unsupervised, during the day when their age-appropriate peers are in school. They often become involved with older peers who are already involved in criminality. Exploitation of excluded children, for drug running, for example, is a real issue.

It is worth noting that the authors focus on cases of protecting children's weighty interests from threats posed by other children, but it seems that the same standards are required to justify excluding children for threats they pose to the weighty interests of adults. The relevant weighty interests will be in staff's physical and mental well-being rather than educational opportunity. Indeed, it seems unreasonable to conclude that since where staff can choose to enter other professions or other schools, they make themselves liable to mental and physical harms without complaint or claims for reasonable protection (*H v Crown Prosecution Service (CPS)*, 2010). This article does not focus on cases of protecting children from threats they pose to their own weighty interests.¹⁸

Interest-violation-based arguments against the use of exclusion

Having considered positive arguments favouring the use of school exclusions, arguments against such policies are now considered. Extensive reference to empirical literature to identify the effects of exclusion and these are in terms of the weighty interests identified in the CRC.

Exclusion as non-punitive prevention

Students subject to exclusion are likely to experience it as a rejection from the school community. Indeed, schools often present the consequence of exclusion as an explicit punishment, with its spectre intended to deter students from behaving in undesirable ways. However, as suggested above, exclusion from school, whether on a temporary or permanent basis, could be employed as a non-punitive, preventive measure to ensure other students' learning and safety. Such exclusions would not aim to produce feelings of rejection or trade on stigmatic understandings of exclusion. Given these considerations, were exclusionary practices to be used solely as a preventive measure, this would already represent an enormous reform. Furthermore, if the fact that non-punitive exclusion would still come at the cost of the excluded child's feelings of rejection, even as an unintended by-product, were recognised to make it hard to justify, it might be regarded as justified less often. It might also be seen to require significant efforts to redress such feelings and reduce stigmatic understandings of exclusion where it is justified.

Inequality in exclusion

Statistics on exclusions from UK schools indicate that some groups of students are more likely to be excluded than others. Students of Black Caribbean heritage are over three times more likely to be excluded than students of other ethnic groups. Boys are three times more likely to be excluded than girls. Children who are eligible for free school meals due to coming from a low-income family are four times more likely to be excluded than children who are not eligible for this benefit (Gibbs, 2018). Children with additional learning needs (often referred to as Special Educational Needs and Disabilities or SEND) are also more likely to be excluded from school than children without SEND (Independent Provider of Special Education Advice (IPSEA), 2019). The Office of the Children's Commissioner (2012) presented a particularly stark statistic:

In 2009-10, if you were a Black African-Caribbean boy with special needs and eligible for free school meals you were 168 times more likely to be permanently excluded from a state-funded school than a White girl without special needs from a middle class family.

While it is unlikely that these inequalities are being perpetuated intentionally, there is clear evidence that they do exist. The use of exclusion in schools is enabling discrimination to take place against certain groups of students. This is incompatible with Article 2: non-discrimination.

Risk of criminal activity

Studies by Searle (2001) and Kinder et al. (1999) suggest that exclusion from school creates feelings of resentment and rejection, which then leads to further incidences of undesirable behaviour. Exclusion from school has been highlighted as one of the key risk factors for young people becoming involved in criminality (Parsons, 2011). The Timpson Review of School Exclusions (2019) highlights that in 2014, in the UK, 23% of young offenders sentenced to less than 12 months in custody had been permanently excluded from school prior to their sentence date. This research indicates a high level of correlation between involvement in the criminal justice system and punishment in schools (such as exclusions). It cannot be said that exclusion from school causes young people to become involved in criminality, as there is no way of knowing whether it is a causal factor or merely a correlation. However, it can be argued that exclusion as a punishment does not seem to be effective in promoting positive behaviour among young people. This is evidenced by the rising numbers of school exclusions each year (DfE, 2019a). If exclusion were an effective way to change student behaviour, it would follow that these numbers would instead be decreasing. Exclusion may also play a role in increasing the opportunities that young people have to become involved in criminality. When a young person is excluded from school, they are at home during the day and often (for secondary school students) unsupervised. Their age-appropriate peers are all in school, unless they have also been excluded, so the young people often start associating with older peers. This leaves them vulnerable to exploitation and involvement in criminal activity, such as drug dealing.

Alternative provision

Exclusion from school causes children to miss out on educational goods in which they have a weighty interest (see 'Educational goods' above). In England, children can be suspended from school for up to 45 days in an academic year. While educational provision does have to be made if any one period of exclusion is longer than 5 days, a child could receive nine periods of 5 days suspension in an academic year and it would be legal for them not to receive any education for these nine school weeks. This is almost one quarter of an academic year.

The Timpson Review of School Exclusions identifies wide variation in the quality of provision that is offered to students who have been excluded from school. There is also a narrowing of the curriculum, with excluded students often only being offered tuition in the core subjects of English, Maths and Science. This does not take into account the child's talents and interests. Therefore, it cannot be said to give sufficient opportunity for the development of the child to their fullest potential.

One consideration that may need to be evaluated is the financial cost of alternative provision providing a sufficiently broad and balanced curriculum. While there are alternative provisions in England which offer a range of opportunities comparable to a mainstream education, these are the exception rather than the norm. Due to financial constraints, schools often by necessity must limit the provision to the minimum required. This therefore limits the extent to which opportunities for developing Educational goods can be provided.

Social care involvement

It is also worth considering Article 39, which states that appropriate measure should be put in place to promote psychological recovery and social reintegration of a child victim of any form of neglect, exploitation or abuse. However, children who have been supported by Social Care are consistently found to be more likely to be excluded from school than other children (Timpson Review of School Exclusions, 2019). This suggests that schools do not always take account of allowances that may need to be made for children who are recovering from, or still suffering from, any form of abuse.

Cultures of listening

When schools exclude students, the student may feel that they have not been given sufficient opportunity to be heard. Where this is true, this significantly undermines their weighty interest in *self-direction* (e.g. expressing views in 'matters affecting' them, where they are 'capable of forming' views). The Timpson Review of School Exclusions found that children often felt a sense of injustice when the full circumstances around an individual's behaviour were not taken into account before the school imposed an exclusion as punishment. It could be argued that the cost to teachers, in terms of time and resources needed to listen to students more thoroughly, would be unfeasible to manage in a mainstream school. Listening can only be achieved to some extent in day-to-day school life when weighed against the alternative uses for the resources required to fully facilitate it. In smaller settings, such as alternative provision schools, it could be, and in

practice is, more easily implemented. However, regarding significant matters, such as possibilities of exclusion, its accommodation is especially important and can be implemented at relatively low costs to staff time and school resources.

Internal exclusion

An alternative to external exclusion that is often used in UK schools is internal exclusion. It can be argued that schools' use of internal exclusion often significantly undermines their interest in *integration*, *self-direction* and being *harm free*. Recently there has been a case where parents were successful in taking legal action against a school after their child received an isolation booth sanction for 60 days during an academic year and served 35 of these days (Perraudin, 2018).

Numerous news stories have reported on children and young people's experiences of internal exclusion at schools (BBC, 2019; Independent, 2019; Schools Week, 2019a; The Guardian, 2019). These suggest that the impact of the use of internal exclusion in schools on children's mental health can be significant. Legal action is currently being threatened by the families of two teenagers against the DfE as a result of the guidance given to schools on the use of isolation booth (Local Government Lawyer, 2019). The lawyers for the claimants describe the guidance as 'damaging the mental and educational wellbeing of thousands of children'. It is suggested that the isolation booths are being used for the long-term management of students, which is detrimental to their mental health and education. If right, internally excluded children's interest in being *harm free* is often significantly undermined.

Despite this, Tom Bennett, behaviour advisor to the DfE, is an advocate of the use of internal exclusion (Bennett, 2018). Bennett has recently taken the lead on a £10 million project to support schools across England to improve behaviour (Schools Week, 2019b). This suggests that the strategy of internal exclusion could become more widely used by schools. Bennett (2018) argues that using isolation booths as a sanction is a 'perfectly normal, useful and compassionate strategy'. This view is at odds with the evidence, outlined earlier in this section.

Best interests

The negative outcomes of exclusion can be argued to outweigh any potential benefits for the excluded child. Therefore, it is in the best interests of the child whose exclusion is being considered for schools to consider alternative methods of managing undesirable behaviour ahead of resorting to exclusion. Where this is not done, exclusion is in discordance with *best interests*.

Conclusion

On balance, the use of exclusion in UK schools is not inherently incompatible with children's moral rights: non-punitive preventive exclusion may sometimes be justified. The argument for exclusion as moral education or as special deterrence is undermined by the fact that many children receive multiple temporary exclusions from school, suggesting that successive and escalating negative experiences are simply failing to deter them. The argument for exclusion as general deterrence is also undermined by the fact that children see peers being punished for

committing wrongs and yet often go on to commit similar acts themselves, demonstrating that exclusion is not completely effective as a form of general deterrence. It could be argued that general deterrence does not need to be completely effective, but just effective enough to prevent enough harm to justify the harm that it causes. It could even be argued to be justifiable for exclusion to do a little more harm than it prevents if the child is liable to sustain that harm. However, it is controversial to suggest that children can incur obligations to sustain harm of this degree, particularly young children (Tadros, 2019). At best, the principle of general deterrence has limited scope to justify the use of exclusion in school.

As a non-punitive preventive measure, there may be certain circumstances in schools where it is necessary to exclude a child in order to safeguard the weighty interests of others in the school community. The safety and educational interests of the whole school community may sometimes outweigh the interests any particular child has in being educated in any particular school. For this reason, the weighty interests of members of the wider school community sometimes translate into rights with correlate duties for other children to behave in ways that do not undermine their learning and safety, and for administrators to find alternative provisions where they do. However, substantial reform is necessary before the use of exclusion in UK schools aligns with the rights of excluded parties. This is because the weighty interests of excluded parties can be provided for in ways that do not compromise similarly weighty interests of others. Changes that can be made to the current system of exclusion practices in UK schools include the following:

Last resort

Other reasonable strategies must have been exhausted. As suggested in ‘Exclusion as non-punitive prevention’ section, it is possible for schools to use exclusion as a strategy to prevent harm being caused to the education of other children, as well as that of the excluded child. However, for this to be effective, other strategies, such as provision of alternative education for the excluded child, would need to be implemented alongside the use of exclusion. Alternative strategies may come at some further cost and any resources spent on this purpose would mean they are not spent on some other purpose. It is therefore important to think about what threshold constitutes an unreasonable redirection of resources for this purpose: some may argue that any redirection of resources is unfair on others, but perhaps resources may be redirected from the service of less weighty or basic interests of others, or of the individual concerned. We offer no general guidance on this, but suggest that there will almost always be several intermediate steps that can be taken before exclusion may reasonably be deemed necessary. In particular, the best interests of the child should be taken into account before an exclusion is imposed.

Blanket exclusion policies

As discussed in the section, ‘Best interests’, blanket exclusion policies, such as zero tolerance policies, should be discouraged as they do not tend to respect the principle of exclusion as a last resort. Schools should acknowledge that allowances may need to be made for children who have suffered some form of trauma, abuse or exploitation. Appropriate and timely support should be made available to help these children integrate

successfully into a school environment. While other children have the right to have their weighty interest in safety and education protected, schools should be mindful as to the difficulties a child may be dealing with in their life. Where schools become aware that a child has suffered some form of trauma, abuse or exploitation, proactive measures should be taken to support the child. For example, this could include counselling sessions being offered or access to a mentor for additional support. Zero tolerance policies often advocate for exclusion as an initial response to a wrong. This goes against the principle of exclusion being used as a last resort.

Elimination of unjust discrimination

The inequalities of society that are perpetuated and reinforced by the use of exclusions in the school community need to be addressed (see 'Inequality in exclusion' above). No group of children, regardless of any characteristics, should be disproportionately affected by exclusion from school, except where that characteristic itself constitutes a threat to other children's weighty interests (for instance, the characteristic of persistently disrupting other children's learning). This may mean that schools must consider why it is that some groups are disproportionately subject to exclusions. For instance, they may consider whether problem behaviours are projected in kind or degree as a function of implicit bias, or whether avoidable circumstances increase the likelihood of misdeeds, including whether the escalation of punitive responses backfires and escalates misdeeds in a tit for tat fashion.

Appropriate and timely alternative provision

Any detriment to the excluded child must not be disproportionate to the interests of others that are protected. It must also be as minimal as is affordable. For these reasons, alternative provision offered to children who are excluded from school needs to be consistently high quality and provide access to a broad and balanced curriculum. It should be provided from the start of a period of exclusion, rather than waiting 5 days to implement this. As mentioned in the section, 'Alternative provision', there is currently variability in the quality and availability of alternative provision. Therefore, schools would need to be proactive in ensuring that there is suitable alternative provision available in the event of an exclusion occurring.

Cultures of listening

Priority should be given to creating a school culture where teachers have the time and motivation to listen to the voice of students. Students should be given the opportunity to have their voices heard in the case of exclusions, as discussed in the section, 'Cultures of listening'.

Guidance on internal exclusions

Appropriate guidance should be provided to schools on the use of internal exclusions, in order to minimise the risk of a negative impact on children's mental health (see 'Internal

exclusion' above). Input from educational psychologists could be valuable in drawing up this guidance. As internal exclusion is still a form of exclusion from the school community, the same principles suggested for external exclusion should apply; it should be used as a last resort, unjust discrimination should be eliminated, appropriate and timely alternative provision should be offered, and cultures of listening should be encouraged. Internal exclusion, as distinct from external exclusion, has the potential to end up being a form of extended isolation, as there are no limits as to how long schools can impose this punishment. Extended isolation can significantly harm mental health and therefore requires serious consideration. Consideration of proportionality and protections from harm suggests that internal exclusion should be used when no other course of action is appropriate and for the minimum amount of time necessary.


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Notes

1. There are legal guidelines around how exclusion can be used by schools and it is important to clarify that this article addresses the legal use of exclusion from UK schools for reasons of behaviour. Practices such as off-rolling, where a child is removed from a school roll illegally without proper procedure being followed, do occur in some UK schools but this is not the target of the current article.
2. For instance, where the two come apart, laws can require reform and sometimes disobedience. To see this, consider the injustice of Jim Crow era laws which distributed legal protections in ways that violated the moral rights of Black people. Plausibly this injustice generated an urgent moral duty to reform the Jim Crow laws, permissions for citizens to disobey them and, arguably, duties for police and courts not to enforce them.
3. Here is Kant's Formula of Humanity: Act so that you use humanity, as much in your own person as in the person of every other, always at the same time as end and never merely as means (Kant, 1996: 429). The best way to interpret this is a matter of some dispute, see Audi (2016).
4. For Tadros, people sometimes have duties to pursue ends even at the cost of some harm to themselves, where they fail to pursue those ends they are liable to be harmed by others to the

- same degree in the service of those ends. For instance, if an offender owes a victim compensation for some wrong and fails to pay it, others may extract the compensation from them.
5. An unattractive result is that people with limited cognitive capacities may be more liable for use if this principle is taken seriously. On the other hand, to suggest that humans, qua humans, have interests that non-humans do not have irrespective of their capacities seems like special pleading.
 6. Brighthouse and McAvoy (2010) suggest that while ‘it is good for a child to have music lessons’, this good may not entail claim right (i.e. duty for someone else to provide it) since ‘providing them might take away money being spent on a parent’s education towards a more fulfilling career’ (p. 80). It needs to be clear that the best interests are not insatiable and do not come at any cost to other parties.
 7. or discussion of this interest, see Clayton (2006), although it should be noted that Clayton’s purpose is not to interpret the UNCRC.
 8. For an illuminating discussion of the problems involved in setting the age of majority, see chapter 5 of Clayton (2006).
 9. We take this expression from Brighthouse et al. who coin the term: ‘Educators have aims – they want to instil knowledge, skills, dispositions, and attitudes in the children they teach. These attributes are what we call educational goods’ (Brighthouse et al., 2018: 19).
 10. Substantive and procedural justice interact in interesting ways. Plausibly substantive justice requires procedural features such that any laws imposed on a community must be in some sense determined by those community, through the free and open democratic elections of legislators, for instance. On the other hand, procedural legitimacy may be constrained by substantive legitimacy, so that it could not be procedurally legitimate to enact laws that establish that people will be treated with unequal regard or have important freedoms abridged.
 11. By contrast, since the US has not signed and ratified the CRC (and is alone among the UN member states in this respect), if US public institutions were, without, following established procedures for establishing laws, to begin to enforce the CRC, this may be a procedural injustice. On the other hand, where US citizens act in ways that contradict the requirements of the CRC, they may still violate substantive requirements of justice, and it might be that the US has strong reasons to ratify and enforce the CRC. It might even be that violations of the CRC are so fundamental that procedural legitimacy is compromised by a failure to ratify the CRC.
 12. Raz (1986) states the interest theory of rights in the following way: “‘X has a right’ if and only if X can have rights, and, other things being equal, an aspect of X’s well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty’ (p. 6). For an alternative to Raz, see Kramer (2013).
 13. The number of permanent exclusions from primary, secondary and special schools has increased each year from 2012–2013 to 2017–2018. The 2017–2018 statistics are the most up-to-date national school exclusion statistics available as of January 2020. The numbers of permanent exclusions for each year are 4630 (2012–2013), 4950 (2013–2014), 5795 (2014–2015), 6685 (2015–2016), 7700 (2016–2017) and 7900 (2017–2018).
 14. For discussion of the distinction between general and specific deterrence, see Stafford and Warr (1993). For philosophical defences of general deterrence in the case of adult infractions of the criminal law, see Farrell (1985) and Tadros (2011). For empirically orientated studies on the effectiveness of general deterrence, see Nagin and Pogarsky (2006) and Loughran et al. (2012).
 15. See Howard (2017) for discussion of ‘moral fortification’.
 16. Tadros (2019) discusses the punishment of children and defends it on paternalist grounds.
 17. For instance, if other children were to be protected in their opportunity to learn one fact each, and it came at the expense of Sandra knowing nothing at all, this condition would not be met.

18. We thank Elizabeth Shaw for bringing these points to our attention. Elizabeth has raised the question whether more demanding standards would be required in such cases, and we do not propose to address that question here.

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